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Contents

Author	Title	Pages
S M Masum Billah	Testing Constitutional Metaphors: Some Insights from Bangladesh	1 - 27
Md. Rabiul Islam	Racial Dichotomy to Escalate Discrimination: An Account of Legal-historiography in Colonial India	29 - 46
Moha. Waheduzzaman	Measuring Constitutional "Laws" and "Conventions" in Same Parlance: Critiquing the *Idrisur* Rahman	47 - 77
Tapos Kumar Das	The Positive Complementarity: An Alternative Approach for the ICC's Engagement	79 - 93
Preeti Kana Sikder	Medical Waste Management and Processing System in Post-COVID Bangladesh: A Legal Analysis	95 - 112
Md. Waliul Hasanat **Md. Yamin Rahman**	Virtual Classrooms in Bangladesh: Assessing Child Vulnerability in the Light of International Law	113 - 125
Rafea Khatun	Medical Negligence Issues in Bangladesh: An Urge for a Separate Medical Negligence Law	127 - 146
Md. Abdur Razzak	Non-State Actors and International Human Rights Law: What Obligations for Business Enterprises?	147 – 166

Jahangirnagar University Journal of Law, Vol. VIII, 2020

Testing Constitutional Metaphors: Some Insights from Bangladesh

Dr. S M Masum Billah*

Abstract: Metaphors are powerful devices to revitalize an idea or a concept. They appeal to the readers' mind as they contrast between a known experience and an unknown idea. As such, their usage is widely hailed as a communicative tool having sophisticated literary value. However, legal scholars have extensively written on the desirability of resorting to metaphor in writing legal opinions. The judges interpret the law to render justice, however, they offer their reasoning for reaching a decision. In this exercise, the judges coin metaphorical terms widely known as legal metaphors. In the realm of constitutional jurisprudence, the use of metaphor has been transcendental. 'Penumbra', 'the marketplace of ideas', 'fruits of a poisonous tree' from American jurisdiction, the 'living tree' from Canadian jurisdiction, 'incoming tide' from the UK jurisdiction are globally appraised metaphors. They have been a commodity readily available for judges of common law traditions as interpretive tools, however, with a cultural variation. Many metaphors have got new dimensions and many have fallen into disuse. In Bangladesh, the use of legal metaphors, their vitality or significance have drawn less scholastic attention. Even then, the judges have epitomized a good number of constitutional metaphors in moulding Bangladesh's constitutional jurisprudence. In this paper, I have examined the perils and promises of legal metaphors used in the leading common law jurisdictions and have added a Bangladeshi insight to them by analyzing the metaphors used in Bangladeshi case law.

Keywords: Constitutional Metaphor, Constitutional Law, Legal Metaphor, Living Tree, Constitutional Interpretation.

1. Introduction

Judges communicate with the community through their judicial opinions. In their opinions, which we may call 'communicative social documents'[1], they offer an interpretation of law through rational discourse and present them in a legal language communicated to the public broadly defined. In so doing, the judges at times resort to metaphorical terms to convey and portray a better meaning of a legal text and context. Therefore, we find that legal discourse is replete with

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[1] Benjamin L Berger, 'Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text' (2002) 39(3) The Journal of the American Judges Association 133.

metaphors.[2] In the American context, Thomas Ross in an eloquent commentary on the paradox of metaphor wrote:

> We live in a magical world of law where liens float, corporations reside, minds hold meetings, and promises run with the land. The constitutional landscape is dotted with streams, walls and poisonous trees. And these wonderful things are cradled in the seamless web of law.[3]

Here, Professor Ross refers to popular yet profound known legal metaphors. These metaphors travel beyond America and the legal fraternity of analogous jurisdictions, the judges of the common law world for example, usually greet them with a few exceptions.[4] In this way, metaphors represent the world of law in a dominant and perhaps in a positively or misleadingly emotive manner. It is not always easy, however, to identify and locate a metaphor. Some metaphors are more subtle than others or they have merged with the general language so much so that their separate existence is not recognised anymore. For example, the use of 'defence' and 'defendant' in a judicial proceeding, indicate the hidden metaphor of seeing the court procedure as an act of 'war' and that someone has to 'win' the case than resolve.[5] Again, when we speak of a body of law, we use a metaphor so apt that it hardly remains a metaphor.[6] Metaphors take a particular stand in this regard, as found in legal literature. The use of metaphors reveals how lawyers and judges perceive different case scenarios. Thus, they fashion the legal discourse and, in some sense, determine the validity of legal arguments.

Metaphor, thus, is a common device in writing a judicial opinion. Of late, the use of metaphors in legal decisions have ignited an increased interest among legal scholars concerned with the metaphor's role in advocacy and judgment writing.[7] It is because metaphors can appeal to the human thought process with admirable easiness and precision. Harold Lloyd compellingly argues that metaphor plays a

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2 Burr Henly, 'Penumbra: The Roots of a Legal Metaphor' (1987) 15 Hastings Constitutional Law Quarterly 81. See also Adam Arms, 'Metaphor, Women and Law' (1999) 10 Hastings Women's Law Journal 257.

3 Thomas Ross, 'Metaphor and Paradox' (1988) 23 Georgia Law Review 1053.

4 For example, I may name a few legal metaphors in a general way: 'miscarriage of justice'; 'slippery slopes'; 'floodgates'; 'shield, not a sword', 'legal transplantation'; 'golden thread'; 'bright and blurred lines'; 'constitutional foothills'; 'scales of justice'; 'level playing field'; 'edifice of Constitution'; 'legal bridge'; 'Constitution not as a railway excursion ticket'; 'Constitution as ballet dancer's mirrored wall'; 'Constitution as architecture'; 'wall of separation between the Church and the State'; and 'migration of constitutional ideas'.

5 Sheng-hsiu and Wen Yu-Chiang, 'Fight Metaphor in Legal Discourse: What is Unsaid in the Story' (2011) 12 (4) Language and Linguistics 877.

6 Maitland quoted in Garry J Jacobsohn, *The Wheels of Law: India's Secularism in Comparative Constitutional Context* (Princeton University Press 2003) 84.

7 Haig A Bosmajian, *Metaphor and Reason in Judicial Opinions* (First edn, Southern Illinois University Press 1992).

much deeper role in legal thought than style,[8] ornament or verbal virtuosity.[9] A well-structured metaphor provides an intuitive perception of the similarity of the dissimilar.[10]

Metaphors, however, bring perilous consequences in many respects. They do not yield precise legal tests. One of the reasons for this is that legal scholars and judges at times use figurative language without properly categorizing them.[11] Richard Posner thinks that they are 'powerful through a logical modes of persuasion.'[12] Benjamin Cardozo J in the same vein wrote, 'A metaphor, however, is, to say the least, a shifting test whereby to measure degrees of guilt that mean the difference between life and death.'[13] Cardozo J—wearing his judge's hat—further added that 'metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.'[14] Interestingly, in attacking metaphors in his stylistic way, Cardozo J took recourse to a dual metaphor, namely the 'liberation of thought' and its reduction to 'slavery'.[15] In this paper, I will discuss the promises and perils of legal metaphors and examine the extent to which they can be exploited in rejuvenating the law and jurisprudence. In particular, I will attempt to draw a Bangladesh approach to the use of legal metaphors for the development of the jurisprudence of constitutional interpretation.

The paper is organized into six parts. After this introduction in part I, part II discusses the role of metaphors in law, part III then examines the use and relevance of some leading constitutional law metaphors from the leading jurisdictions. Part IV attempts to trace the approach of the Bangladeshi judges in referring and using the metaphors by looking at some leading constitutional litigations. Part V examines the present trend and relevance of the legal metaphors. Part VI is the conclusion.

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8 Andrew Ortony, 'Metaphor, Language, and Thought' in Andrew Ortony (ed), *Metaphor and Thought* (Cambridge University Press 1993). See also George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press 1980) [stating, 'We have found ... that metaphor is pervasive in everyday life, not just in language but in thought and action'.]

9 Harold A Llyod, 'Law as Trope: Framing and Evaluating Conceptual Metaphors' (2016) 27 (1) Pace Law Review 89.

10 Daniel Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State (New York University Press 2002).

11 Michael R Smith, 'Levels of Metaphor in Persuasive Legal Writing' (2007) 58 Mercer Law Review 919.

12 Richard A Posner, *The Problems of Jurisprudence* (Harvard University Press 1993) 456.

13 Benjamin N Cardozo, Law and Literature and Other Essays and Addresses (FB Rothman 1986) 100.

14 *Berkey v Third Avenue Railway Co* (1926) 244 NY 84 (Per BN Cardozo J).

15 Alessandro Morelli and Oreste Polliciono, 'Metaphors, Judicial Frames and Fundamental Rights in Cyberspace' [2019] American Journal of Comparative Law<https://ssrn.com/abstract=3422946>22 October 2020.

2. Mapping the Metaphoricity of Law

Lakoff and Johnson in their influential works stated that 'our ordinary conceptual system, in terms of which we think and act, is fundamentally metaphorical in nature.'[16] Metaphor is the rhetorical process by which a discourse unleashes the power of certain fictions in redescribing the reality.[17] Elizabeth Thornburg, a prolific researcher on the use of metaphor in the legal context ascertains that 'metaphors so pervade our language about litigation that it is almost impossible to talk about a trial without using metaphors.'[18] Thornburg found that battle, sports and sex metaphors dominate the discourse within the American adversary system.[19] It is widely accepted that legal metaphors can contribute to the legal trend.[20] John Deutsch poignantly suggests that 'judicial opinion works the way a metaphor works'.[21] Steven Winter in the same vein observes that metaphors are an inescapable part of human reasoning—even the language of 'breaking' the law involves an implicit metaphor comparing the law to a physical object.[22]

A metaphor should not be confused with an analogy.[23] The term 'analogy' is used in so many ways, particularly within the law, that it is hard to define it precisely.[24]

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16 George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press 1980) 3.

17 Paul Ricoeur, *The Rule of Metaphor: The Creation of Meaning of Language* (Robert Czerny, Kathleen McLaughlin and John Costello tr, First edn, Routledge 2003) 5.

18 Elizabeth Thornburg, 'Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System' (1995) 10 Wisconsin Women's Law Journal 225. Even, the judges themselves have been the subject of legal metaphors like the 'umpires', 'tiebreakers' and 'referees'. See Matthew R Krell, 'Judging as Soccer: Jurisprudence, Legisprudence and Metaphor' (2018) 10 Elon Law Review 126.

19 ibid, 232. The use of 'battle' and 'fight' metaphor is also profound in Bangladeshi case law. See, for example, *ECOM Agroindustrial Corporation Ltd and Others v Mosharaf Composite Textile Mills Ltd* (2014) 43 CLC (HCD): '… [t]he contract upon which legal battle arose'; *Md. Abul Bashar v Government of Bangladesh* (2014) 43 CLC (HCD): ' … [t]he respondent lost his battle'; *Gopinath Das and Others v Government of Bangladesh* (2010) 39 CLC (HCD): 'the fruit of decree got through a sustained legal battle'.

20 Louis J Sirico Jr, 'Failed Constitutional Metaphors: The Wall of Separation and the Penumbra' (2011) 45 University of Richmond Law Review 459.

21 Jan G Deutsch, 'Law as Metaphor: A Structural Analysis of Legal Process' (1977-78) 66 Georgetown Law Journal 1339. See also James E Murray, 'Understanding Law as Metaphor' (1984) 34 (4) Journal of Legal Education 714.

22 Steven L Winter, *A Clearing in the Forest: Law, Life, and Mind* (University of Chicago Press 2001) 14.

23 Mustafa Kamal CJ, for example, in writing the leading opinion in *Masdar Hossain* made an analogy of 'oil and water' to refer to the nature of judicial and the executive works. For Kamal CJ, as oil and water cannot mix, so is the executive and judicial powers. This is a powerful analogy, not a metaphor. See *Secretary, Ministry of Finance v Md. Masdar Hossain and Others* (2000) 52 DLR (AD) 82. In this case, the judges of the Bangladesh subordinate judiciary challenged the government's power to amalgamate judicial service with the other services of the state. The Court ruled for the judges and established a complete regime of judicial independence.

24 Linda L Berger, 'Metaphor and Analogy: The Sun and Moon of Legal Persuasion' (2013) 22 Journal of Law and Policy 146.

They share common grounds in many respects,[25] however, one suggested difference is that a metaphor is more associated with emotion and expression than an analogy.[26] According to Dan Hunter, the major difference is that analogy has an explicit explanatory or predictive component than a metaphor.[27]

As implicit in the definitions, metaphor serves many purposes. On the basic functioning of metaphor, Aristotle wrote:

> Metaphor consists in giving the thing a name that belongs to something else; the transference being either from genus to species or from species to genus or from species to species or on grounds of analogy.[28]

This Aristotelian view represents a poetic context. Its, however, also relevant in a legal context as this view has been very influential both in traditional and modern discussions of metaphoric interpretation. From this view, it can be said that metaphor is primarily a matter of words involving the transfer of a name to some objects to which that name does not properly belong. Based on this premise, Oldfather, an authority on legal metaphor, identifies five functions of metaphor: decorative, analogical, comparative, creative and precision of legal metaphors.[29]

A. Decorative function

Metaphors serve a decorative function which adds to the persuasiveness of an argument. They work in this way also to enrich and facilitate legal communication through useful analogies, yet, the former is far more powerful than the latter.

B. Analogical reasoning

Metaphors operate as a form of analogical reasoning which makes abstract concepts more concrete. Metaphors are rich in information; they are tightly wrapped buds that convey textures of perceptions, experience, emotional tenor and intensity.[30] They are powerful in reflecting attitudes and understandings, as well as seminal in creating them. They give a window to see the larger canvas of

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[25] Angella Condello, 'Metaphor as Analogy: Reproduction and Production of Legal Concepts' (2016) 43 (1) Journal of Law and Society 16. Posner suggests that 'analogies can be suggestive like metaphors … [B]ut cannot resolve legal disputes intelligently'. See Richard A Posner, *How Judges Think* (Harvard University Press 2008) 181.

[26] Linda Berger (n 24) 159.

[27] Dan Hunter, 'Teaching and Using Analogy in Law' (2004) 2 Journal of the Association of Legal Writing Directors 151.

[28] Aristotle, The Basic Works of Aristotle (Richard McKeon trans., Random House 1941) quoted in Benjamin L Berger, 'Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text' (2002) 39 (3) Court Review 30.

[29] Chad M Oldfather, 'The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions' (1994) 27 Connecticut Law Review 17 at 20-24.

[30] Michelle Lebaron, 'Is the Blush off the Rose? Legal Education Metaphors in a Changing World' [2016] Cardiff Journal of Law and Society 145.

understanding and reflect the epistemology of change. The metaphor is predominantly appropriate as a means of explaining abstract ideas. By drawing the idea together with a familiar item or phenomenon, metaphor provides a conceptual bridge for the reader to follow.[31]

C. Comparative function

Metaphors compare one concept with another and may encourage the reader to find similarities in different events and legal theories. Metaphors are sensory images that relate one world of things or ideas to another. Because they resonate with sound, visual imagery and sensations, they are more likely to lodge in consciousness and physically felt awareness than more abstract vocabulary.

D. Creative thoughts

By linking unrelated ideas, metaphors can unleash creative thought. They also yield clues about how people see themselves and situations, revealing perceptions, assumptions and blind spots. Metaphors are a hidden grammar of being, delicately framing what is possible and impossible, what is likely and far-fetched. They interweave with agency, analysis and ethics. Without awareness of the pervasive shaping power of metaphors, we see through a glass darkly.[32]

E. Precision

Finally, metaphors can express concepts in a few words as opposed to a few pages. Metaphors are not just illustrations offering concrete versions of legal concepts. They are models-shorthand versions of reality that emphasize or exclude to make a point. Like many models, metaphors portray one part of the experience by borrowing terms associated with another part. Thus, they require a jump from one category of experiences to another.

While metaphors help us see and understand the world, they can also blind us and lead us to problems. They make us associate positively or negatively and, at times, accept analogies without further reflection or critical thinking. Thus, for example, within the US debate, Eileen Scallen asserts:

> Metaphors and other figures of speech have a wonderful power to make the abstract concepts and doctrines of the law become concrete, and thus real, to those who must understand and apply them. However, when we are unconscious or forgetful of the suggestive power of language, we risk becoming limited by the images that we have selected in the past or, more ominously, by the images that others have selected for us.[33]

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[31] Benjamin Berger (n 1) 34.

[32] Lebaron (n 30) 145.

[33] Eileen Scallen, 'Book Review: Metaphor and Reason in Judicial Opinions by Haig Bosmajian' (1993) 10 Constitutional Commentary 482.

Through these elegant yet simple functions, they bring us mentally to another place. By highlighting certain aspects of a concept, and hiding others, metaphors are beneficial linguistic devices, and getting a metaphor acknowledged may change the outcome of a negotiation, a court procedure or a theoretical legal debate. Inventions of new metaphors give new meaning to an issue and offer a new understanding of our knowledge.[34]

3. The Leading Metaphors: A Short Narrative

Legal metaphors have cultural specificity. Although they differ according to jurisdictions, yet concerning constitutional ideas, metaphors of one jurisdiction may have influenced the legal debate of another jurisdiction. In this part of the paper, I discuss some leading metaphors from the US, Canadian and UK jurisdictions, to understand their interpretative nuances in constitutional settings.

A. Penumbra

In United States constitutional law, the penumbra rights emanate by implication from other rights expressly guaranteed in the Bill of Rights.[35] They come into being by a process of 'reasoning by interpolation' from a grey area of the Constitution.[36] Having originated earlier,[37] the penumbral idea first gained popular attention in 1965, when Justice William O Douglas's majority opinion in *Griswold v Connecticut*[38] identified a right to privacy in the penumbra of the Constitution.

Since its initiation, penumbra perhaps has been the most perplexing metaphor in American constitutional law. In *Griswold,*[39] while striking down a Connecticut statute forbidding the use of contraceptives, Douglas J stated, 'Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.'[40]

Before *Griswold*, different judges used the term in different contexts. In *Schlesinger v Wisconsin*,[41] for example, OW Holmes J used the term to describe rights derived by analogical deduction.[42] Holmes J wrote, 'The law allows a penumbra to be embraced that goes beyond the outline of its object so that the object may be

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34 Lakoff and Johnson (n 16) 146.

35 Brannon P Denning and Glenn Harlan Reynolds, 'Comfortably Penumbral' (1997) 77 Boston University Law Review 1089.

36 Chris Rideout, 'Penumbral Thinking Revisited: Metaphor in Legal Argumentation, (2010) 7 Journal of the Association of Legal Writing Directors 155.

37 The term 'penumbra' first appeared in an opinion published by the Supreme Court of the United States in 1916. See *Hanover Star Milling Co. v Metcalf* (1926) 240 US 403.

38 (1965) 381 US 479.

39 ibid.

40 ibid 484.

41 (1926) 270 US 230.

42 Burr Henly (n 2) 257.

secured.'[43] Similarly, in *Olmstead v United States*,[44] Holmes J argued that evidence obtained through wire-tapping should not be admitted at trial and that 'the penumbra of the 4th and 5th Amendments covers the defendant'.[45] However, in *ALA Schecter Poultry Corp. v United States*,[46] BN Cardozo J used the term to describe an area of ambiguity in the law.[47]

Although 'penumbra' metaphor is widely hailed by the scholars, it also gave rise to criticisms. In his dissenting opinion in *Griswold*, Black J was sceptical about the finding of a right to privacy in the penumbra of the Constitution and disagreed with the majority's attempts to 'stretch' the Bill of Rights.[48] Besides, Louis Sirico described the term as 'intellectually confusing'.[49]

B. Incoming tide

'Incoming tide' is a widely used UK constitutional law metaphor. Lord Denning MR while speaking about the influence of the European Union (EU) law over the UK system held as follows, '[European Law] is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back; parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.'[50] Denning, subsequently expressed himself more emphatically:

> Our sovereignty has been taken away by the European Court of Justice (ECJ)… No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses — to the dismay of all.[51]

So much national law of the UK was characterised by the EU law that the UK Courts repositioned themselves to reality. It will be interesting to see as to the fate of this famous metaphor in the post-Brexit era, in which the UK courts no longer are bound to follow the EU law.[52] One exit point is that the UK courts did not accept the legal reasoning offered by the ECJ.

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43 (1926) 270 US 230.

44 (1928) 277 US 438.

45 ibid 469.

46 (1935) 295 US 495.

47 ibid 495.

48 *Griswold* (n 38) 508.

49 Sirico (n 20) 488.

50 *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401.

51 Gavin Smith, The European Court of Justice: Judges or Policy Makers? (Bruges Group 1990) foreword.

52 Paul Macgrath, 'Is Reporting EU Case Law Now a Waste of Time' (ICLR, 31 March 2017)< https://www.iclr.co.uk/blog/commentary/is-reporting-eu-case-law-now-a-waste-of-time> 2 October 2020.

C. Market Place of ideas

This metaphor can be traced to the dissent of Holmes J in the 1919 case, *Abrams v United States*.[53] The majority, in this case, upheld the convictions for antiwar leafleting. Holmes J, however, in the famously articulated single passage of his dissenting opinion joined by Louis Brandeis J, stated, 'The best test of truth is the power of the thought to get itself accepted in the competition of the market.'[54] A properly functioning marketplace of ideas, thus, in Holmes's thesis, ultimately assures the proper evolution of society. This focus on a marketplace seeking truth and encouraging an informed society made a curious effect on scholastic works on American constitutional law. The Court invoked the marketplace idea to justify free expression for the cumulative benefits to society and not merely for an individual's right.[55] Since its inception, the market place idea has received a mixed reaction from the legal scholars, however, like other constitutional metaphors have been a ready commodity for import in other common law countries including Bangladesh.[56]

The marketplace metaphor has been effective in supporting unpopular speech. It has also contributed to the general ubiquity of free-market rhetoric and ideology in legal discourse. But the metaphor is based on the principles of unregulated markets rather than a market theory or experience. Thus, arguably it is an anti-regulatory claim with no insights into how the law should deal with speech or markets. The metaphor of the 'marketplace of ideas' while illuminating some issues, is inadequate to the task of articulating appropriate boundaries for the regulation of commercial speech, even on its own terms:

> The marketplace of ideas is not actually a place where items-or laws-are meant to be bought and sold, and when we move from the realm of economics to the realm of corporate electioneering, there may be no reason to think the market ordering is intrinsically good at all.[57]

D. Wall of separation between the church and the state

The 'wall' metaphor is about the relationship between state and religion. Since Thomas Jefferson used the term in 1802, it has played a significant role in giving meaning to the First Amendment's Establishment Clause of the American Constitution. Loius Sirico observes:

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53 (1919) 250 US 616 (Holmes J dissenting).

54 ibid 630.

55 Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' [1984] Duke Law Journal 1.

56 For example, see *State v Chief Editor, Manabjamin* (2005) 57 DLR HCD 359 (holding— 'Freedom of expression generates and disseminates ideas and opinions, information of political and social importance in a free marketplace for peaceful social transformation under rule of law').

57 Tamara Piety, 'Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away' (2007) 41 Loyola of Los Angeles Law Review 181.

> Although the metaphor of a wall separating church and state may be the most prominent in constitutional law, it has not proven immune to criticism for the obstacle it has created in finding a middle ground between strict separation and accommodation of the role of religion in American life.[58]

Thomas Jefferson used the metaphor in his 1802 Letter to Danbury Baptist Association:

> I contemplate with sovereign reverence that act of the whole American people which declared that *their leg*islature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between Church and state.[59]

Jefferson's metaphor did not appear in any Supreme Court judicial opinion until 1878 in *Reynolds v United States*.[60] In that case, the Court held that the Constitution's Free Exercise Clause protected religious beliefs absolutely but did not necessarily protect all religious-based activity. As part of his discussion on the adoption of the first constitutional amendment, Waite CJ included Jefferson's 1802 Letter in his judgment. Thus, Waite CJ did not expound the wall metaphor but discussed the letter's meaning as a whole. At best, he accepted the metaphor as part of the argument that a wall forbids the government to intrude in people's religious beliefs.

The wall metaphor again appeared in Supreme Court opinion in *Everson v Board of Education*, [61] in which the Court declared that the First Amendment's Establishment Clause was incorporated through the Due Process Clause of the Fourteenth Amendment and therefore, applicable to the states. In that case, Hugo Black J writing for the majority declared that the Establishment Clause did not prevent a state from expending public funds to transport children to religious schools. As part of that history, Black J referred to Jefferson's Letter and the wall metaphor:

> Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state.[62]

In 1952**,** in *Zorach v Clauson,*[63] the wall metaphor appeared in the dissents of Black and Jackson JJ again. The case permitted public schools to release students to offsite locations for religious instruction or devotion. In his dissent, Jackson J

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58 Sirico (n 20) 463.

59 Letter from Thomas Jefferson, President of the United States, to Nehemiah Dodge and Others, Danbury Baptist Association (January 1802).

60 (1878) 98 US 145.

61 (1947) 330 US 1.

62 ibid 16.

63 (1952) 343 US 306.

offered a peculiar metaphorical concern about the Jeffersonian wall, 'The wall which the Court was professing to erect between church and state has become even more warped and twisted than I expected.'[64] In course of time, the wall metaphor, thus, has received mixed interpretation. Since the 1990s, its vitality and strategy as a constitutional metaphor have declined.

E. Fruit of the poisonous tree

Originated in the USA, 'fruit of the poisonous tree' is mainly a metaphor invoked in criminal law, however, has played a significant role in defining the constitutionally based exclusionary rule.[65] According to the doctrine, the evidence is inadmissible when it is obtained in an illegal arrest, unreasonable search or coercive interrogation. The initial illegal evidence is the 'poisonous tree' and the secondary evidence is the 'tainted fruit'. The doctrine made its first appearance in *Silverthorne Lumber Co*,[66] although the opinion did not use the 'poisonous tree' metaphor but did rest on 4th Amendment grounds.

The metaphor itself first appeared in the judgment of Frankfurter J in *Nardone,*[67]which dealt with wiretapping that violated a US Federal statute. The metaphor later was mentioned by Stewart J in *Lanza*,[68] in which the Court stated that the defendant had not raised a 'fruit of the poisonous tree' argument concerning evidence that had been obtained from an intercepted conversation in jail. The metaphor was first employed to forbid evidence on constitutional grounds in *Wong Sun* wherein collection of drugs as evidence by entering into the accused's house was tested.[69]

F. Living tree

The 'living tree' metaphor has been a staple idea in Canadian constitutional law.[70] Without some exceptions, the Canadian Court's 'living tree' metaphor appears to be accepted in the legal discourses along with the common law traditions.[71] Since the 1930s, Canada advanced a kind of metaphors that speak mainly about the organic aspect of the Constitution and tend to focus on 'flexibility, suppleness and growth'.[72] The most famous of these, the Constitution as a 'living tree', coined by

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64 ibid 317.

65 Louis Sirico (n 20) 460.

66 *Silverthorne Lumber Co v United States* (1920) 251 US 385.

67 *Nardone v United States* (1939) 308 US 338.

68 *Lanza v New York* (1962) 370 US 139.

69 Wong Sun v United States (1963) 371 US 471.

70 Vicki C Jackson, 'Constitutions as "Living Trees": Comparative Constitutional Law and Interpretive Metaphors' (2006) 75 Fordham Law Review 921, 943.

71 WJ Waluchow, 'Constitutions as Living Trees: An Idiot Defends' (2005) 18(2) Canadian Journal of Law and Jurisprudence 207. Australia is an exception to Canada because its judges did not explicitly embrace accept the 'living constitution' approach. See Vicki Jackson (n 70) 934.

72 Warren Newman, 'Of Castles and Living Trees: The Metaphorical and Structural Constitution' (2015) 9 Journal of Parliamentary and Political Law 472, 475.

Lord Chancellor Sankey in *Edwards v AG Canada*[73] permeates Canada's recent constitutional jurisprudence about the interpretation of the 1882 Canadian Charter of Rights and beyond.

Within two years of the 1982 Charter's adoption, the 'living tree' analogy was invoked in its interpretation. In 1984, *Law Society of Upper Canada v Skapinker*[74] asserted a continuity in the principle of flexible constitutional interpretation, explaining that the Charter, unlike a statute, is a part of the Canadian Constitution, and as a Constitution, its interpretation must be 'modulated by a sense of the unknowns of the future'. In a 1991 case challenging the reapportionment of districts in Saskatchewan, Beverley McLachlin J upheld the new districting, noting 'the Charter is engrafted onto the living tree that is the Canadian Constitution'[75] and 'it must be viewed as a living tree capable of growth and expansion within its natural limits.'[76] McLachlin J further held, 'The past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions, but must be capable of growth to meet the future.'[77] Similarly, the Canadian Court in *Hunter v Southam* noted that as a 'living tree', the Constitution of Canada 'must be capable of growth and development, over time to meet new social, political and historical realities often unimagined by its framers'.[78]

Thus, 'living tree' is an epitome of progressive interpretation of the Canadian Constitution. However, in the *Supreme Court Act Reference* and the *Senate Reform Reference*, the Supreme Court shunned the 'living tree' metaphor in favour of a repeated invocation of the more fixed and determinate 'constitutional architecture' metaphor.[79] Even then, the living tree metaphor embraces the idea that the very possibility of growth depends on the stem but the root remains the same.

4. Bangladeshi Case Law: An Appreciation of Metaphors

The constitutional metaphors, as shown above, have played a pivotal in explaining constitutional ideas in America, Canada and the UK. While metaphor may well be the key mechanism through which all of the crucial connections among cultural domain takes place,[80] it continues to be largely overlooked in legal studies of

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73 [1930] AC 124. *Edwards* was concerned with the question of whether the phrase 'fit and qualified person' eligible to serve in the Senate per s 32 of the British North America Act, could include female persons as well as male. The Privy Council reversed the Canadian Court's decision and held that there was no proper reason why the term should exclude the women.

74 (1984) 1 SCR 357.

75 Reference re Provincial Electoral Boundaries (1991) 2 SCR 181.

76 ibid 180.

77 ibid.

78 (1984) 2 SCR 145.

79 Richard Haigh (n 102) 138.

80 Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press 2006) 9.

Bangladesh. Be that as it may, a plethora of Bangladeshi case law has used metaphors of different tastes.[81] However, I will confine myself to some metaphors used in the leading constitutional law cases with a particular focus on *8th Amendment*.[82] Constitutional metaphors are a great source of looking at the Court's attitude to constitutionalism. To borrow the argument of Warren Newman from Canadian jurisdiction:

> Constitutional metaphors can be a powerful means of describing and illuminating otherwise abstract, obscure or intangible aspects of constitutional arrangements and institutional relationships. Employed judiciously, they can perform an important normative function in respect of the fluid political dynamics often associated with the exercise of constitutional powers, by asserting a restraining or channelling influence and encouraging actions or behaviour consistent with constitutional principles.[83]

Arguably, Newman's idea also carries the same weight in Bangladesh. The constitutional metaphors, hence, tend to be value-driven. In this part of the paper, I delve into several metaphors used by the leading judges of Bangladesh in upholding the values enshrined in the Constitution of Bangladesh.

A. Constitutional ideas: 'sand dune', 'reformation in situ', 'edifice' and 'pole star'

Eighth Amendment[84] probably is the case in which the judiciary regained itself after the somersault to the Constitution twice by the martial law regimes.[85] For the first time in Bangladesh's constitutional history, the higher judiciary was asked to determine the validity of a constitutional amendment. By amending art 100, the 8th Amendment set up six permanent Benches of the High Court Division (HCD) in six different places of Bangladesh. The petitioner alleged that by the said split-up of the HCD, the unitary character of the state has been offended. The petitioner claimed that the amendment vitiated the basic structures of the Constitution

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81 *HBS Association (Pvt) Ltd v Prof Shahabuddin Khaled Chowdhury* (2005) 34 CLC (AD): 'Court's discretionary power is wide, but it does not sit under a palm tree'; *Motiur Rahman and 18 Others v Govt of Bangladesh* (2005) 57 DLR 327: 'Tree of Liberty' quoting Thomas Jefferson's Letter; *Sheikh Hasina Wazed v Govt of Bangladesh* (2010) 39 CLC (HCD): 'In the end, writ petitioner won the battle, but lost the war'; *Esrarul Huq Chowdhury v Md Amir Hossain* (2012) 41 CLC (AD): 'stream may be flowing along the sea bed'; *State v Chief Editor, Manabjamin* (2005) 57 DLR HCD 359: 'scales of justice', 'free marketplace of peaceful social transformation', 'chilling effect on freedom of speech and expression'.

82 *Anwar Hossain Chowdhury v Bangladesh* (1989) 1 BLD (AD) spl 1.

83 Warren Newman, 'Of Castles and Living Trees: The Metaphorical and Structural Constitution' (2015) 9 Journal of Parliamentary and Political Law 472, 475.

84 Anwar Hossain Chowdhury (n 82).

85 First Martial Law: 1975-1979; Second Martial Law: 1982-1986. See Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (Dhaka University Press 1994). See also Shahdeen. Malik, 'Bangladesh' in Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law: A Comparative Study* (Martinus Nijhoff 1993) 55.

among others the unitary nature of the state, the independence of the judiciary and by that way, of course, the rule of law. The respondent, on the other hand, submitted that the impugned amendment to art 100 merely made a jurisdictional allocation of territorial nature maintaining the inviolability of the HCD. The Appellate Division by a majority ruled for the petitioner. The Court expounded the basic structure theory, earlier established by the Dacca High Court[86] and the Indian Supreme Court,[87] in a larger canvas and declared the amendment illegal.

Eighth Amendment enjoys great authority in Bangladesh's constitutional history. The judges' acumen, the depth of the judicial opinion rendered, the political context of the time and the subsequent constitutional developments made the case a source of enormous constitutional curiosity. All the four judges have been cited frequently by the judges and scholars of the subsequent time to argue for or against a particular constitutional stand. However, the use of the metaphors by the judges of this case in expounding the Constitution or in narrating its development has been a less explored venture. I will pick up four metaphors that two judges epitomized in offering their interpretation of constitutional principles including the basic structure. The four metaphors are: 'sand dune' and 'edifice' applied by Shahabuddin Ahmed J (Ahmed J) and 'pole star' and 'reformation in situ' used by Muhammad Habibur Rahman J (MH Rahman J).

Shahabuddin Ahmed J used the 'sand dune' metaphor to indicate the transitory nature of the constitutionalism of a developing democracy. Ahmed J held:

> Bangladesh which got independence from Pakistan through a costly War of Independence which was fought with the avowed declaration to establish a democratic polity, under a highly democratic Constitution, met the same fate as Pakistan. Two Martial Laws covered a period of 9 years out of her 18 years of existence. During these Martial Law periods, the Constitution was not abrogated but was either suspended or retained as a statute subordinate to the Martial Law Proclamations, Orders and Regulations. However, ours is not the only country to have such problems and misfortunes. These are common features of all the under-developed countries which, though they are called developing countries by mere courtesy, are held in contempt by the Western Democracies as countries of the Third World, wrecked by coups and counter-coups, revolution and rebellion, over-populated, steeped in abject poverty, illiteracy and superstition, exploited by their leaders under catchy slogans. *Constitutions of most of those countries are as transitory as sand dunes*.[88]

A 'sand dune' is a hill of sand near an ocean or in a desert that is formed by the wind.[89] The sand dunes are very transitory in nature. It is very difficult to say the

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86 *M Abdul Huq v Fazlul Quader Chowdhury* (1963) 15 DLR (Dacca) 355.

87 *Keshavananda Bharati v State of Kerala* [1973] AIR SC 1461.

88 Anwar Hossain Chowdhury (n 82) para 311.

89 Cambridge Dictionary<https://dictionary.cambridge.org/dictionary/english/sand-dune> 15 Oct 2020.

extent to which the metaphor inspired Ahmed J to narrate the constitutional journey of the country. However, it can be fairly assumed that Ahmed J candidly placed the perilous journey of Bangladesh's constitutionalism by resorting to the 'sand dune' metaphor. The eight amendments to the Constitution within 16 years of its adoption (1972-1988); the assassination of the father of the nation (August 1975); the imposition of two successive Martial Laws and making the Constitution subservient to the regimes must have struck Ahmed J's mind while he was handing down the *8th Amendment* verdict. To make the point clearer Ahmed J quoted de Smith:

> Constitutions in developing countries are apt to prove frail structures, mainly because so much value is attached to the acquisition and retention of political power, followed by the suspension or supersession of the Constitution.[90]

For Ahmed J, the value lies with the people. That was why he wrote in his judgment that the judges in such a case were to interpret a Constitution widely acclaimed as the embodiment of the 'will of the people' and 'supreme law of the land'.[91] Ahmed J observed that the pre-eminence of the Constitution does not derive from merely of its supremacy, but also from the fact that it contains the 'lofty principles' and 'higher values of human life'. On the one hand, the Constitution gives outlines of the state-apparatus, on the other hand, it enshrines long-cherished hopes and aspirations of the people. Amir-Ul Islam, one leading constitutional commentator of Bangladesh and also a lawyer for the petitioner in the *8th Amendment*, takes note of the 'sand dune' metaphor mentioned by Ahmed J and fully endorses the implications of the term in portraying the necessity of durable constitutionalism. Islam writes:

> Permanence is necessary not only for the continuity, the growth and development of a society but also for the protection of the basic norms and rights against the likely onslaught of other competing powers and values.[92]

Ahmed J's appreciation of Bangladesh's constitutional journey also found recognition in the words of his fellow judge MH Rahman. Rahman J did not mention the 'sand dune' metaphor as such, but resorted to an analogous legal fiction called 'reformation in situ'. The fiction of 'reformation in situ' was coined by James LJ in the famous case of *Felix Lopez* in 1840,[93] wherein his Lordship held that if a diluvion land, after submersion into a river or sea, reappears in the same site after a considerable period, the original land-holder would be regarded as the

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90 SA de Smith, Constitutional and Administrative Law (Third edn, Penguin Books 1977) 35.

91 The preamble of the Constitution of the People's Republic of Bangladesh.

92 M Amir-Ul Islam, 'Hazardous Journey of Bangladesh' (Unpublished paper, Dhaka, 2019) 2.

93 *Felix Lopez v Muddin Mohan Thakur* (1840) 13 MIA 467 (PC). The plaintiff's land was submerged in the Ganges and re-appeared after 12 years at the same site but annexed to the defendant's property. The Privy Council held that the defendant could not claim the added land as an accretion because the plaintiff's right over his submerged land was not extinguished.

owner of the reappeared land. The 'reformation in situ' concept by now is an established principle of alluvion-diluvion law in ascertaining the land ownership of a riparian peasant.[94] MH Rahman J applied this theory in a constitutional context to mean the arduous journey of constitutionalism in Bangladesh. Rahman J indicated the 'avulsion'[95] of the Constitution during the martial law regimes and realized the necessity of regaining the people's ownership over the Constitution. According to MH Rahman J:

> In the last seventeen years, the Constitution has experienced avulsion and kinds of a *reformation in situ*. Far-reaching and radical changes had been introduced in the Constitution both when it was functioning and when it was not allowed to function. For the first time, an amendment of the Constitution has been challenged in this Court and it is now declared to be unconstitutional.[96]

In an essay in 1998, MH Rahman J reiterated his position about Bangladesh's tortuous constitutional journey. This time he sounded more concrete in bringing the import of the 'reformation in situ' principle into a constitutional context. Rahman J wrote, 'Like the deltaic land of our country, our Constitution has experienced several avulsions and various kinds of *the reformation in situ*.'[97] The affirmed position of MH Rahman J indicates that he had consciously resorted to this metaphor in his judgment in 1989.

Next, the 'edifice' metaphor is somewhat broadly related to the 'sand dune' and 'reformation in situ' metaphors, used again by Ahmed J in a different place of the *8th Amendment* judgment. The former indicates an architectural image of the Constitution to mean its permanent structure. The latter two metaphors emphasised on the transitory nature of the Constitution portraying a bad signal to the life of the nation. As such, the Ahmed J (BH Chowdhury CJ and MH Rahman J concurring) thought the Constitution as an 'edifice' having 'pillars' to give it a permanent shape. From this conception, arguably, the doctrine of 'basic structure' emerged. To quote Ahmed J:

> There is no dispute that the Constitution stands on certain fundamental principles. Which are its structural pillars and if these pillars are demolished or damaged the whole Constitutional edifice will fall-down. It is by construing the Constitutional provisions that these pillars are to be identified. Implied

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94 State Acquisition and Tenancy Act 1950 (s 86), for example, recognises individual ownership to a reappeared land in the same site subject to time and ceiling law.

95 According to Oxford Languages retrieved from Google search, in Law, 'avulsion' means 'the sudden separation of land from one property and its attachment to another, especially by flooding or a change in the course of a river.' From this perspective, MH Rahman J's use of 'avulsion' offers the full sense of 'alluvion-diluvion' provision of land law.

96 Anwar Hossain (n 82) para 422 (per MH Rahman J).

97 MH Rahman, 'Our Experience with Constitutionalism' (1998) 2 (2) Bangladesh Journal of Law 116, 118.

> limitation on the amending power is also to be gathered from the Constitution itself including its Preamble.[98]

The 'constitutional edifice' lies at the heart of the basic structure doctrine. From this angle, the term 'basic structure' may itself sound to be a metaphor. But for the general nature of the term, it is more a constitutional principle than a metaphor. Although the judges in *8th Amendment* differed on the contents of the 'basic structure', they, however, agreed on the necessity of having such a 'structure', demolition of which would destroy the whole edifice of the Constitution.[99] This reminds us of the 'house' analogy of Joseph Raz who submits that a Constitution is like an old house, which survives amidst changes and the house-dwellers continue to live in it for ages. In the words of Raz:

> It is still the Constitution adopted two hundred years ago, just as a person who lives in an eighteenth-century house lives in a house built two hundred years ago. His house has been repaired, added to, and changed many times since. But it is still the same house and so is the Constitution.[100]

Therefore, the amendment process entails an inbuilt limitation to remake the Constitution. The common theme of 'edifice' metaphor and 'house' analogy is the sustenance of the Constitution.[101] It is 'the same Constitution' that governs a nation in its marching forward. It would be interesting to see whether this 'edifice' analogy have any meaning for the constitutional idea when we use the metaphor 'living tree' to mean the growth of the Constitution.[102]

Before looking at the 'living tree' metaphor, it will be pertinent to discuss the 'pole star' metaphor used by MH Rahman J to discover the intention of the Constitution framers. In *8th Amendment*, the judges, MH Rahman J, in particular, sought for the

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98 Anwar Hossain (n 82) para 415.

99 The most settled 'basic structure' decided by the Court are: independence of judiciary: *Secretary, Ministry of Finance v Masdar Hossain* (2000) 52 DLR (AD) 82; democracy: *Abdul Mannan Khan v Bangladesh* (2012) 64 DLR (AD) 1; republicanism: *Maulana Syed Rezaul Haque Chandpuri and Others v Bangladesh Jamaat-e-Islami and Others* (2014) 66 DLR (HCD) 14; local government: *Kudrat-i-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319, judicial review: *Bangladesh and others v Advocate Asaduzzaman Siddiqui* [2017] Civil Appeal No 6.

100 Joseph Raz, Between Authority and Interpretation (Harvard University Press 2009) 370. See also S M Masum Billah, 'Who, We the People Are' (Daily Star, March 8, 2015) <https:// www. Thedaily star.net/who-we-the-people-are-48755>18 October 2020.

101 However, Yaniv Roznai thinks that 'constitutional changes should not be tantamount to constitutional metamorphosis'. See Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 149.

102 In the Canadian context, a metaphor close to Bangladesh's 'edifice' is 'architecture' used in *Senate Reference* [2014] SCJ No 32. However, the 'architecture' metaphor, unlike the 'living metaphor' has attracted criticism. See, for example, Richard Haigh, 'You Don't Need a Metaphor to Know Which Way the Case Goes: The Senate Reference and Constitutional Metaphors' [2015] The Supreme Court Law Review 71 (arguing 'any description of our [Canadian] Constitution that seeks external support from metaphors, also risks losing sight of what it ultimately signifies').

pole star that would guide the judges to interpret the Constitution. According to MH Rahman J, the preamble was the 'pole star'. In the words of MH Rahman J:

> This Preamble is not only a part of the Constitution; it now stands as an entrenched provision that cannot be amended by the Parliament alone. It has not been spun out of gossamer matters nor is it a little star twinkling in the sky above. *If any provision can be called the pole star of the Constitution then it is the Preamble* (emphasis added).[103]

By treating the preamble of the Constitution as the pole star, MH Rahman J discovered that establishing rule of law was the fundamental aim of its framers, and as the impugned 8th Amendment splitting the HCD prejudices the rule of law, as a basic structure, so the amendment was void. The 'pole star' metaphor was not, however, something used by MH Rahman J for the first time in Bangladeshi constitutional dispensation. During Pakistan period in 1957, Munir CJ in a *Reference by the President*[104] referring to an observation of an Ohio Judge stated that the 'pole star' in the construction of a Constitution is the intention of its makers and adopters. After *the 8th Amendment*, the pole star metaphor has been approvingly quoted in many cases with an emphasis on the preambular pledge.[105]

B. 'Living tree [Bangladesh variant]

As argued above, Canada's 'living tree' jurisprudence considers a broad range of legal arguments and factors in making constitutional decisions and allows for the evolution of its constitutional law. In several cases, the Bangladesh Supreme Court endorses the living tree metaphor. Surendra Kumar Sinha (SK Sinha CJ), for example, in *Sontosh Kumar Saha*,[106] approvingly quotes from *Edwards*,[107] by saying that a Constitution is a 'living tree' its current and continued authority rests on factors like the consent, commitment or sovereignty of the people. In viewing a Constitution as a living tree, the contemporary interpreters see the essential aspects of the idea of constitutionalism.[108]

Sinha CJ referred to the 'living tree' metaphor to discuss the position of judicial review in Bangladesh. While doing so, he had been referring to Canadian and Indian position of judicial review. All judicial review, thus, is an exercise of judicial

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103 Anwar Hossain (n 82) para 496. But, see para 595 where Syed Ishtiaque Ahmed for the petitioner argued art 7 as the 'pole-star' of the Constitution regarding which the validity of all laws including an amendment of the Constitution is to be judged. Ishtiaque Ahmed's point was that art 7 declared the Constitution to be the supreme law of the Republic being the solemn expression of the will of the people and if 'any other law' including an amending law is inconsistent with the Constitution, 'that other law' shall, to the extent of the inconsistency, be void.

104 (1957) 9 DLR SC 178.

105 Jamaat-i-Islami Registration (2014) 66 DLR (HCD) 14.

106 *Bangladesh and Others v Sontosh Kumar Shaha and Others* (2016) 6 SCOB (AD) 20.

107 *Edwards v AG of Canada* [1930] AC 124 (also known as the *Persons Case*).

108 *Sontosh Kumar Shaha* (n 106) 20 (per Sinha CJ).

accountability. On the spirit of constitutionalism, Sinha CJ also quoted from Fali S Nariman, a renowned Indian Judge:

> My only regret sometimes is that some of our modern-day Judges – whether in India or elsewhere – do not always realise the solemnity and importance of the functions they are expected to perform. The ideal judge of today, if he is to be a constitutional mentor, must move around, in and outside Court, with the Constitution in his pocket, like the priest who is never without the Bible (or the Bhagavad Gita). Because the more you read the provisions of our Constitution, the more you get to know of how to apply its provisions to present-day problems.[109]

Therefore, what is a Constitution is not a question merely of being but also a matter of becoming. Perhaps, this approach of 'living tree' metaphor helped Sinha CJ in *16th Amendment*[110] to decide that an amendment reviving the original provision of a Constitution even may be violative of the Constitution.[111] Sinha CJ's view on 'living tree' enjoys more strength than that of ATM Afzal J, who in *8th Amendment* had earlier held:

> If we apply the universally accepted principles that a Constitution of Government is a living and organic thing … in accordance with the general rule that harmony in constitutional construction should prevail, whenever possible, an amended Constitution must be read as a whole, as if every part of it had been adopted at the same time and as one law. A constitutional amendment is not to be considered as an isolated bit of design and colour, but must be seen as an integral part of the entire harmonious picture of the Constitution.[112]

Afzal J, in essence in his minority view in *8th Amendment* held the view that a constitutional amendment once validly enacted becomes a part of the original Constitution. However, Afzal J contradicts himself when he mentioned elsewhere in his *8th Amendment* opinion that the framers did not conceive everything for the new generation, therefore, the parliament in its own wisdom can make a new device for function the state institutions.[113] Afzal J did not mention the term 'living tree' expressly, and his views did not help him reach the same conclusion as that of the majority, Sinha CJ's view represented the majority view in *Santosh* and *Asaduzzaman Siddiqui.*

Thus, the living tree metaphor suffers a misty conundrum in Bangladesh.[114] In some ways, however, the metaphor better captures the idea that even a 'living' document is constrained by its origins. Trees, after all, are rooted, in ways that

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[109] Fali S Nariman, Before Memory Fades: An Autobiography (Hay House Publishers 2010).

[110] Asaduzzaman Siddiqui (n 99).

[111] In *16th Amendment,* a reintroduction of parliamentary intervention model for judges' impeachment was found to be unconstitutional.

[112] Anwar Hossain (n 82) para 622.

[113] *Anwar Hossain* (n 82) para 574, 578 and 600.

[114] *AKM Shafiuddin v Bangladesh* (2012) 41 CLC (HCD).

other living organisms are not.[115] Trees must grow from where they begin and maintain contact with their roots for nourishment and in this way, the 'living tree' metaphor embraces the mixed elements of rootedness and growth.

C. 'Not an isolated island standing above the sea-level of the other provisions of Constitution'

The 'isolated island' metaphor used by Mustafa Kamal CJ in *Mohiuddin Farooque*[116] has been instrumental in fashioning the jurisprudence of Public Interest Litigation (PIL) in Bangladesh. Article 102 of Bangladesh Constitution confers writ jurisdiction on the High Court Division and envisages the principles under which 'an aggrieved person' may approach the Court against the actions of a public functionary. Mustafa Kamal CJ viewed the whole Constitution as a sea-level and opined that art 102 was not an isolated island from that sea level. The petitioner, in this case, challenged the merit of a Flood Action Program (FAP) initiated by the government on the ground of being violative of the right to life, livelihood and environment. The petitioner's standing was questioned, as he was not directly affected by the project, as such the interpretation of the term 'any person aggrieved' under art 102 of the Bangladesh Constitution became the central question to be decided in the case. Kamal CJ took a holistic approach and interpreted the term 'any person aggrieved' in liberal mould, relate the term with the other provisions of the Constitution and suggested to view art 102 as an inextricable part of the whole constitutional framework. Kamal CJ reasoned as follows:

> We now proceed to say how we interpret Article 102 as a whole. We do not give much importance to the dictionary meaning on the punctuation of the words 'any person aggrieved'. Article 102 of our Constitution is not an isolated island standing above or beyond the sea-level of the other provisions of the Constitution. It is a part of the overall scheme. Objectives and purposes of the Constitution. And its interpretation is inextricably linked with the (i) emergence of Bangladesh and framing of its Constitution; (ii) the Preamble and Article 7; (iii) Fundamental Principles of State Policy; (iv) Fundamental Rights and (v) the other provisions of the Constitution.[117]

Kamal CJ, thus, through the 'island' metaphor featured the people as the focal point of constitutional law. For Kamal CJ, the Constitution, historically and in real terms, is a manifestation of what is called 'the people's power'.[118] The people of Bangladesh, therefore, are central, as opposed to ornamental, to the framing of the Constitution. A careful look at the above observation of Kamal CJ reveals the

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[115] Vicki Jackson (n 70) 943.

[116] *Mohiuddin Farooque v Government of Bangladesh* (1997) 49 DLR (AD) 1.

[117] ibid para 23, 24.

[118] ibid.

relationship of art 102 with the other parts of the Constitution in the following manner:

(1) The Constitution is not just a replica of the other common law legal traditions. It was not gifted from external sovereign power. Rather, it was the fruit of a historic war of independence, achieved with the lives and sacrifice of a telling number of people for a common cause making it a class apart from the other constitutions of comparable description.[119]

(2) The preamble of the Constitution stands on a different footing from that of other comparable jurisdictions. It is largely because the birth of Bangladesh is different from other countries. In Bangladesh's Constitution, a real and positive declaration of pledges have been adopted, enacted and given by the people to themselves as a reflection of the ethos of their historic war of liberation. The people vowed to establish a society in which the rule of law, fundamental human rights and freedom, equality and justice—political, economic and social shall be ensured for all. The people owe a duty to safeguard, protect and defend the Constitution to maintain its supremacy as the embodiment of the will of the people. Article 7 of the Constitution bestows the powers of the Republic with the people and the exercise of the people`s power on behalf of the people is said to be performed only under and by the authority of the Constitution. It means that all the legislative, executive and judicial powers the powers of the people themselves and the respective functionaries exercise the powers of the people on terms expressed by the Constitution. The people, thus, is the repository of art 7.

(3) Article 8 (2) provides that the Fundamental Principles of State Policy (economic, social and cultural rights) 'shall be a guide to the interpretation of the Constitution and the other laws of Bangladesh.' It is constitutionally impermissible to leave out of consideration of Part II of the Constitution when an interpretation of art 102 needs guidance.

(4) Part III of the Constitution bestows fundamental rights on the citizens and other residents of Bangladesh. Article 44 guarantees the right to move the High Court Division under art 102 for the enforcement of these rights. Article 102 is, therefore, a mechanism for the enforcement of fundamental rights which can be enjoyed by an individual alone in so far as his individual rights are concerned, but which can also be shared by an individual in common with others when the rights pervade and extend to the entire population and territory. For this reason, the mandate of art 102 cannot be divorced from Part III of the Constitution.

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[119] ibid.

(5) The other provisions of the Constitution which vary case to case may also come to play a role in interpreting art 102 of the Constitution. Article 102, therefore, is an instrumentality and a mechanism, containing both substantive and procedural provisions, using which the people as a collective personality and not merely as a conglomerate of individuals, have devised for themselves a method and manner to realise the objectives, purposes, policies, rights and duties which they have set out for themselves and which they have strewn over the fabric of the Constitution.

Kamal CJ, thus, showed that with the power of the people looming large behind the Constitutional horizon, it is difficult to conceive of art 102 as a vehicle for realising exclusively individual rights upon individual complaints. The Supreme Court being a vehicle for the exercise of the judicial power on behalf of the people, the people should always remain the focal point of concern of the Supreme Court while disposing of justice or interpreting the Constitution. Viewed in this context, interpreting the words 'any person aggrieved' meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the Constitution. Thus, Kamal elevated the pro-people jurisprudence in Bangladesh into a new height, and since 1996 the term 'person aggrieved' has been receiving a pragmatic interpretation in the highest forum of justice in Bangladesh. The 'island' metaphor in this regard has been playing the role of a catalyst to devise a people-centric image of the Constitution.

5. The Future Permeability of Legal Metaphors

There is evidence of overwhelming use of constitutional metaphors, thus far shown, in leading common law jurisdictions. It is also evident that the Bangladeshi judges have also used several metaphors epitomizing its comparativist and sui generic nature. The question now is where do we go from here? Should we practice and nurture the usage of legal metaphors more expressively? To have a response the idea of Iris Murdoch may be of relevance at the first instance:

> We can no longer take language for granted as a medium for communication. Its transparency is gone. We are like people who for a long time looked out of a window without noticing the glass—and then one day began to notice this too.[120]

The first, therefore, task before making any critique on this discipline is to notice the omnipresence of metaphor in legal settings. Critics like Earl MacCormac accepts that metaphor may play an initial role in understanding law, but then loses its influence with time and use.[121] This view sees the oft-used metaphor's power as eventually dying and the metaphor 'becoming part of a mundane conventional

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[120] Iris Murdoch, Sartre (Bowes and Bowes 1953) 27.

[121] Earl R Mac Cormac, *A Cognitive Theory of Metaphor* (MIT Press 1989) 6.

language, the cemetery of creative thought'.[122] However, many see the issue from the perspective of legal and linguistic culture. James B White, one great authority on law and metaphor, terms the metaphors as 'rhetorical characters' and suggests that they entail meanings for the social and cultural functions of law:

> ... [T]he fact that the law can be understood as a comprehensibly organized method of argument, or what I call a rhetoric, means that it is at once a social activity—a way of acting with others—and a cultural activity—a way of acting with a certain set of materials found in the culture. It is always communal, both in the sense that it always takes place in a social context and the sense that it is always constitutive of the community by which it works.[123]

In this way, while metaphors have been largely a blessing, reservations about their frequent and unscrupulous use are not meagre. Legal metaphors describe one kind of law and one kind of relation to the law, all in the service of maintaining the law's facade of weighed fairness and cloistered neutrality. They highlight precision, scientific balancing and equity in terms of confrontation and they obscure both the input of the hand of the judge and alternative modes of dispute resolution.[124]

Jonas Ebbesson, in a critical essay, gives the example of judges' practice to use the term 'findings' to denote their verdict and to refer to 'sources' in indicating the material in which a law can be found.[125] Arguably, the courts not only apply the law but also make it in proper circumstances. Then, rather than 'finding' the law in some 'source', they are indeed 'manufacturing a fresh legal principle'.[126] If the court only 'finds' in the 'sources of law' how a text should be interpreted or applied or a case resolved, it becomes immune to criticism. Ebbesson wonders under the guise of 'finding' and 'source' metaphor, whether the judges want to shift their responsibility to some places. These two words help them avoiding the blames, but they do not fully describe what the judges do.[127]

In addition to this criticism, Ebbesson further refers to the use of the terms 'balancing of interests' or 'weighing of interests' to show how they are used to shield the possible weakness of the judicial decision.[128] The balancing of interest is

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122 George Lakoff, 'The Death of Dead Metaphor' (1987) 2 Metaphor and Symbolic Activity 143.

123 James B White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life' (1985) 52 University of Chicago Law review 684, 691. For an idea about law, narratives and metaphor, see James B White, The Legal Imagination (University of Chicago Press 1973). See also James B White, When Words Lose Their Meaning: Constitutions, Reconstitutions of Language, Character and Community (University of Chicago Press 1984) 226-27.

124 Andreas Philippopoulos-Mihalopoulos, 'Flesh of the Law: Material Legal Metaphors' (2016) 43 (1) Cardiff University Journal of Law and Society 45.

125 Jonas Ebbesson, 'Law, Power and Language: Be Aware of Metaphors' (2008) 53 Scandinavian Studies in Law 259 at 266.

126 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 17.

127 Ebbesson, 'Law, Power and Language' (n 125) 266.

128 ibid 266.

sometimes explicitly set out in legislation, sometimes established through the jurisprudence of courts. A case of balancing is essentially developed by case law in the form of 'proportionality principle' or 'reasonable test' in an environmental right or freedom of expression context. To speak of 'balancing' is to speak metaphorically. Proportionality indicates that measures taken for the promotion of certain public interests shall be balanced against restrictions and infringements affecting individuals. In practice, this is an absurd suggestion, as balancing is intuitive, improvised and subjective. The 'balancing' metaphor conveys a false sense of being perfect.[129]

Although, Ebbeson's criticism is confined to metaphors inherent with the legal proceedings and system, and they have not got many things to do with the external constitutional metaphors, yet the criticism bears weight in the sense that metaphors are susceptible to misuse. The criticism is further compounded by the cultural and political differences of jurisdictions in which the metaphors operate. Furthermore, a metaphor in one language may not carry the same sense and weight in another language. For example, the concept of 'standing', is highly metaphorical in American law and language but does not translate into many other languages.[130] A translation of a metaphor into another language may intensify the ambiguity of the concept and create a mismatch for a different context.[131]

Bosmajian quotes with approval Monroe Beardsley, 'Because of its very complexity, its multiplicity of meaning, a metaphor is hard to control to keep from saying things you don't want to say, along with the things you do want to say.'[132] While 'unintended' meanings can be problematic from an academic's point of view, they can be very important to a critic of legal language, because they can reveal how a metaphor candidly functions to define our perspectives.[133] After all, metaphors are the realm of literature and rhetoric; reliance upon them to do compelling intellectual work smacks of methodological chaos.[134] Greta Olson alleges that mental leap for metaphorical mapping is immediate rather than

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[129] Michel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 795.

[130] Steven Winter, 'The Meaning of Under Color of Law' (1992) 91 Michigan Law Review 323. Winter analyses the metaphor which is closely linked to the language and jurisprudence of one country, but does not necessarily work when translated to another context and language.

[131] Laura V Fabregat, 'Legal metaphors in translation: The Great Chain of Being' (2015) 2(2) Cognitive Linguistic Studies 330.

[132] Bosmajian (n 7) 38

[133] Scallen (n 33) 485.

[134] Finn Makela, 'Metaphors and Models in Legal Theory' (2011) 52 (2-4) Les Cahiers De Droit 397, 415.

sequential, for it is associated with 'slippage, ideology and rhetoric'.[135] As such, it is disparaged as a vehicle of distortion.[136]

These notes of criticisms may not carry great weight as we have no criteria to decide whether a judge in a case had used the metaphor as a vehicle of distortion and made it a sole basis of his/her decision. The immediate appeal of a metaphor in the mind of an audience is not something to be overlooked. If the law is a means of communication, then the use of the metaphor in judicial opinion is obvious. And it is not without reason that a metaphorical expression creates a lasting impression in legal exposition.

Why, then, the old metaphors, particularly those used in constitutional law, continue to govern us? Two reasons can be deduced for its continued appeal: i) their visual and physical appeal; ii) their power as precedent. Metaphors contrast in the human mind and relate a complex legal idea to a known object making it uniquely sufficient to make it memorable. Further, when a veteran judge uses a metaphor, it becomes a point of attention by the subsequent judges and law scholars, and through recurrent reference, the metaphorical term starts to enjoy a place of authoritative precedent. The basic structure doctrine firmly enunciated by the Bangladeshi judges in the *8th Amendment*, for example, has been transformed into a canon of constitutional interpretation through the consistent confirmation of the doctrine since 1989.

Lon Fuller perhaps represents a balanced view on the topic. Although Lon Fuller exhibited somewhat less hostility to metaphor than others, Fuller nevertheless preferred to treat metaphors 'as servants to be discharged as soon as they have fulfilled their functions'.[137] Fuller, however, in the ultimate analysis admitted the utility and vitality of metaphors, 'Metaphor is the traditional device of persuasion. Eliminate metaphor from the law and you have reduced its power to convince and convert.'[138]

In a constitutional context, an additional weighty trend comes into play in rejuvenating the realm of metaphors, what is known as 'global constitutionalism'[139] or 'migration of constitutionalism'.[140] The 'migration' (again, a metaphor in itself] of constitutional ideas across legal systems, as Sujit

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135 Greta Olson, 'On Narrating and Troping the Law: The Conjoined Use of Narrative and Metaphor in Legal Discourse'. In Michael Hanne and Robert Weisberg, *Narrative and Metaphor in the Law* (Cambridge University Press 2018) 19.

136 ibid, 19.

137 Lon Fuller, 'Legal Fictions' (1930-1931) 25 Illinois Law Review 363, 380.

138 ibid 380.

139 Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72

140 Sujit Choudhry, 'Migration as a Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Chicago University Press 2006) 13.

Choudhury shows, is rapidly emerging as one of the central features of contemporary constitutional practice.[141] Metaphor as a generative idea will be vivid in comparativist constitutional culture, as an understanding tool, if not a reformist apparatus.[142] Bangladeshi judges in this regard have shown considerable creativity in fashioning a good number of constitutional metaphors, the use of 'flaming sword' to mean the enforcement of court orders and 'living tree' to mean the constitutional transformation in *16th Amendment* being the latest.[143]

6. Conclusion

Metaphors powerfully influence our legal thoughts. It offers an intuitive image of a familiar kind and purports to visualize something from our accustomed experience to present the vitality of law and its development. Omnipresent, unchallenged or even at times unnoticed, metaphors perform a constitutive function of legal reality itself. The legal language would sound hollow and unimpressive without figurative expressions. The powerful metaphors used by the American judges and the judges of other common law jurisdictions have made a fervent appeal to enrich the common constitutional tradition. Although many of them have fallen into disuse or received a new dimension over time, they still enjoy a persuasive value in fashioning the constitutional jurisprudence. Regarding metaphors in the law, as elsewhere, the challenge is not whether to use them, but rather how to understand their richness, heritage and complexity.[144] Robert L Tsai compellingly concludes in an essay:[145]

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[141] ibid 1. A momentous example of the migration of constitutional ideas is the use of the term 'penumbra' by the Bangladeshi judges from the Indian judges who in turn had borrowed the idea from America. In *V Lakshmipathy v State of Karnataka* [1992] AIR Karnataka 57, HG Balakrishnan J extended the meaning of 'penumbra' to environmental rights in interpreting the right to life enshrined in art 21 of the Indian Constitution; and the Bangladeshi judges followed through in *Mohiuddin Farooque v Bangladesh* (1997) 49 DLR (AD) 1; *Metro Makers and Developers Limited v Bangladesh Environmental Lawyers' Association Limited (BELA)* (2012) 41 CLC (AD); *Sharif Nurul Ambia v Dhaka City Corporation* (2006) 35 CLC (AD).

[142] For example, to understand the relationship between civil and political rights and socio-economic rights, the two chariots' metaphor used by Chandrachud J in the Indian context looks very catchy. The metaphor does not appeal for reform in Bangladesh but probably ignites the Bangladeshi judges to interpret the Constitution purposively. Chandrachud J in *Minerva Mills Ltd v Union of India* [1980] AIR 1789 held that Directive Principles of State Policy and Fundamental Rights are 'like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution.' *Minerva* approach to constitutional interpretation has been cited approvingly by the Bangladeshi judges in *Siddique Ahmed v Bangladesh* (2010) 39 CLC (HCD), *Anwar Hossain Chowdhury v Bangladesh* (1989) 1 BLD (AD) spl 1 and *Mujibur Rahman v Bangladesh* (1992) 44 DLR (AD) 111.

[143] *Asaduzzaman Siddiqui* (n 99) 2 (per Sinha CJ).

[144] Chris Rideout (n 36) 155.

[145] Robert LTsai, 'Fire, Metaphor, and Constitutional Myth-Making (2004) 93 Georgia Law Review 181.

> But what it does reveal about the formation of constitutional culture is considerable. Metaphor is at once the first step in a complicated dance over institutional prerogative and legal meaning, the symbolic union of communitas and the democratic spirit, and the embodiment of our innermost hopes and fears as members of the American polity.

In Bangladesh, it seems that the judges have not consciously imported the constitutional metaphors. However, an in-depth look at Bangladesh's leading constitutional law cases with a special focus on *8th Amendment*, reveals that the Bangladeshi judges have devised some metaphors as discussed in this paper having utility, generative spark and strategic value. Although it is not the argument of this paper that metaphorical fight and interpretative battle are the same, yet our understanding of constitutional development has been enriched by their use through our leading legal minds. They also have helped to shape a people-centric constitutional jurisprudence.

While some metaphors adequately defined antecedents, architecture and concepts of constitutional law, a good number have not been successful in doing so. It is not the time to discard the role of metaphor readily without further research and judicial appreciation in Bangladesh. A conscious effort to lean towards the linguistic and stylistic matters of the judiciary may furnish a new ground for legal and constitutional research on the topic. Thus, the assumption is that rather than treating the metaphors as a rhetorical flourish, we should study, research and teach the operation of metaphor not only in our legal life but also in our thought process to enhance its potential as a strategy to view the law as an all-embracing phenomenon.

Racial Dichotomy to Escalate Discrimination: An Account of Legal-historiography in Colonial India

Md. Rabiul Islam*

Abstract: The enlightenment era of modern Europe can be seen as the repercussion and efforts to exterminate the racial discriminatory policies and exploiting strategies throughout their colonization projects. However, despite the emerging position of liberal democracy in Britain, they imposed imperial despotism by the means of racial dichotomy and discriminatory approaches in colonial India which they validated under the guise of racial superiority. To reinforce the racial discrimination, different forms of classes and discriminatory laws and policies were constructed methodically by the white British colonizers. Positivist role of the colonial laws, therefore, affected the positions and entitlements of native Indians in commerce, labour, employment and related sectors. The colonizers, eventually, aimed to orchestrate the top-down formula between them and natives on the basis of their common dividing nod 'self and others'. The research, primarily, traced the legal aspects accounted for the deliberate discrimination in the aforesaid sectors, but the academic research harvested the issues in relation to the historiographic account. To go through the projection of racial dichotomy and discrimination, the methods of the research emphasized on the socio-economic aspects and the legal instruments that were deployed to increase the menace.

Keywords: Racial dichotomy, discrimination, colonial India, desperate discrimination and impact, Critical Race Theory

1. Introduction

Colonial racism reached its ugliest face in Indian subcontinent escalating discrimination, deprivation, subjugation, and oppression. The work aims to unpack how racial divisions and the attacks made thereto soared over the British colonial regime and badly affected the basic rights of native people. The research that facilitated this article at first has paid attention to explain 'race' to understand the constructed classification of people living in colonial India, and the forms and methods of discrimination insulated thereto, subsequently. The ontological research method instigates to understand and establish the colonial and racial supremacy, and the natives' story of discrimination and deprivation. The debate was developed on the hypothesis of colonial supremacy and the axe of taxonomical class construction in colonial Indians. Positing a research lay out, the state of discrimination, subjugation and deprivation in colonial India is

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aiding to reconcile the concept of 'race' as the racial construction helps to underscore the discrimination badly. This qualitative research has primarily moved on with the epistemological arguments examining the modes of introducing the supreme class based on the features of the Britons, and insulating various versions of discrimination and deprivation to the native people. Turning to the methodological debated, a critical investigation has been executed to check the colonial laws and policies to understand the forms and methods discrimination. In so doing, the paper has deeply reviewed the literature, analyzes the colonial legislations and case laws, and consulted the juristic opinions of scholars. The approaches of constructing racial divisions, breaching legal commitments of equality, developing narratives of discrimination tested by 'disparate treatment' and 'disparate impact discrimination', and the reflection of Critical Race Theory will be examined through the doctrinal methodologies based on the contents and contexts of the colonial rules that amplified racial injustices.

This research work has been divided into several parts. The first part outlines the process of constructing racial division and advancing the colonial and sovereign dogma of self and others. The second part articulates the discriminatory and exploiting colonial commercial laws and labour policies that disfavoured and deprived the colonized people in the respective sectors. The third part depicts the modes of racial discrimination escalated in practising the criminal laws and procedures intersecting both the desperate discrimination and impact. The fourth part illustrates the racial discriminatory policies of the British Raj in public employments to marginalize the natives. The thesis on these selected issues would invoke the historiographic account of racial discrimination, deprivation and subjugation, and the socio-legal methods *inter alia* disparate treatment and disparate impact applied to examine situations thereto. The research was done introducing the method of disparate treatment and disparate impact. Disparate treatment thought practiced in colonial era, was defined in the Title VII of American Civil Rights Act, 1964. Disparate treatment implies unequal treatment towards someone because of some pre-determined factors, i.e. race, gender, religion and the like.[1] Unjustified discriminatory treatment tends to cause adverse result in employment, business and many other options of social life. On the other hand, disparate impact theory has long been viewed as a cardinal technique to assess the discriminated position of people. It systematically deprives a group of people but enshrouds to pretend an innocent scheme. It was the US Supreme Court that took decision in the landmark case, *Griggs v. Duke Power Co.*[2] and embarked the disparate impact theory unanimously in an

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1 Gordon Willard Allport, Kenneth Clark and Thomas Pettigrew, *The nature of prejudice* (MA: Addison-Wesley:1954)

2 401 U.S. 424 (1971)

employment discrimination claim. The relevance of applying this theory into this research is justified with the universal application of it.[3] While disparate treatment is applied very openly as without any shame and hesitation and results in the classical forms of racial discrimination, but disparate impact is a smart method that apparently looks neutral and affects seriously.

2. Constructing Race-oriented Classes in Colonial India

The enlightenment era of modern Europe can be considered as the repercussion and efforts to exterminate the racial discriminatory policies and exploiting strategies throughout their colonization projects.[4] Despite the emerging position of liberal democracy in Britain, British colonial administrators, however, imposed 'imperial despotism'[5] in their colonial territories which they validated on the ground of racial superiority. The patriarchal infatuation and fashion of British political aristocrats to rule over others was supplemented with their notion of undefined 'morality' and 'civilizational destiny'.[6] The secret motive and the quest of purity of the mission was questioned and intervened with the famous statement of Benjamin Disraeli in the House of Commons as he stated "[r]ace implies difference, difference implies superiority, and superiority leads to predominance".[7] Hence, the process of colonialism inherently resided in the systematic methods of establishing racial classification, segregation, and discrimination. The way of observing racial division by the European rulers in their colonies disclosed their approaches of classifying the colonized subjects.

The research work here primarily relies on the ontological perspective in tracing colonial forms of race, and context of racism, not genealogical aspect at all. 'Race' seems a complex phenomenon which was attributed by different disciplines of knowledge while it is significantly contextualized in social sciences. In this paper, racial divergence has been investigated from the colonial perspective as existed in the Indian subcontinent under the British regime. However, some European tests and scholarly views have circumscribed the study to understand the construct of racial divide. EM Collingham viewed that the European classification of race mainly built on the social *Darwinism* as white Europeans considered only themselves capable for any work of governance and

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3 Michael Selmi, 'Was the Disparate Impact Theory a Mistake?', (2006) 53 UCLA Law Review 701

4 Mahmud Tayyab. 'Colonialism and Modern Constructions of Race: A Preliminary Inquiry' (1998) 53 U. Miami l. Rev. 1219-1246, 1220.

5 A kind imperial governance that was directed by the colonial administrators and extended over the colonies. It highly cared the values of peoples' will and took the decisions arbitrarily and ignoring norms of accountability.

6 Susan Bayly, 'Caste and "Race" in the Colonial Ethnography of India', in Peter Robb of (ed.) *The Concept of Race in South Asia*, (Oxford University Press, 1995) 165-218.

7 Waltraud Ernst, 'Introduction: Historical and Cotemporary Perspective on Race, Science and Medicine' in Bernard Harris and Waltraud Ernst (ed), *Race, Science and Medicine 1700-1960*, (Routledge, 1999) 3.

development.[8] This trend of classification based on race formed the European intellectual superiority and hence, helped them to establish colonial rule. The narratives relating to institutionalizing colonial rule offended the Indian identity that juxtaposed the eventuated racial injustice through all possible means. The racial position of the native Indians to the British rulers was described by Sen as "Indians were commonly regarded as blacks or negroes who were members of an inferior race and natural slaves."[9] About such orientation, they convinced themselves by recalling their benevolent mission of civilization. Correspondingly, Fanon's reference is relevant; in his master piece, *Black Skin, White Masks* (1952), he compared the internalization of racial subjugation to 'epidermalization of inferiority'. The policy of insulating racial superiority along with the self-imposed 'vanguards of civilization'[10] scratched the image of white British colonial power and questioned the legitimacy of their political administration albeit they pledged the rule of law to their colonized subjects.[11] Nonetheless, the ontological facet of race and racial division throughout colonization including colonial India was straightforward and embarked the taxonomy mainly implicated between the British who were 'colonizers' and the 'natives' or 'native Indians' comprising all classes subjects irrespective of their racial, ethnic, social and religious backgrounds. Significantly, a combined study of the colonial class-construction and the mode of discrimination will be advantageous to perceive the seriousness of their deliberate task of dividing the society and establishing the superior position across all sectors of socio-economy and politics. Almost all sectors in colonial India were found interrupted by the colonizers if the ways of interruption were not anyhow burdensome. The wholesale ill-treatments and discrimination on the basis of racial divisions resulted in '[t]he period of Warren Hastings' administrative experiments, the 1770 famine, revenue systems, trade monopolies and its abuses, the 'new constitution' of Cornwallis, the Permanent Settlement, and Sati…' were treated as the responsible suspects.[12] Alongside the long desires of capturing economy and politics, colonizers repeatedly invested their efforts to intensify social changes as they understood that political life of Indian natives enmeshed with their socio-economic dynamics.

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8 Elizabeth M. Collingham, *Imperial Bodies: The Physical Experience of the Raj, 1800-1947* (Oxford Polity Press, 2001) 122.

9 Sudipta Sen, Distant Sovereignty: National Imperialism and the Origins of British India, (Routledge, 2002) 17.

10 Margaret MacMillan, 'Anglo Indians and the Civilizing Mission, 1880-1914' (1982) Contributions to South Asian Studies 2, 73-109, 82.

11 Harald Fischer–Tiné, 'Britain's other civilising mission Class prejudice, European "loaferism" and the workhouse–system in colonial India', (2005), 42(3) Indian Economic & Social History Review, 295-338, 296.

12 Nitin Shaha, 'Opinion' and "Violence": Whiteness, Empire and State-Formation in Colonial India', (2006), 4 Südasien-Chronik *Berlin*, 322-351, 323

Thomas Metcalf meticulously pointed out as how British colonial and racial ideology defined the colonized people inferior and weaker in all aspects.[13] The program of 'Divide and Rule' in the colonial India became easier because of the pre-existing race and caste system practiced by Hindus in various social aspects. Prehistoric Vedic roots had contempt of class-construction amongst the Indians with their skin colour, and that abhorrence of the dark skin was enhanced with the advent of British colonization in the Indian subcontinent.[14] However, most of the racial differences throughout the colonization were crafted deliberately to exclude the native Indians from professional, commercial and labour domain on the pretext of 'the dominant paradigm of social knowledge'[15].

3. Colonial Commercial Laws and Labour Policies Pressed on Racial Discrimination

The racial segregated economic policy of the British rulers ruined the commerce and business of the native entrepreneurs. As colonialism evidently uploads retardation in cases of commercial production in colonies[16], the British colonial mission in India was associated with capitalist objectives inhibited the mercantile changes in respect of waging capital, reforming trading method, using new technologies, and promoting popular products instead of the traditional and sustainable crops and goods. The devastating economic projection was escalated by the application of 'race barrier' that restricted the access of native traders to the main commercial associations like the Bengal Chamber of Commerce, Indian Tea association, Indian Textile Association, Indian Jute Mills Association and so on.[17] Due to the lack of membership of these mercantile bodies, Indian traders became unable to export their products abroad.[18] To pauperize the affluent Indian businessmen overnight, and destroy the native commercial network, the discriminatory method of the colonizers can be perceived as disparate treatment. Other than the motive of monopolizing trades in colonial India and taking the control of the existing larger enterprises, there was no compelling reason of banning the native traders on the grounds of registration. Even, in case of

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[13] Thomas Metcalfe, *Ideologies of the Raj* (Cambridge University Press, 1995) 89-90.

[14] Sydney G. Checkland, *The Gladstones: A Family Biography 1764-1851,* (Cambridge University Press, 1971) 6.

[15] Peter Gottschalk, *Religion, Science and Empire: Classifying Hinduism and Islam in British India* (London: Oxford University Press, 2012) 213.

[16] Amiya Kumar Bagehi, 'Colonialism and the Nature of 'Capitalist' Enterprise in India', (1988) 23 (31) Economic and Political Weekly 38.

[17] Adrian Carton, Mixed Race and Modernity in Colonial India: Changing concepts of hybridity across empires, (Routledge, 2012) 60.

[18] Bhishnupriya Gupta, 'The Rise of Modern Industry in Colonial India', in Latika Choudhury, Bhishnupriya Gupta, Tirthankar Roy, Anand, V. Swamy, (ed.), *A New Economic History of Colonial India* (Routledge, 2016) 136.

escalating such disperate discrimination, the colonial laws and regulations were clear-cut, and enough to exclude the natives.

In the context of the eighteenth century, another bizarre commercial stipulation was imposed in terms of long-distance trading. The practice of registering firm at joint-stock companies was first time introduced here that asked for maintaining all partnership and company rules in forming commercial enterprise that were completely unknown to Indians.[19] The so-called neutral rules intended to encourage foreign (mostly British) investments in Indian commercial sectors and to monopolize the existing business by foreign firms. This registration policy was tacitly an account of indirect discrimination. Due to this new commercial obligation, Indian merchants were also marginalized in conducting the domestic trading. The Indian traders, therefore, were discriminated both expressly and impliedly by the colonial rules and policies that were continuing in both the inland and overseas trading. Critical reading takes the understanding of the above situations that the British purposively required 'slakes' in different stages of trading to keep a manifested gap between the privileged colonial traders and the deprived local merchants.

The racial dichotomy was seen instrumental for the colonizers in boosting British economic interests subordinating and ruining the established salt-industries in the subcontinent.[20] The infamous Salt Act, 1882[21] can be an example of disparate discriminatory treatment theory which ruled that the native Indians would not be allowed to produce and sell salt. They, therefore, had to buy salt from the British traders and trade remaining sub-dealers. Section 9 of this black law ruled that illegal dealing with salt production and sale was punishable, and the penalty would extend to six months. The extreme grievances and reactions against such unprecedented legislation were completely ignored by the then administrators.[22] The heinous law was devised to exhibit the political powers of the British extinguishing the natives' dream of independence rooted in their sense of Indian nationalism. However, this incident provoked the movement of independence, and Gandhi started his Satyagraha[23] (non-violence movement) to awaken the nation with the spirit of liberty.

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19 Tirthankar Roy, 'Trading Firms in Colonial India', (2014) 88(1) Harvard Business History Review, 9-42, 11-12.

20 Howard, Neil, 'Freedom and Development in Historical Context: A Comparison of Gandhi and Fanon's Approaches to Liberation' (2011) 4(7) Journal of Pan African Studies, 94-108.

21 Colombia University's collection on Gandhi attributed by http://www.columbia.edu/cu/weai/exeas/asian-revolutions/pdf/gandhi-timeline.pdf (access on 26/05/2017).

22 Peter Ackerman and Jack Duvall, *A Force More Powerful* (Palgrave, 2000) 84.

23 Richard L. Johnson, 'Return to India', in Richard L. Johnson (ed.)*Gandhi's Experiments with Truth: Essential Writings by and about Mahatma Gandhi* (Lexington Books, 2006) 31.

Besides the commercial discriminatory laws and practices, the labour policies of British also carried on colonial stigma in the socio-economic fields. The history of colonized Indian labourers reminded the story of exploitation, and the account of extortion and deprivation seemed more agonizing than the impact of critical discrimination. Postcolonial critic, Hug Tinker in his book, *A New System of Slavery*[24], articulated the coerced migrant policies of the British against the Indian workers. The undertaking of restructuring the economy of colonial India targeted unabsorbed labours along with the existing working people. Racial discrimination went beyond the invidious claim when British people became owners, supervisors or managers and non-white people were simply labourers.[25] No sophisticated method the colonizers applied to shift the burden to any neutral provisions of qualifications. It gestates the disparate treatment though. After working long when the native employees or workers were waiting for the promotion or other professional incentives, they had to see the snatching their entitlements by someone belonging to the white Europeans or British, in particular.

Kolsky rightly mentioned that the colonial labour policies and violence against the native workers in tea gardens, especially in Assam, encapsulates the menaces of British subjugation. Along with the poor wages and inflexible working hours, the constant violence made by the white administrators against the native tea labourers was considered as a normal phenomenon in their daily working life. In the words of Kolsky "European violence was viewed as a rational and necessary mode of labour control, peasant attacks were generally described as acts of insubordination, fanaticism, or insanity."[26] Furthermore, when the tea workers and their white administrators were tried by courts of law for any violence in the working places, the white perpetrators got off lightly but the native tea workers were penalized severely for their mere defensive actions or argumentative positions.[27] The intentional annihilation of business of the local traders and earning source of native labourers served two purposes, *e.g.* taking the control of all profitable businesses, and gaining a huge number of cheap workers which could be deployed outside Indian colony.[28] The cheapness of Indian labour was compared by Gladstones as "cost [was] not one-half that of a slave."[29] Instead of proper and balanced labour laws and policies, the British rulers tended to see the

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[24] Hugh Tinker, A New System of Slavery: the export of Indian labour overseas, 1830-1920, (OUP, 1974)

[25] Ranajit Das Gupta, 'Plantation Labour In India', in Valentine Daniel, Henry Bernstein, Tom Brass (ed.) *Plantations, Peasants and Proletarians in Colonial Asia* (Frank Cass, 1992) 173.

[26] Elizabeth Kolsky, Colonial Justice in British India: White Violence and the Rule of Law (CUP, 2010) 175.

[27] Ibid 175-176.

[28] Tayyab Mahmud, 'Cheaper Than a Slave: Indentured Labor, Colonialism, and Capitalism' (2012), 34 Whittier L. Rev. 215-243, 226-230.

[29] Ibid 14, 318.

labour affairs in India as the masters-servants provisions of English contract and commercial laws.[30]

On the top of the low wages for the native workers, the discriminatory policies of British became vivid when the colonial government arranged special residences for white railway employees whereas the Indians were completely left out of such arrangements.[31] This issue can be compared to Foucault's *heterophia* that "enacted utopia in which the real sites, all the other real sites that can be found within the culture are simultaneously represented, contested and inverted."[32] No doubt, the native working class suffered severely from such type of exclusionary labour policies exercised by the British Raj, but more dangerously, they transplanted the top-down mindset amongst the Indians. The local people who survived themselves with labour and their skill, they suddenly noticed about their unemployment or dismissal from their permanent jobs. The whimsical and unreasonable labour policies breached all norms of natural justice as the dismissed workers were never given any explanation about their termination. Their misfortune reached the climax when they had to leave their working places without any pension benefits. Finding no alternatives to survive, few of them even attempted to commit suicide. Impacted deeply, the labour policies of the British shattered the socio-economic tradition of the then India. Max Weber's 'social stratification' narrative mirrored the socio-economic setback experienced by Indians.[33] Being the Indian workers, once they had the opportunity to get the work according to their background and efficiency, and they felt honoured. However, that taste of socio-economic life disappeared whilst the works were not offered fairly on the basis of qualifications or removed on capricious decisions of colonizers.

The class antagonism against native Indians and discrimination on labourers extended to the native women (multiple discriminations or intersectionary discriminations) who were employed in the households of either the British or European people that came to India for business or employment purposes in the late eighteenth century and the early nineteenth century. They were treated as the 'slave-concubinage'. This trend of household labour exploitation forced the native women house-keepers to be available for sex, reproduction and domestic labour. Indrani Chatterjee in *Subalter Studies X*, narrated such undignified life of the native Indian women which eventually made them the sex-workers and

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30 The Workmen's Breach of Contract Act 1859; The Employers and Workmen's Act 1860; and The Penal Code 1860.

31 Laura Gbah Bear, 'Miscegenations of Modernity: constructing European respectability and race in the Indian railway colony, 1857-1931' 3(4) Women's History Review 531-538, 532.

32 Foucault, Michel, and Jay Miskowiec. 'Of Other Spaces' (1986) 16(1) *Diacritics,* 22-27.

33 Max Weber, *Economy and Society* (ed.) Guenther Roth and Claus Wittich (University of California Press, 1968) 33.

bound to lead an unsocial inhuman life.[34] In the colonial era, Englishmen kept several Indian mistresses out of wedlock to satisfy their sexual desire. The white complexions of the Englishmen attributed to escalate the mistreating attitudes to native women, especially the housemaids.[35] The availability of the Indian women for sexual consummation was confirmed with their financial power and administrative authority.[36] They often forced Indian women to live together but never offered any marital status and related social benefits. Thus, many legal disputes stemmed from such relationship involving interracial and inter-religion issues.[37] Those litigations were complicated because in most of the cases, the marriage was not found solemnized; rather they maintained only cohabitation. Consequently, the informal partnership status of an aggrieved woman was not considered by court of law when they claimed any pension benefits after the death of the white European masters.[38] This situation was widely criticized because the British courts followed equity maxims in England but they had not applied them in cases of the impoverished Indian women in the colonial era. This practice went worsened when the parenthood was recognized only to the male person while there was no marital relation between them. Interestingly, such stigmatization of sexism was not appreciated in the contemporary society of England.

Thus, the sexual issue relating to the exploitation to feminine labourers and the legal practices to conserve and continue it turned to another episode of the socio-economic disgraceful episode in colonial India. The account of exploitation by the white British employees scratched the glory of their revolutionary reforms toward improving the conditions of the native Hindu women like the Bengal Sati Regulation, 1829, the Widow Marriage Act, 1956 etc. Likewise, this issue qualifies the discriminatory discourse of intersectionality prompted by Critical Racial theorist Crenshaw[39] since the combination of an exploited race in conjunction with gender made the Indian women vulnerable and the worst sufferer of colonialism.

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[34] Indrani Chatterjee, 'Colouring Subalternity: slaves, concubines, and social orphans in early colonial India' *Subaltern X* (OUP, 1999) 60-2.

[35] Harmeet S. Sandhu, 'British Raj: The Legacy of Colonialism in India', (2014), 3(1) Sociological Imagination: Western's Undergraduate Sociology Student Journal, 1-17, 8.

[36] Radha R. Sharma, Rupali Pardasani, and Sharda Nandram, 'The Problem of Rape in India: a Multi-dimensional Analysis' (2014) 7(3) International Journal of Managing Projects in Business, 362-379.

[37] Sally Engel Marry, 'Law and Colonialism', (1991) 25 Law & Society Review, 892-922. 903-905.

[38] Durba Ghosh, Sex and the Family in Colonial India: The Making of India, (CUP, 2007) 171.

[39] Kimberle Williams Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991), 43(6) Stanford Law Review, 1241-1299.

4. Unequal Criminal Laws and their Application to Native Indians

The immunity of white British subjects and the employees of East India Company from legal jurisdiction of the local courts like the *Sadar Diwani Adalat* (upper civil court), and *Sadar Nizamat Adalat* (upper criminal court) was confirmed by the Regulating Act, 1773.[40] They could be subjected only by the jurisdiction of the Supreme Court established in three presidency towns like Calcutta, Bombay and Madras in the effect of the Regulating Act.[41] Dividing people on the basis of the British subjecthood and citizenry, the disparate treatment was furthered and motivated with the intent to give the British administrators and industrialist resistance to the law; other way targeted the laws of courts' jurisdiction targeted the native people only. Explicit legal provision of these laws evidenced the disparate discrimination as well. Apart from the explicit of exemption mentioned earlier, the nature of Supreme Court's legal procedures and functioning practically released the British from prosecutions. For example, the legal proceedings of the Supreme Courts were relatively slow and costly. Therefore, then the natives were hardly interested to sue the white British for any criminal offence or civil wrong. Besides this, the white supremacy of the colonial administrators provoked themselves to structure the administration of justice in such ways where the inferior Indians could not prosecute any white Europeans. Thus, the discrimination and oppression against the Indians were continued by the colonizers without any fear of legal action.

The Criminal Procedure Code, 1873 disqualified the native session judges and magistrates in trying the Europeans in criminal cases albeit their European counterparts had not suffered such restriction in trying native people.[42] To exclude the native junior judges, the British colonizers insulated the differential treatment on the excuse of racial background. However, during the liberal regime of Lord Ripon, the Ilbert Bill 1883, otherwise known 'White Mutiny', while attempting to remove such disqualification of the native judges, the white British subjects became furious. They expressed their deeper concerns about the trustworthiness of the local judges, and repeatedly claimed that the native officers were not quite knowledgeable to understand the characters and lifestyle of the British whites.[43] Surprisingly, any white British judge was never barred in trying the cases of native Indians on the ground of their lack of knowledge in understanding the nature of societal paradigms natives, and the dynamics of their regular life. In *Bhagat Sing Case*[44], the Privy Council of London, rejected the

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[40] B.M. Gandhi, V.D. Kulshreshtha's Landmarks in Indian and Constitutional History (Eastern Book Company, 1997) 230.

[41] Durba Ghosh, Sex and the Family in Colonial India: The Making of India, (CUP, 2007) 172.

[42] Dr. V.K. Agnihotri, *Indian History* (Allied Publishers Private Limited, 2010) C-229.

[43] Judith Whitehead, 'Bodies of evidence, bodies of rule: The Ilbert Bill, revivalism, and age of consent in colonial India' (1996) 45(1) Sociological Bulletin, 29-54, 35-36.

[44] *Bhagat Singh and Others v. The King Emperor*, 58 Indian Appeals 169.

objection of credibility was raised against the Viceroy's decisions. In that case, the white elite Indian Viceroy had been accused of insufficient understanding the realities of Indian society. The irreducible position of British judges in trial of native litigants was substantiated without any rational justification. Disparate discrimination intersecting the exclusion of native Indians from judicial offices and the new method of judicial extortion to local litigants pervasively added the self-obsessed attitudes to colonial governance in India.

The trial of *Raja Nanda Kumar* is still known as the 'judicial murder' in the legal history of India. After being vindictive to Raja Nanda Kumar, a trustworthy native revenue collector of Hugli, Warren Hastings filed the case of forgery against him. Consequently, Raja Nanda Kumar was convicted for forgery under the English Statute of 1729.[45] This was a glaring example of hostile behavior of the British ruler against a native because at that time it was the practice that the personal criminal laws would be applied according to defendant's religion.[46] In colonial India until the Charter of 1776, no English laws were supposed to be applied in the cases where the native Indians were the parties.[47] Furthermore, jury of trial exclusively formed with British whites who hardly understand the native Indian languages. Thus, they did not properly comprehend and communicate the defending rebuttal of defendants.[48] In fact, they were impatient to listen and understand the corroboration of local defendants. Historian James Bryce noted "the native of course suffers from violence more frequently than does the European, whose prestige of race ... keeps him safe."[49] Such arbitrary pattern of administration of justice and their coercive judicial behaviour proved that the British never treated the colonized people with the minimum respect and dignity even for the basic justice.

The interracial violence and the right to brutality of white colonizers were granted impliedly in the colonial mission. The richness of the history of white violence in colonial India was evidently archived in court records, press of metropolitans and newspapers published by indigenous communities.[50] The British-made penal laws directly and indirectly favored the Britons. A total duplication of English criminal laws was transplanted in drafting the criminal

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45 B.N. Puri, P.N. Chopra, M.N. Das, A Comprehensive History of India: Ancient India, Medieval India, Modern India Vol. 3 (Starling Publishers Pvt. Ltd., 2003) 44-46.

46 No uniform criminal laws were made until then; those were then prescribed by religious faith of individual communities.

47 Ibid 40, 109.

48 Vinod Pavarala, 'Cultures of Corruption and the Corruption of Culture: The East India Company and the Hasings Impeachment', in Emmanuel Kreike, William Chester Jordan (ed) *Corrupt Histories, Studies in comparative history,* (University of Rochester Press, 2006) 306.

49 James Bryce, The Ancient Roman Empire and the British Empire in India (OUP, 1914), 24.

50 Nicholas Dirks, 'Colonial Histories and Native Informants: Biography of an Archive', in Carol Breckenridge and Peter van der Veer, (eds) *Orientalism and the Postcolonial Predicament: Perspectives on South Asia* (University of Pennsylvania Press, 1993) 279–313.

laws for India. How far this initiative was conflicting with the traditional and religious values of the Indian society can be demonstrated by the example of 'Adultery' provision. The Penal Code defined 'Adultery' as "[w]hoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offense of rape, is guilty of the offense of adultery"[51]. At that time, sexual intercourse with an Indian wife with or without the consent of her native husband was out of imagination according to the conservative social and religious values of the Indian society. Thus, in many extents, the imposed criminal laws contrasted with 'Asian values'. However, the colonial lawmakers defended this arrangement on the argument that the European British subjects cannot be subjected to any unfamiliar laws.[52] Unfortunately, they never thought of the societal consequences of the total banning of the personal criminal laws of Hindus and Muslims. In addition, the Hindu *panchayati* system (arbitration system) was treated arbitrary and unorganized; on the other hand, Islamic measures of determining penalty were described as 'open to venality'.[53]

In their new criminal justice system, the jury provision was introduced by the Indian Jury Act, 1826 and 1832. This initiative was highly debated because at that time in England, the jury system was found contentious on account of its support to prosecution. Moreover, the jury was found biased to the white litigants, especially in commercial litigations. Critics commented on such racial biasness of jury as "[n]o greater or complicated effort is required from the British Parliament than it should give to Englishmen the liberty of unlicensed resort to and residence in India, with the right of trial by jury in all cases. Without such indispensable protection, no Englishman will invest capital in agricultural or manufacturing speculations and India may continue forever stationary in wealth, civilization and happiness."[54] Furthermore, the Chapter XXIII of the Criminal Code, 1861 barely kept the provisos for the defined 'European British subject' that established white predominance in forming jury panel. The racial disparity undermined the natives' claim of being the part of jury ever. Undeniably, it impaired the probability of securing justice for the natives. After a century, in the similar situation, Justice Thurgood Marshall famously stated in *Peters v. Kiff*[55] "[w]hen any large and identifiable segment of the community is excluded from

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[51] Section of 497 of the Indian Penal Code, 1860.

[52] Kalyani Ramnath, 'The colonial difference between law and fact: notes on the criminal jury in India' (2013), 50(3) The Indian Economic & Social History Review 341-363, 344.

[53] Ibid, 344-345.

[54] Gavin Young, A Further Inquiry Into the Expediency of Applying the Principles of Colonial Policy to the Government of India: And of Effecting an Essential Change in Its Landed Tenures, and in the Character of Its Inhabitants. (JM Richardson, 1828) xiii-xiv.

[55] 407 U.S. 493 (1972).

jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." Kolsky viewed these discriminatory jury provisions in colonial India as the manifestation of 'colonial difference'.[56] Natives remained frustrated whereas they knew that the introduction of jury system was nothing but another means of rendering discriminatory treatment within the colonial legal framework.

During the First World War, the British Government, to realize the war loan of £100 millions, imposed additional taxes which amounted one-fourth to half of the income of native earners.[57] Usually, the native people faced serious financial crisis. This scheme brought famine and it took the toll of twelve/thirteen million people.[58] On the other hand, the white government employees were protected by different welfare schemes. Consequently, the poor hungry people started committing theft, snatching, shoplifting, robbery and so on. Furthermore, the long-suppressed Indians attempted to protest and overthrow the colonial rulers. In this situation, the Imperial Legislative Council passed the Defence of India Act in 1915. About the nature of such stringent law, Lord Hastings commented that the law was more drastic than its comparator, the Defence of Realm Act, 1914 of England.[59] This law introduced the special tribunal for trying the revolutionary crimes and it did not allow appeal against the decision of the tribunal.[60]

The British Raj continued their suppressing attitude even after the end of war period by enacting the Rowlatt Act, 1919.[61] The titles and provisions of these laws were adequately neutral. Nonetheless, it was understandable that all the revolutionaries were colonized people of India. The series of suppressive laws found its next sequel titled the Defense of India Ordinance, 1939. Applying the despotic law a large number of Indian politicians including Mahatma Gandhi were arrested and detained without trial on the excuse of prevention of future crime.[62] Its disparate impact -as the arrest and detention orders were exclusively made to the natives- substantiated its discriminatory character. The exclusive use of this law to subjugate Indians was challenged in *Niharendu Dutt Mazumdar sedition case*.[63] The Federal Court of India in its judgment stated "the time is long

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56 Elizabeth Kolsky 'Codification and the rule of colonial difference: criminal procedure in British India' (2005), 23(3) Law and History Review 631-683, 637.

57 Rushbrook Williams, India in the Years 1917-18: Government of India, Calcutta 1919 (Anmol Publications, 1985) 81-82.

58 Census of India 1921, Part I, Vol. I ,Calcutta, 1924, p. 13.

59 R.C. Majumdar, *History of Freedom of Movement in India, Vol. II* (Firma K.L. Mukhopadhya, 1963) 491.

60 S.C. Mittal, *Freedom Movement in Punjab (1905-29)* (Concept Publishing Company, 1977) 96.

61 Helen Fein, *Imperial Crime and Punishment* (The University Press of Hawaii, 1977), 25.

62 C.M. Abraham, 'India- An Overview', in Andrew Harding, John Hatchard Preventive Detention and Security Law: A Commparative Survey (Martinus Nijhoff Publisher, 1993) 60-61.

63 *Niharendu Dutt Mazumdar v. King Emperor*, AIR 1942 Federal Court 22.

gone when a mere criticism of government, even abusive language, was sufficient to constitute sedition". The Federal Court, while assessing the detention orders of lower courts, used to be predominantly comprised by the white British judges. However, the objection concerned with their lack of own Common Law principle 'non application of mind' was never taken into account.

Apart from that, the investigation of Sanjay Nigam on the Criminal Tribe Act, 1871 traced out its long-harsh impacts upon the tribal people where all members of the existing tribal groups, their dependents and future generations were 'destined' to be habitual criminal.[64] In enacting and construing such inhuman and intrusive law, they entirely based on racial segregation policy. It included 80 tribes of India within the range of habituated criminals, and treated the tribal people as born and habitual criminal.[65] The law compelled the aboriginals to register their names and identities with the police and surveillance authority.[66]After the promulgation this law, English lawmakers did not face any extreme protest from the mainstream of Indian intellectuals and activists because the tribal people were more inferior to the colonized Hindus and Muslims in British India. In enacting laws and applying them, the British colonizers paid concentration to the sub-divisions of native Indians. Indigenous communities or tribal people were more subjugated and deprived by the colonizers than the mainstream communities.

The list of racial exploitation by the British colonizers to the tribal community, besides the non-tribal Hindus and Muslims, is fairly long. For instance, the Sonthal Parganas Act, 1855 was passed to remove all legal protections for *Sonthal*[67] treating them an uncivilized race of Bengal.[68] This racial hatred of British resulted in from the insurrection whereas *Sonthal* protested the long-lasted exploiting actions and policies of the landlords and money lenders who were patronized by the colonizers either. After the enactment of this law, *Sonthal Pargana* was labelled as a barbarian island in the colonized Bengal territory of the subcontinent. The legal provisions of the Sonthal Parganas Act prejudicially provided that the *Sonthal* people would not be entitled to avail any legal protection unless their claim is supported by the headman of the given village who was nothing but the colonial agent.

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64 Government of India, Governor of East Berar, Legislative Proceedings, No 62, London, 1871.

65 The International Work Group for Indigenous Peoples, Suhash Chakma and Marianne Jensen (edt.) *Racism against Indigenous Peoples*, (IGWIA, 2001) Introductory pages-11.

66 Mohammad Tarique, *Modern Indian History*, (Tata-McGrew Hill Education, 2007) 2.13.

67 An aboriginal community is still living in India and Bangladesh.

68 Archana Mandal, 'The Sonthal Problem in Nineteenth-Century Bengal' (1975), 4(2) Social Scientist 36-47, 38-40.

5. Unequal Treatment in Employments and the Discriminatory Impacts Thereto

Pervasive forms of inequalities or discriminatory approaches are seen in almost every aspect since the pre-historic periods. British colonial regime in India was not any exception. When they claimed their arrival in India tagging civilizing mission, it was expected that they would redesign the class-oriented Indian society, especially, in offering employments. Nevertheless, after gaining the political power, the British insulated different forms of discrimination into the native society. Almost every profession was manipulated in recruiting people thereto. Discriminatory treatments were located related to some valued attributes like qualifications, status, incomes and so on.[69] Applying the discriminatory method, they ultimately deprived the eligible Indians of their professional opportunities and entitlements thereof.

The study on the unequal and discriminatory treatment that was multiplied by the British colonizers can be started from the judicial service. Discrimination ranged not only to inequalities, it reached to exclusion from the services even. The trend of excluding the native judges from their offices was not unique in British regime because Lord Cornwallis in the name of judicial reforms removed all the Muslim judges from their office and declared them disqualified for further recruitment.[70] All the magisterial posts were then filled with the white judges. This employment policy structured racial hierarchy in judiciary. The difference affirmed the white supremacy and closed all possibilities of the natives to be recruited in the near future. The situation, however, was changed later on. Indians were again recruited judges in the native lower courts during the period of Lord Hastings (1813- onward). However, the discriminations around the judicial offices remained intact, especially, in social and economic aspects of judicial profession. The number of native judges was exceedingly disproportionate comparing to the European counterparts. The British judges kept the exclusive access to the judges' clubs where Indians were denied for their racial inferiority.[71] Moreover, differences were found in the salaries and incentives for the native judges and advocates.[72] It, therefore, can be said that Indians were given judicial jobs but not the prestige and status coherent thereto.

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69 Autar S. Dhesi, 'Caste, class synergies and discrimination in India' (1998), 25 International Journal of Social Economics 1030-1048.

70 Ibid 66, 2.13.

71 Rahi Gaikwad, "Race and the colonial court", *The Hindu Times*, July 12, 2015 <http://www. Thehindu.com/todays-paper/tp-features/tp-sundaymagazine/race-and-the-colonial-court/article7412059.ece> (access on 16/06/2017)

72 Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947* (CUP, 2014) 106.

Dominance through the 'linguistic imperliasm' was another means for the colonizers to marginalize the natives in their employments. Following the downfall of the East India Company and the *Sepoy Mutiny* in 1878, the British rulers became aware of the rigid religious belief of Indians which were intrusive to the economic and political interests of the colonizers.[73] Therefore, declining the native Indian languages, they introduced compulsory English as the official language on the excuse of assimilation among the Indians and non-Indians.[74] This imposition of English as the medium of professional communication was instrumental to make the indirect discrimination among the employees. This so-called neutral policy generated disparate impact among the native speakers. Due to their inefficiency in English, they could not get jobs in public offices. Even who were already in employments could not sustain anymore. The new recruitment policy exclusively favored the English speakers who were mostly Europeans. In addition to that, the Vernacular Press Act, 1878 was another cardinal racial biased legal instrument which imposed restriction on the publications of any native Indian languages.[75] Behind the promulgation of this Act, the immense political motive of the British rules operated because this law tended to impede all sorts of circulation of news criticized the British policies and suppressive actions.[76] Fanon aptly uttered "[a] man who has a language consequently possesses the world expressed and implied by that language."[77] The projection of applying English language in most of the important segments of professional fields amplified the supremacy of white British colonizers, and executed the blueprint of exclusion.

The colonial strategy of racial discrimination was preceded in the armed forces as well. Lord Cornwallis, according to the India Act, 1786, excluded all the members of armed forces who got born from black Indian women. When this bill was tabled in the British Parliament, Edmund Barke opposed this bill by addressing it as a dreadful racial legislation.[78] The discriminatory provision excluded both the native Indians and Eurasians. By fear of internal armed rebellion, Cornwallis adopted such measures. While it was abolished subsequently,particularly after 1797, a tight separation was maintained between the white and Indian members in the military.[79] Additionally, the emergence of

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73 Sudipta Sen, *Distant Sovereignty: National Imperialism and the Origins of British India* (Routledge, 2002) 72.

74 Ibid 8, 9.

75 Robert Darnton, 'Literary Surveillance in the British Raj: The Contradiction of Liberal Imperialism', in Ezra Greenspan and Jonathan Rose (ed) *Book History Vol. 4* (Pennsylvania State University Press, 2001) 147.

76 Sagarika Dutt, *India in a Globalized World* (Manchester University Press, 2006) 37-38.

77 Frantz Fanon, *The Wretched of the Earth* (Grove Press, 1961) 9.

78 PJ. Marshall, The Writings and Speeches of Edmund Burke; - India: The Launching of the Hastings Impeachment 1786-1788, vol.VI, (Clarendon Press, 1991) 66-73.

79 Ibid 73, 147.

the theory of 'Martial Race' increased the tension of racial division among the native people willing to be recruited in the army.

Lord Roberts, the Commander in Chief of Madras Army architected the theory of 'martial race' which preferred only three classes of ethnic groups among the Indians like *Gurkhas*, *Shikhs* and *Pathans*. This strategy was orchestrated as a preferential policy of particular races over others. However, the essence of such strategy was heavily political because following the uprising during the *Sepoy Mutiny*, British policies searched more trustworthiness and loyalty among the armed members besides their martial qualities.[80] In the process of recruitment to maintaining homogeneity in army, British rulers advanced the pre-colonial practice of recruiting the high-caste Hindus for army.[81] This policy was, therefore, designed to reduce the tension of rebellion. Alike the military, in case of recruiting police, the British explicitly introduced 'racial difference' clause. The Indian Police Act, 1861 provided arbitrarily that all the officers of police force had to be white Europeans and all low ranked polices namely *Havaldar* would be recruited from local Indians. Accordingly, the British Raj used the Indian police to inflict atrocity on their fellow countrymen. Even, the British regulation related to government service proscribed the minimum freedom in professional life. The 'forced labour' compelled the people do everything as per the commands. For example, the Workmen's Breach of Contract Act 1859 imposed fines for the breach of professional contract and required the specific performance of the contractual service.[82]

6. Conclusion

In India, the colonial conquest of British Empire was not limited to their political power and economic gains; rather they consciously insulated racial difference in the society. The mission of discrimination too often extended to exploitation and subjugation. In some extents, discrimination and exploitation were found perplexed. The British colonizers institutionalized racism both in private and public spheres. Besides this, the breach of equality and unnecessary discriminatory policies were lodged frequently against the Indians. In the present days, the discriminatory laws and policies are mainly identified by observing their desperate impacts but the British Rulers without hesitation introduced both direct and indirect racial laws and policies. Legal enactments, judicial decisions, and also other informal policy strategies of the colonizers were used to deprive the native Indians of their legal entitlements. Their life, liberty,

80 Gavin Rand and Kim A. Wagner, 'Recruiting the "martial races": identities and military service in colonial India' (2012), 46(3-4) Patterns of Prejudice 232-254, 234.

81 Ibid, 237.

82 Richard Mitchell, Petra Mahy and Peter Gahan, 'The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development' (2014), 1(2) Asian Journal of Law and Society, 313-454, 415.

equality and dignity suffered blatantly. Careful attention to the timeline of escalating the degrees of discrimination suggests the more political powers they gained, the more inequalities and suppression they crafted against the natives.

The colonized people were left impoverished mostly without showing any rationales for discrimination that is not, of course, uncommon in colonial pattern governance. The colonizers systematically smashed the commercial, labour and employment sectors as if the colonized natives could never stand strong. In addition, the introduction of biased and target oriented criminal laws nailed last on the coffin of their existence. Surprisingly, the liability of causing such socio-legal consequences of racial differences along with its cultural effect was declined by the colonial powers; rather they persistently justify their civilizing mission. Their argument of civilizing and modernizing the indigenous Indian society[83] is susceptible since the Indian Subcontinent experienced the evolution of several civilizations[84] over the centuries.The above discussion involving the historiographic strands and critical legal analysis articulates that Indian colonialism was tantamount to a projection of racial control and classification. The repercussion of incessant racism and exploitation in colonial India, therefore, eventually led the revolution of independence.

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[83] Nicholas B. Dirks, 'FORWARD' of the book, in Bernard S. Cohn,*Colonialism and Its Forms of Knowledge: The British in India* (Princeton University Press, 1996).

[84] In ancient India the civilizations were Indus Valley Civilization (3000 BC), Mohenjo Daro and Harappan Civilization (2600 BC), in the medieval period, there were Sultanate (1206-1526) and Mughal 1526-1857.

Measuring Constitutional "Laws" and "Conventions" in Same Parlance: Critiquing the *Idrisur Rahman*

Moha. Waheduzzaman*

Abstract: The Appellate Division of Bangladesh Supreme Court in *Idrisur Rahman* enforced against executive the convention of 'consultation' in a Judge appointment context. Applying the *recognition* criteria of Jennings, the Court found 'consultation' as an established convention in its system and enforced the same against the executive organ of the government. In reaching this conclusion, the Court relied upon this particular view or approach on laws and conventions of the constitution. *First*, the Court held that Jennings, unlike Dicey, did not draw any distinction between *laws* and *conventions* on the basis of their 'court enforceability'. *Second,* the Court measured "conventions" in the same parlance with "laws" of its Constitution. I could not agree with either of the view or approach of the Supreme Court. I am of the view that Jennings also maintained distinction between *laws* and *conventions* of the constitution and that too on the ground of their 'court enforceability'. I am also of the view that "conventions" from the point of view of their judicial enforcement should be measured in the same parlance with "customary rules" of its system as opposed to "laws" of its Constitution. Due to the misleading approach, the Court in effect failed to appreciate the distinction between *recognition* and *enforcement* of conventions in its jurisdiction. As a consequence, the Court omitted in its judgment the analysis of some essential inquires relating to judicial enforcement of conventions within the framework of its Constitution. The misunderstood view of the Bangladesh Supreme Court on "laws" and "conventions" of constitution necessitates for reflecting again on their distinction. However, the paper does not seek to examine the judicial enforceability of the convention of 'consultation' in the specific context of Court's *Idrisur Rahman* decision. Rather, the paper only makes a critique of the *Idrisur Rahman* decision and suggests a demarcation line between constitutional conventions and laws, with reference to Bangladesh.

Keywords: Laws of constitution, conventions of constitution, recognition criteria of conventions, judicial enforcement of conventions.

1. Introduction

Constitutional Conventions form an integral part of global constitutionalism. Bangladesh, a significant representative of common law family, also observes a certain number of conventions in addition to its written constitutional law principles and norms.[1] However, among these, the requirement of presidential

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[1] To mention, for example, a few conventions of Bangladesh Constitution, Article 73 of the Constitution mandates the President to address the Parliament at the commencement of the first

'consultation' with the Supreme Court in appointing the Higher Judiciary Judges have drawn attention of the legal fraternity due to its judicial application in the recent past.[2] The Appellate Division of Bangladesh Supreme Court in *Bangladesh v Idrisur Rahman* [3] emphasized on the necessity of obligatory 'consultation' with the Supreme Court by the government while the latter appoints a Judge in the former.

Ivor Jennings in his *The Law and the Constitution* [4] has provided some standard tests to determine the existence of a convention in a constitutional system. The three-fold tests of Jennings are: a) *precedent*; b) *normativity* (rule); and, c) *reason* for existence of the rule in the system.[5] The three-fold tests of Jennings have been consistently followed both in the scholarly literature and by the Superior Courts of divergent jurisdictions for determining in its system the existence of any

session of Parliament after general election and at the first session of every year. However, there is nothing in the Constitution as to who is to write the address and whether it is the choice of the President as regards the contents of the address. But it has become a conventional rule that the President's address will be written by his ministers outlining the policy of the government. Again, Article 95(1) of the Constitution provides that the Judges of the Supreme Court of Bangladesh shall be appointed by the President. Purport of Article 95(1) does not prevent one for appointment as a Judge directly to the Supreme Court of Bangladesh. But it is on record that since the establishment of the Supreme Court, no one has ever been appointed as a Judge to the High Court Division or the Appellate Division of the Supreme Court directly under Article 95(1) of the Constitution. On the contrary, a practice has developed for recruitment of Judges in the Supreme Court by appointment as Additional Judges first in the High Court Division for two years under Article 98 of the Constitution. This conventional rule has established Article 98 of the Constitution as the gateway for entry as a Judge to the Supreme Court of Bangladesh. Similarly, Article 95(2) of the Constitution prescribes some qualifications for being appointed as a Judge of the Supreme Court of Bangladesh. It is, however, interesting to note that no such qualifications are prescribed for appointment as an Additional Judge under Article 98 of the Constitution. But conventionally the President appoints only such persons as Additional Judges of the Supreme Court who satisfy the same minimum qualifications as are laid down in Article 95(2) of the Constitution.

[2] The provision for 'consultation' was there in the 1972 original Constitution of Bangladesh. However, it was done away with later on but now has again formed part of the Constitution. Article 95 (1) of the original Constitution of 1972 provided that "the Chief Justice shall be appointed by the President and other Judges shall be appointed by the President after consultation with the Chief Justice." Likewise, the President was also required to consult the Chief Justice to appoint Additional Judges under Article 98 of the Constitution. By the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975) the phrase 'after consultation with the Chief Justice' was omitted both from Articles 95 and 98 of the Constitution. The said phrase was restored to Article 95 (1) by the Second Proclamation (Seventh Amendment) Order, 1976 [Second Proclamation Order No. VI of 1976] but was soon omitted by the Second Proclamation (Tenth Amendment) Order, 1977 [Proclamation Order No. I of 1977] and finally by the Constitution (Fifth Amendment) Act, 1979 [Act I of 1979]. Constitution (Fifteenth Amendment) Act, 2011 has again revived the original provision in Article 95 (1) of the Constitution. [Act XIV of 2011, section 31].

[3] [2010] 15 BLC (AD) 49 (hereinafter *Idrisur Rahman*). For the same view, see also the *Idrisur Rahman* decision of the High Court Division in *Idrisur Rahman v Bangladesh* [2009] 61 DLR (HCD) 523 and the *obiter dicta* of Syed Amirul Islam J in *State v Chief Editor, Manabjamin* [2005] 57 DLR (HCD) 359.

[4] Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press Ltd. 1972) 136.

[5] For detail, see, *ibid*, 134-36.

convention.[6] Applying the same test, the Appellate Division of Bangladesh Supreme Court in *Idrisur Rahman*[7] also established the existence of the convention of 'consultation' in its jurisdiction. The Court found an unbroken line of *precedent* of the executive's 'consultation' with the Chief Justice in the matter of appointment of Judges of the Supreme Court, excepting the sole departure made in 1994.[8] The political actors in the precedents believed also that they were *bound* by the conventional rule of 'consultation' which satisfies *normativity*, the second requirement of a convention of the Jennings test.[9] The Court observed that the appointment of Judges of the Higher Judiciary with primacy of opinion of the Chief Justice is a condition for independence of judiciary, rule of law and supremacy of the Constitution.[10] The Appellate Division thus found also the *reasons* for existence of the conventional rule of 'consultation' in its system.

I am of the view that there is no problem if any Superior Court seeks to determine within its jurisdiction the existence of a convention applying the Jennings test. But the *Idrisur Rahman*[11] Court not only *recognized* the existence of the convention of 'consultation' in its system but also *enforced* the same against the executive organ of the government. I submit that the *recognition* criteria (such as, the Jennings test)

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6 The Supreme Court of Canada, for example, in *Patriation Reference* (see, *infra* (n 114)) adopted the Jennings test to determine in its jurisdiction the convention that 'the Constitution of Canada cannot be amended without first obtaining the consent of the Provinces.'

7 *Supra* (n 3).

8 See, *ibid*, 90-91 at para. 183. See also Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (2nd edn, University of Dhaka 1994) 29-30.

9 His lordship MA Matin J observed: "This shows that the executive, the judiciary and the Bar who are the main 'actors' believed that they were *bound* by the convention" (emphasis added). *Ibid*, 93 at para. 192.

10 In the words of his lordship MA Matin J: "This is why appointment of Judges is the key to the independence of judiciary and the convention of consultation with the chief Justice with primacy of his opinion is essentially ingrained in the very concept of independence of judiciary, rule of law and supremacy of the constitution. These are the *reasons* of the convention of consultation" (emphasis added). *Ibid*, 95 at para. 207. However, in my view, the appointment of Higher Judiciary Judges by the executive is not in itself a condition that fetter judicial independence provided the other post appointment conditions for securing judicial independence are ensured. His lordship Joynul Abedin J, in his dissenting judgment, also holds the same view: "There should not be any apprehension that merely because the power of appointment is with the President meaning the executive, the independence of judiciary would become impaired. The true principle is that after such appointment the executive should have no scope for interference with the work of the Judge or for that matter judiciary," *Ibid*, 70 at para. 73. I do not substantially differ with Court's observation that judicial independence is an aspect of 'rule of law' and 'rule of law' forms part of the doctrine of basic structure in Bangladesh. But I could not agree with Court's main claim that the appointment of Higher Judiciary Judges with primacy of opinion of the Chief Justice is a condition for independence of the judiciary. The present paper, within its limited scope, cannot hope to examine the issue and substantiate author's arguments in this regard. The issue demands a separate full-fledged study and any inquisitive reader may seek to undertake a research initiative on the issue. The present author himself, however, hopes to undertake in future a separate study on the subject.

11 *Supra* (n 3).

of a convention has nothing to do with the question of its *enforcement* since a Superior Court may *recognize* the existence of a convention in its system but may at the same time deny *enforcing* the same in the instant case.[12] If a political practice has not yet matured into the norm of an established convention, no question of its enforcement arises. At the same time, if an established conventional rule is found to be in existence, its enforcement by courts cannot be said to be automatic. Rather, in such a case, before enforcing the convention, courts should enter into some interrelated themes and inquires of special importance in this regard. The related inquires of judicial *enforcement* (as opposed to mere *recognition*) of conventions may shortly be stated as below.

First of all, the courts should try to ascertain whether the conventional rule is law itself or just a source of law in its system. And any norm or rule existing in the system is law or not should be decided taking into account the relevant materials available in the legal system including, *inter alia*, the constitution and statutes. *Second*, in case the convention is found to be just a source of law for the system, a court's authority to enforce the conventional rule cannot be automatic but is conditional under the case. This may be best understood and evidenced from the fact of a court's recognition of any 'customary rule' existing in the system. A court's power to enforce a 'customary rule' in an appropriate concrete case though recognized and approved is always subject to the satisfaction of some conditions and circumstances under the case. It is submitted that the same position should obtain in cases of constitutional conventions also. Therefore, the judges exercising jurisdiction under any state constitution must *of necessity* see whether the necessary conditions and circumstances are satisfied before they may *enforce* any convention in a given case. *Third*, courts should also deal whether this particular approach towards the question of *enforcement* of constitutional conventions commensurate in large measure with the nature and role of judicial power in a tripartite system of government or in the respective jurisdictions they are functioning.

It is submitted that any question regarding the judicial *enforcement* of conventions in Bangladesh jurisdiction can be determined only with reference to an exhaustive and critical analysis of the above enumerated issues and inquiries of some jurisprudential significance. Did the Appellate Division of Bangladesh Supreme Court enter into any such inquiries in its leading *Idrisur Rahman* [13] decision on constitutional convention? I find just *no discussion* of the Court regarding the above identified vital aspects in relation to the question of judicial *enforcement* of conventions in its respective jurisdiction.

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[12] For a court's *recognizing* a convention but denying *enforcing* the same in the instant case, see, *infra* text accompanying notes 113 to 126. See also *infra* text accompanying notes 127 to 128.

[13] *Op. cit*.

Why did the *Idrisur Rahman* [14] Court omit in its judgment the analysis of the above enumerated inquiries relating to judicial enforcement of conventions? I find the reason in Court's reliance on the view of an Indian Judge reflecting on the status of conventions particularly from the point of view of their judicial enforcement. The question of judicial enforcement of constitutional conventions came up for determination before the Supreme Court of India also. Dealing with the issue, Kuldip Singh J of the Indian Supreme Court held his views as under:

> We are of the view that there is no distinction between the "constitutional law" and an established "constitutional convention" and both are binding in the field of their operation. Once it is established to the satisfaction of the court that a particular convention exists and is operating then the convention becomes a part of the "constitutional law" of the land and can be enforced in the like manner.[15]

The above mentioned view of the Indian Judge may be stated to represent in general the status of constitutional conventions within the framework of its Constitution. The Appellate Division of Bangladesh Supreme Court in *Idrisur Rahman* [16] heavily relied upon this view of Justice Singh. The Court cited with approval the above quoted view of Singh J [17] to enforce judicially an *established* convention in its jurisdiction. And accordingly, the Court enforced in the instant case the convention of 'consultation' in a Judge appointment context.

Thus, the *Idrisur Rahman* [18] Court, in line with the view of Singh J of Indian Supreme Court, measured "conventions" in the same parlance with "laws" of its Constitution. I, however, submit that "conventions" from the point of view of their judicial enforcement should be measured not with "laws" of constitution but with "customary rules" of its system. Measuring "laws" and "conventions" in the same parlance may have the effect of doing away with inquires essential for judicial enforcement of conventions. Bangladesh Supreme Court's *Idrisur Rahman* [19] decision is a paradigm example for this kind of avoidance of a Superior Court. But any Superior Court, it is submitted, in exercise of the judicial power of the state, is of necessity bound to deal with the above enumerated inquires involved in their judicial enforcement.

At this stage, however, I should clearly define the scope of the paper to avoid any confusion and misjudgment in this regard. In this paper, I do not hold the view that conventions cannot become law under any circumstances. Indeed, besides legislative incorporation, a convention may always form part of the law of the land by judicial recognition and enforcement in an appropriate concrete case. The

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[14] *Ibid*.
[15] *S.C. Advocates-on-Record Association v India* [1994] AIR (SC) 268,404.
[16] *Op. cit*.
[17] *Ibid*, 90 at para. 182 (per MA Matin J).
[18] *Op. cit*.
[19] *Ibid*.

Appellate Division of Bangladesh Supreme Court in *Idrisur Rahman* [20] applying the Jennings test found 'consultation' as an established convention and just enforced the same against the executive government of the state. I only hold that this particular one-dimensional approach or inquiry of the Court is not sufficient to determine the question of a convention's *enforceability* within the framework of its Constitution. In my view, to determine the question of *enforceability* of a convention, the Supreme Court must take into consideration the above enumerated aspects involved in their judicial enforcement. From this, however, one might assume that the object of the paper is to examine the propriety of Bangladesh Supreme Court's enforcement of the convention of 'consultation' in *Idrisur Rahman* [21] in the light of the above enumerated themes and inquires of their judicial enforcement. But this really is not the scope of the present paper. Indeed, a discussion on the attending *circumstances* and *conditions* of judicial enforcement of conventions and the *legitimacy* of a court's exercising such power within its respective jurisdiction is a different inquiry [22] from the one which I seek to undertake in this paper.

It is obvious that any Superior Court in its ordinary course needs not to go through such a rigorous exercise, as I suggest for conventions, for enforcing simply laws in general or constitutional laws in particular of its system. It is very likely that the approach of a Superior Court as regards the enforcement of conventions would be the same when it measures "laws" and "conventions" of constitution in the same parlance. And this is exactly what has happened for the Appellate Division of Bangladesh Supreme Court in *Idrisur Rahman* [23] since the Court, approving the view of Singh J [24], held that there is just no distinction between "laws" and "established conventions" of the Constitution. Thus, on this view of the Court, the status of "laws of constitution" and an "established convention" are same in its jurisdiction.

This particular approach towards "laws" and "conventions" reflects why the Court, either advertently or inadvertently, omitted in its judgment the analysis of the above enumerated inquiries relating to judicial enforcement of conventions in a given case. The root cause lies in Court's measuring "conventions" in the same parlance with "laws" instead of measuring them with "customary rules" of its system. As a consequence, the Court simply failed to appreciate the distinction

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20 *Ibid*.

21 *Ibid*.

22 A discussion on the attending *circumstances* and *conditions* for determining the *enforceability* status of a convention in a given case demands for a separate full-fledged study on the subject. Any inquisitive researcher may undertake the task of filling up the vacuum of Supreme Court's *Idrisur Rahman* (see, *ibid*) verdict in this regard. I myself, however, hope to undertake in future another research study on the subject.

23 *Op. cit*.

24 See, *supra* (n17).

between *recognition* and *enforcement* of conventions in its jurisdiction. The misleading approach of the *Idrisur Rahman* [25] Court revitalizes the necessity for reflecting again on the distinction between "laws" and "conventions" of the constitution. The object of the paper, therefore, is not to examine the propriety of judicial enforcement of the convention of 'consultation' in *Idrisur Rahman* [26]. Rather, the object is just to draw the demarcating line between "laws" and "conventions" of the constitution in the wake of Supreme Court's misleading approach towards the enforcement of the convention of 'consultation' in *Idrisur Rahman* [27].

However, it is true that the Supreme Court's misleading approach in *Idrisur Rahman* [28] causes only for the failure of appreciating the distinction between *recognition* and *enforcement* of conventions. The paper, therefore, could have been written focusing only on this aspect of distinction between *laws* and *conventions* of the constitution. But, in my view, Supreme Court's approach towards "laws" and "conventions" (i.e. measuring them in the same parlance) in *Idrisur Rahman* [29], in a broader sense, relates ultimately to the *nature* and *status* of conventional rules within the framework of its Constitution. Hence, I seek to undertake in this paper a through and critical comparative discussion between "laws" and "conventions" of the constitution. Therefore, besides the *recognition* and *enforcement* aspect of distinction, the paper also includes within its scope the analysis of some other significant grounds of comparison between these bodes of rules of the constitution.

However, it would be worth mentioning at the outset that I do not claim to create or establish the distinctions *de novo*. Indeed, the distinction between "laws" and "conventions" already remains and should also remain on a proper perusal of the subject. The *Idrisur Rahman* [30] Court in its reasoning and reaching conclusion relied heavily, *inter alia*, on the English authorities on conventions.[31] But the Court failed to appreciate distinction between the expressions *unconstitutional* and *unlawful* as maintained in English jurisdiction. This failure expedited the Court's enforcement of the convention of 'consultation' immediately after it could establish its existence without entering into any further inquiry as to the attending *circumstances* and *conditions* that may be regarded necessary for judicial enforcement of conventions in a given case. The paper, in course of analysis, would reflect on this aspect of distinction of the English jurisdiction.[32]

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25 *Op. cit*.
26 *Ibid*.
27 *Ibid*.
28 *Ibid*.
29 *Ibid*.
30 *Ibid*.
31 For the Appellate Division's heavy reliance on English authority in *Idrisur Rahman*, see, *ibid,* 88-92.
32 See, Part 2.D (*Consequence* of Violation) of the paper for this distinction of English jurisdiction.

The *Idrisur Rahman* [33] Court also applied the Jennings test to determine in its jurisdiction the *existence* of the convention of 'consultation'. His lordship MA Matin J delivered the main judgment for the Court in the case. The learned judge, reviewing the works of Jennings that explain the *role* and *identifying* criteria of conventions in a constitutional system, concluded his observation regarding the views of Dicey and Jennings on the 'court enforceability' of conventions in these words:

> Thus it appears that the distinction made by Dicey has been rejected by Sir W. Ivor Jennings who argued that *enforceability* by the Courts was not a valid basis for a distinction between laws and conventions and that both rested essentially on the *acquiescence* of those to whom they applied.[34]

It is submitted that the learned judge wrongly interpreted Jennings to hold that he, unlike Dicey, does not draw distinction between *laws* and *conventions* on the ground of their 'court enforceability'. In my view, Jennings also maintained the distinction between *recognition* and *enforcement* of conventions in English jurisdiction. To be more specific, my submission is that Jennings though provided a different explanation of the issues from that of Dicey ultimately maintained distinction between *laws* and *conventions* of the constitution. And, importantly and interestingly, Jennings, as did Dicey, also maintained such distinction mainly on the ground of their 'court enforceability'.[35] Thus, the paper in effect argues that the distinction between *laws* and *conventions* is maintained even in English literature (on which the Court heavily relied on for its reasoning and reaching conclusion) [36] and should also exist in Bangladesh jurisdiction.

The paper, I believe, would attain some specific objectives in the field of constitutional law. *First,* anyone including judges exercising judicial power under any state constitutional jurisdiction would learn the danger of equating "conventions" with "laws" from the perspective of their judicial enforcement. *Second,* one would also learn that the proper approach of a Superior Court dealing with conventions should be to measure "conventions" in the same parlance with "customary rules" of its system and not with "laws" of its constitution. *Third,* the judges and others responsible for constitutional interpretation would learn that the *recognition* criteria (e.g. the Jennings test) and *enforcement* conditions of a convention may not be the same in its jurisdiction. *Fourth,* Dicey and Jennings are the two highly esteemed authors on English constitutional law whose writings are frequently quoted and relied upon (not in England but all over the world) on any discussion on *laws* and *conventions* of the constitution. The paper in addition to

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33 *Supra* (n 3).

34 *Ibid*, 89-90 at para. 179 (emphasis added).

35 For a critical comparative discussion on Jennings and Dicey's views on 'court enforceability' of *laws* and *conventions*, see, Part 2.F (*Recognition* and *Enforcement* in a Court of Law) of the paper.

36 See, *supra* (n 31).

enriching one's general understandings of laws and conventions would also enrich his understandings of the views of Dicey and Jennings in this regard.

The paper has three Parts. Part 1 introduces one with the *background, rationale* and *significance* of the study. Part 2 undertakes a thorough and critical comparative discussion between laws and conventions of the constitution. It identifies in particular six major areas of concern to compare them: a) *certainty* of existence and meaning; b) *flexibility* in operation; c) *significance* as rules of the governmental system; d) *consequence* of violation; e) reasons for *obedience*; and, f) *recognition* and *enforcement* in a court of law. The paper holds the view that there is indeed no distinction of substance or nature (distinction may be in terms of *degree* only but not in *kind*) between laws and conventions on the first three grounds of their comparison. However, the paper holds, there is and there should also be distinction of some substance between laws and conventions on the last three grounds of their comparison. The paper, in course of analysis of this Part, would establish my arguments and observations made in the context of maintaining distinction between "laws" and "conventions" of the constitution.[37] Additionally, the paper, in this Part, would also reflect on the distinction between 'reasons for compliance' and 'consequence of non-compliance' with rules of constitution in conjunction with the jurisprudentially significant expression 'sanction'.[38] Part 3 concludes by summarizing the findings and arguments of the paper.

2. Conventions Compared with the Normative Concept Law

There are six grounds in which laws and conventions may be contrasted. This demands a detail explanation.

A. *Certainty* of Existence and Meaning

Rules of law are, for the most part, precisely formulated through proper authorities of the state. In searching for a legal rule, its source will normally be found within a Constitution or within an Act of Parliament or within a judicial decision. On the contrary, "it is usually nobody's business to formulate conventions."[39] They grow out of and are modified by practice[40], and it is "never quite certain at what point practice becomes or ceases to be convention."[41] Stanley Baldwin aptly remarked:

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37 For this, see generally Part 2.D (*Consequence* of Violation); Part 2.E (Reasons for *Obedience*); and, Part 2.F (*Recognition* and *Enforcement* in a Court of Law) of the paper.

38 For the distinction between 'reasons for compliance' and 'consequence of non-compliance' with constitutional rules, see, Part 2.E (Reasons for *Obedience*) of the paper.

39 Ivor Jennings, *Cabinet Government* (3rd edn, Cambridge University Press 1959) 4.

40 *Ibid*.

41 See, *supra* (n 4) 133.

> The historian can tell you probably perfectly clearly what the constitutional practice was at any given period in the past...there may be one practice called *'constitutional'* which is *falling into desuetude* and there may be another practice which is *creeping into use* but is *not yet constitutional*.[42]

This view of Baldwin relates to certainty of *existence* of conventions of Constitution. Thorough analyses of the essential elements that determine the *existence* of conventions in a given jurisdiction surely fall beyond the limited scope of the present paper. However, in the present context, it may be enough to state that Baldwin's view is not true of conventions arising out of 'agreement' indicated and explained by Wheare in his *Modern Constitutions*.[43] It is not true of all conventions arising out of 'custom' either.[44] In England, for example, conventions governing the relations between the Queen and the Government are at least as closely defined as some of the rules of the common law.[45] Again, there may be (or indeed is) greater precision regarding conventions governing the relations among the members of the Commonwealth than with some of the rules of the common law.[46]

Apart from Baldwin's test of 'certainty', there is another dimension of the term in respect of its meaning and content. True, the meaning and scope of conventions may at times display a lack of certainty. But that should not be taken to be a conclusively distinguishing characteristic from laws since rules of law also on occasions display uncertainty as to their meaning and content. No doubt, there are differences between laws and conventions on the basis of their source and method of formulation, but such differences alone cannot be attributed to the lack of *certainty* of meaning for any body of rules existing in the system. Uncertainty as to the meaning and content of rules is not peculiar only to conventions but generally common to rules of any kind existing in the legal atmosphere. Thus, although the source and method of formulation of conventions different from laws, that should not be taken to affect substantially the question of *certainty* as to the meaning and content of this body of rules any more than the rules of laws operating in the system. But are conventional rules more *flexible* in operation than the legal rules of the constitution because of their difference in mode of creation? This issue is often somewhat regarded simple and a less important one. I, however, consider it to have a rigorous examination reflecting, in some measure, on the nature of *creative* judicial interpretation of words of a constitution.

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[42] Hilaire Barnett, *Constitutional and Administrative Law* (4th edn, Cavendish Publishing Ltd: London 2002) 32 (emphasis added).

[43] For detail on conventions arising out of 'agreement', see, KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 122.

[44] For conventions arising out of 'custom', see, *ibid*.

[45] Jennings (n 39) 5.

[46] *Ibid*.

B. *Flexibility* in Operation

It is commonly asserted that the laws generally are rigid and hence not amenable to easy change if required in a particular situation. On the contrary, conventions of the constitution are flexible and in this feature, as Barnett says, "lies much of their value".[47] Barnett elaborates his views in these words:

> A convention may change with changing circumstances: individual ministerial responsibility is a prime example of this feature of conventions. Conventions may adapt to meet particular needs, as with collective responsibility in relation to the European Community in 1975...Conventions may be breached and placed on a statutory basis, as with the House of Lords in 1911. A legal rule has a relatively fixed and certain quality while in existence. If a legal rule is changed, either by judicial decision or by parliament, the previous rule will be superseded by the new: it will 'go out with a bang'. The same cannot be said of conventions. For the most part, they evolve, adapt in amoeba-like fashion to meet the constitutional needs of the time. It is for this reason that they present the student of the constitution with such a fascinating challenge. [48]

SA de Smith also shares the same view when he observes in the context of codification of conventions that codification would 'purchase certainty at the expense of flexibility.'[49] I do not dispute the views of Barnett and de Smith and also others who share the same view. I only argue that, like conventions, the laws of the constitution may also be adapted to meet the changing realities of time without bringing about a formal amendment to the constitution. The task of modifying a constitution can be done through the process of a *creative* interpretative technique of judiciary in explaining words of its constitution. KC Wheare has also sought to justify that a constitution, in addition to formal amendment, may change through judicial interpretation.[50] To establish his point, Wheare offers and elaborates, in particular, three examples from American jurisdiction: 'due process of law', 'delegation' of legislative power, and 'commerce power' of the Congress.

The fifth and fourteenth amendments of the US Constitution provided that no person shall be "deprived of life, liberty, or property, without *due process of law*."[51] The US Supreme Court refused to interpret the expression 'due process of law' as

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[47] Barnett (n 42) 42.

[48] *Ibid*, 36 -37.

[49] SA de Smith and R Brazier, *Constitutional and Administrative Law* (8th edn, London: Penguin 1998) Chapter 2. Regarding codification of conventions, it is worthy to quote this remark of Barnett: "it is to be doubted whether, in relation to such a dynamic organism as the constitution, it would be possible to identify, define and formalize conventions in such a manner both to provide a comprehensive code and to allow for subsequent constitutional development. It may prove to be the case that codification would stultify the growth of the constitution." See, Barnett (n 42) 42.

[50] Wheare (n 43) 100-120.

[51] Emphasis added.

any law duly passed by Congress or a State Legislature. Instead, it regarded 'due process of law' "as a phrase which guarantees the recognition of certain rights, and it has been prepared to say, in particular cases, what these rights are and whether they have been denied or recognized."[52] In other words, the US Supreme Court did not mean by the phrase *due process of law* merely 'in accordance with the law' or 'save as provided by law' – an expression "which occur in many modern Constitutions and contain no necessary guarantee of good government."[53] After reviewing some cases, Wheare summarizes the meaning of 'due process of law' as understood in American jurisdiction: "the Supreme Court has regarded the due process clause as requiring that governmental action 'shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as "the law of the land."'"[54]

The US Constitution declares that "all legislative powers herein granted shall be vested in a Congress of the United States."[55] Can the US Congress delegate legislative power to a minister or a department or an official? One may argue that the US Constitution by implication at least forbids the delegation by Congress of its legislative power to any other body of the government. The question has been raised on a number of occasions in courts but the US Supreme Court "has deliberately adopted the view that these portions of the Constitution must be construed flexibly."[56] Referring to some relevant decisions on the point, Wheare rightly concludes that "the attitude of the Supreme Court has made possible in the United States a flexibility in the exercise of rule-making power which a strict view of the nature of legislative power and of the words of the Constitution would have prevented."[57]

The US Constitution has vested upon Congress the power to regulate 'commerce' among the several states.[58] So many issues are involved in this 'commerce clause' provision of the US Constitution. To mention just a few: what 'inter-state' and 'intra-state' commerce mean; when 'inter-state' commerce ends and 'intra-state' commerce begin; the meaning of 'regulate' and commerce 'among several states';

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52 *Op. cit*., 118.

53 *Ibid*.

54 *Ibid*, 119.

55 See, Section 1 of Article I of the US Constitution.

56 *Op. cit*., 115.

57 *Ibid*. Wheare mentions, *inter alia*, the instance of the years of 1941-45, when "the United States was at war and a vast rule-making power was exercised by the President and by administrative agencies under the authority of Acts of Congress. The Supreme Court upheld them all when cases came before it." *Ibid*, 114-15. On the point of delegation of legislative power, the first Chief Justice of the Australian High Court shares the same view as that of the US Supreme Court when he said his oft-quoted statement in 1909 that "it is too late in the day to contend that such a delegation, if it is a delegation, is objectionable in any sense." Griffith CJ in *Baxter v Ah Way* 8 CLR 626, 632-33.

58 See, clause 3 of Section 1 of Article I of the US Constitution.

the idea of a 'stream' or 'flow' of commerce; the effect of 'inter-state' commerce on 'intra-state' commerce and the *vice versa*; 'direct' or 'indirect' effect of commerce etc. To resolve these issues, the US did not have to make any formal amendment to the constitution since its Supreme Court, through a *creative* interpretative exercise, well adapted the old words to meet the new demands of the day. Wheare, after reviewing some important decisions, beautifully sums up the role of US Supreme Court in the context of its interpretation of the 'commerce clause' provision:

> As we follow the decisions of the Supreme Court on this matter, it does not seem to be an exaggeration to say that it has adapted the commerce power of Congress to all the demands of the economic, commercial, industrial, and transport revolutions of the past one hundred and fifty years...So extensive has the commerce power proved to be that it has been *unnecessary* in the United States *to contemplate an amendment of the Constitution* to adjust the powers of Congress in economic affairs to the needs of the United States today. It is indeed remarkable that powers granted over one hundred and fifty years ago to an agricultural country with a few million people should be adapted to the needs of a great industrial power with thirty times that population.[59]

In view of the abovementioned observation, Wheare concludes that the US Constitution "has been adapted to the new society is the work of the Supreme Court."[60] And it is in the context of this kind of role of a court that Wheare held this important view: "It is interesting to find that these changes in conditions often obtain recognition in the decisions of judges who find themselves called upon to decide whether *an old formula* in a Constitution can be made *to embrace new and unforeseen circumstances*." [61]

The foregoing analysis should leave no doubt in one's mind that, like conventions, the laws of the constitution may on occasions be well adapted to the new conditions of life through a *creative* interpretative exercise of the judiciary. But how far the Apex Court of a country may go in such a *creative* interpretative venture? Wheare, in the specific context of 'commerce clause' provision of US jurisdiction makes an important observation: "the Supreme Court could make this adaptation because the words of the Constitution were adaptable."[62] Wheare sought to justify his claim with reference to an example from Canadian Constitution.[63] I agree with this specific view of Wheare bearing in some measure on the *limitation* of a court's power of *creative* judicial interpretation.

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59 *Op. cit*., 108-09 (emphasis added).

60 *Ibid*, 109.

61 *Ibid*, 106 (emphasis added).

62 *Ibid*, 109.

63 Wheare cites an example from Canadian Constitution and argues that "the Canadian Constitution was not easily adaptable, even had the judges been ready to adapt." *Ibid*, 110.

Judicial process, therefore, may not be appropriate in all cases to bring about a change in the meaning of a constitution. In such cases, where words are not susceptible for adaptability by judicial means, a direct legislative intervention is required to make a formal amendment to the constitution. If laws of the constitution are, however, regarded *rigid* on this count alone, it may equally be true to say that some conventions are also *rigid* since it may indeed be difficult to change them in practice. Importantly, Jennings also shares the same view when he says: "Indeed, it is better that the rule should be law and not convention, for a law may be changed by legislation and a convention is rather difficult to change abruptly."[64] Thus, on this view, the term *rigid* may be applicable for both laws and conventions of the constitution with the only distinction being that in the former it is rigid in *law* whereas in the latter it is rigid in *practice*.

In view of the above mentioned analysis, I could not but hold that conventions are not different in *kind* (may be different in terms of *degree* only) from laws of the constitution on the ground of their *flexibility* in operation due to the differences of their method of formulation or mode of creation. But are laws more important than conventions as rules of the governmental system? Although this question also has some bearing on the procedural differences between laws and conventions in terms of their mode of creation, I seek to analyze the issue under another separate heading, although very briefly, as provided below.

C. *Significance* as Rules of the Governmental System

We have just acknowledged that the source and method of formulation of laws are different from conventions of the constitution. At modern times, laws are enunciated through some formal and proper constitutional authorities of the state. Because of this, it is sometimes asserted that the "laws commonly have a greater sanctity"[65] than conventions and there is also "greater reluctance to break them."[66] Jennings, however, regards this distinction largely "psychological."[67] Jennings rightly so regards since a 'rule of law' has no merit merely because it is a 'rule of law'. It is primarily the 'content' and not 'form' that matters so far as the successful functioning of the government is concerned. Jennings, in support of his contention, appropriately mentions some of the fundamental conventions relating to the

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64 See, Jennings (n 4) 132. For a similar view, see also Mackintosh: "The real difference between law and convention is just that there is no formal procedure for enacting or enforcing conventions, though some conventions (for example, the monarch shall not veto laws passed by both Houses; the Prime Minister shall resign if he is defeated on a major issue in the Commons) are as important as any laws and perhaps *even more difficult to alter*." (Emphasis added). JP Mackintosh, *The British Cabinet* (3rd edn, London: Stevens 1977) 12.

65 Jennings (n 39) 3.

66 *Ibid*.

67 *Ibid*.

Cabinet governmental system as prevalent in the UK.[68] Those conventions, Jennings asserts, are among the bases of UK constitutional system and are *as important as* the fundamental principles of the *law*.[69] That the conventions are no less important than the laws is also apparent from this another remark of Jennings: "Indeed, judges who are familiar with both find some difficulty in distinguishing between them. In practice, the two are inextricably mixed, and *many conventions* are *as important as* any *rules of law*."[70]

John Mackintosh in his *The British Cabinet* argues the same when he says:

> The real difference between law and convention is just that there is no formal procedure for enacting or enforcing conventions, though *some conventions* (for example, the monarch shall not veto laws passed by both Houses; the Prime Minister shall resign if he is defeated on a major issue in the Commons) are *as important as any laws* and perhaps even more difficult to alter.[71]

The relative importance of laws and conventions as rules of the governmental system was considered also by the Supreme Court of Canada in *Reference re Amendment of the Constitution of Canada*.[72] The Court was of the view that while they are not laws some conventions may be more important than some laws and their importance depends on that of the value or principle which they are meant to safeguard.[73]

The abovementioned view of the Canadian Supreme Court and arguments of Jennings and Mackintosh very clearly reveal that the conventions may be no less important than the laws as rules for the constitutional system of a country. Yet, as Jennings at the same time reminds us, "it cannot be doubted that, as between laws and conventions of equal constitutional importance, the law has the greater sanctity."[74]

From the above critical examination of the issues, I may claim with some credibility that there is indeed no distinction of substance or nature between laws and conventions of the constitution on the grounds of their *certainty* of existence and meaning, *flexibility* in operation, and *significance* as rules of the governmental system. There may, however, be distinction of some substance regarding the question of their *obedience*, the *consequence* of their violation as well as the question of their *recognition* and *enforcement* in a court of law. For convenience, I deal first with the *consequence* of their violation.

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68 *Ibid*.

69 *Ibid*.

70 See, Jennings (n 4) 84 (emphasis added).

71 See, Mackintosh (n 64) 12 (emphasis added).

72 *Reference re Amendment of the Constitution of Canada* [1981] 1 SCR 753. Quoted in Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 5-7.

73 *Ibid*.

74 Jennings (n 39) 3.

D. *Consequence* of Violation

We have just seen that, as opposed to laws, there is no formal procedure for enacting or formulating conventions of a constitution. On this point alone, conventions are certainly procedurally different from laws of the constitution. But such procedural difference, as has just been explained, could not bring any distinction of substance as regards the question of their *certainty*, *flexibility* and *significance* as rules for the governmental system. However, in case of the violation of a convention, this procedural difference may be seen to contribute to produce, on some *substantive* merit, different a result from the violation of laws of the constitution.

Barnett enumerates two basic points that may be mentioned regarding the *consequence* of violation of laws.[75] *First,* "a breach of a rule of law normally, but not invariably, leads to enforcement of the rule by the courts."[76] *Second,* "when a rule of law is breached, the rule remains valid and in force, unless repealed by parliament or overruled by the judges."[77] With conventional rules, however, the situation is very much different. It cannot be "predicted in advance the consequence which will flow from a breach of convention."[78]

All conventions of the constitution may not be of equal *certainty* and *significance* in working the governmental machinery of a state. And it is in part for this reason that the consequences of their violation may vary.[79] At the next stage, the consequence may also depend on the "extent"[80] of breach and the "political mood"[81] of the country at the time of breach since "conventions are obeyed because of the potential political difficulties which would arise if a firmly established convention was departed from without constitutional justification".[82] Mahmudul Islam also observes in the same vein: "Though there is no consequence stipulated for non-compliance, disobedience to it create *political difficulties* and it is unthinkable that the constitutional conventions can be wholly discarded."[83]

Thus, the consequence for violating a conventional rule is, for the most part, *political* rather than *legal*. Perhaps the differing nature of the violation of laws and conventions and their consequential effect has been best explained by Jennings. To quote him in his felicitous exposition:

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75 Barnett (n 42) 33.
76 *Ibid*.
77 *Ibid*.
78 *Ibid*, 36.
79 *Ibid*, 35.
80 *Ibid*, 34.
81 *Ibid*.
82 *Ibid*.
83 See, Mahmudul Islam (n 72) 4 and 5 (emphasis added).

> To break the law is to do something clearly and obviously unconstitutional. Unless there are special circumstances, such as a political or financial emergency, it is the subject of blame; it is possible to rouse public opinion to indignation; the breach would be proclaimed from every platform and blazoned forth in every headline. Breaches of constitutional conventions are less obvious and can be more easily clouded by a fog of misunderstanding. A judicial decision that a law has been broken leaves no room for argument, save as to its political justification; an accusation that a convention has been broken may be met by an accusation of factious and deliberate misrepresentation. The angel who has been formally condemned is no longer an angel; in the absence of formal condemnation he may protest his injured innocence.[84]

Thus, it may be asserted with some confidence that there is distinction of some substance between laws and conventions on the basis of *consequence* of their violation. However, in this discussion on *consequence*, there is another point that needs clarification to avoid confusion. In many jurisdictions including Bangladesh, one commonly uses the expressions 'unlawful' and 'unconstitutional' interchangeably in the study of constitutional law. But in England – the mother country of constitutional conventions – the expressions are used to denote different governmental conducts of political and constitutional actors. They regard an action 'unlawful' (and hence also unconstitutional) only when that breaches a law of the constitution. And an action is regarded only 'unconstitutional' (but not unlawful) when that breaches a convention of the constitution.

This distinction is obvious in Barnett's summary of the meaning of constitutional conventions: "A constitutional convention is a *non-legal* rule which imposes an obligation on those bound by the convention, breach or violation of which will give rise to legitimate criticism; and that criticism will generally take the form of an accusation of *'unconstitutional conduct'*."[85] Barnett, in a tabular form, has categorically shown that the sanction attending breach for habits is *none*. For understandings and practices, the breach requires *justification*. In case it is a convention, the action may be charged with as an *unconstitutional conduct* and the expression *unlawful conduct* he uses only for breach of laws.[86] Jennings also maintained the distinction when he wrote: "an Opposition feels that it has a more effective remedy if it can point out that the Government has acted *illegally* than it would have if it could say only that it had acted *unconstitutionally*."[87]

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84 Jennings (n 39) 4.

85 Barnett (n 42) 31(emphasis added). It is in this sense that the remark of Austen Chamberlain made with Baldwin's approval, if not entirely true, carries some merit: '"unconstitutional" is a term applied in politics to the other fellow who does something that you do not like.' Quoted in Jennings (n 39) 13.

86 Barnett, *ibid*, 30.

87 Jennings (n 4) 133 (emphasis added).

Thus, in England the violation of a convention renders the action unconstitutional though not unlawful. The violation is unconstitutional simply because of the fact that conventions form part (one of the two sets of rules) of the constitution. But even the actions are not unlawful since they regard conventions only as 'non-legal' elements of their constitution. This distinction of English constitutional law seems to have been well understood and maintained by the Canadian Supreme Court when it held that "they (conventions) form an integral part of the constitution and of the constitutional system and that is why it is perfectly appropriate to say that to violate a convention is to do something which is *unconstitutional* although it entails *no direct legal consequence*."[88]

The distinction certainly has important practical consequences as regards the question of *effect* of breach of laws and conventions of the constitution as well as their *recognition* and *enforcement* in courts of law. But unfortunately, unlike the Canadian Supreme Court, the Supreme Court of Bangladesh has not been able to appreciate and maintain the distinction in its leading case dealing with the constitutional convention of 'consultation'.[89] However, having well understood the distinction between laws and conventions on the basis of *consequence* of their violation, I now turn to analyze their differences on the ground of *obedience*, a term which focuses or relates mostly to the *reasons* for compliance with these bodies of rules of the constitution.

E. Reasons for *Obedience*

Obedience to a rule and *consequence* of violation of the rule though may on occasions overlap, are jurisprudentially different ideas. To understand the point, it may be convenient to consider an example from the realm of law. Penal laws of all states recognize murder as an offence. In this particular context, the questions – why is the law of murder *obeyed*? and, what is the *consequence* for violation of the law of murder? – are distinct and separate. Consequence for violation of the law of murder is invariably *punishment* being mostly life imprisonment or death sentence. In this example, the consequence *punishment* would, in legal theory, be termed as *sanction* for the law of murder.

It may be that one obeys the law of murder due to the fear of the *sanction* of *punishment*. However, there may be some/others who obey the law of murder not because of that fear but because they regard murder, as conscientious citizens, bad in itself or a sinful conduct. In any event, these people would not commit murder even if there was no law on murder stipulating in it a *sanction* in the form of *punishment*. Sanction, in jurisprudence, is mainly the consequence for violation of law but may occasionally be also reason for compliance with the provision of law.

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[88] Quoted in Mahmudul Islam (emphasis added) (explanation in the brackets supplied). See, Mahmudul Islam, (n 72) 6. For case reference, see also (n 72).

[89] See, *supra* (n 3).

To state otherwise, sanction contained in law may be one of the reasons for compliance with law but there may be other reasons for a person, apart from sanction, to obey the law. The expression *obedience* to law is mostly related to *reasons for compliance* with law whereas *consequence* is related mostly with the jurisprudentially more significant expression *sanction* which, in large measure, is stipulated in the provision of law itself.

After having these general understandings, we may now ask the question: why are conventions obeyed in any constitutional system? In the British context, Dicey was "much puzzled by the fact that though the conventions had no court to enforce them, they were nevertheless obeyed".[90] A very common and general answer to the question is that the obedience to conventions is ensured by the fear or force of public opinion. Dicey, however, was not much content with this answer and decided to go a bit more in depth into the inquiry: "Why is it that public opinion is, apparently at least, a sufficient sanction to compel obedience to the conventions of the constitution? and it is no answer to this inquiry to say that these conventions are enforced by public opinion."[91] This reflects why Dicey formulated his initial question as thus: "What is the sanction by which obedience to the conventions of the constitution is *at bottom* enforced?"[92] To find something *more* and something *in addition to* public opinion, Dicey brought the analogy of international morality:

> Every one, except a few dreamers, perceives that the respect paid to international morality is due in great measure, not to moral force, but to the physical force in the shape of armies and navies, by which the commands of general opinion are in many cases supported; and it is difficult not to suspect that, in England at least, the conventions of the constitution are supported and enforced by *something* beyond or in addition to the public approval.[93]

What is that "something" beyond or in addition to the force of public opinion? In Dicey's view, it is nothing but the force of the law itself.[94] To establish his point, Dicey offered, *inter alia*, the example of the convention that requires the British Parliament to meet at least once a year. If this convention is not obeyed, the money granted, in particular, "on an annual basis by parliament for the maintenance of the armed forces would not be forthcoming."[95] Accordingly, the "maintenance of the army would become unlawful by virtue of Article VI of the Bill of Rights 1689, which provides that the raising and keeping of an army in peacetime, without

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[90] See, Jennings (n 4) 128.

[91] AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, MacMillan Press Ltd. 1959) 444.

[92] *Ibid*, 439 (emphasis added).

[93] *Ibid*, 445 (emphasis added).

[94] *Ibid*.

[95] Barnett (n 42) 33-34.

parliament's consent, is unlawful."[96] Again, in general, "the financial legislation of the year would not be passed, so that some forms of taxation and some items of expenditure would become illegal."[97] Thus, the convention of annual meeting of Parliament, as Dicey puts it, "is in reality based upon, and secured by, the law of the land."[98] That Dicey also generally held this view for all conventions in English constitutional system is obvious from this unequivocal expression:

> The breach, therefore, of a purely conventional rule, of a maxim utterly unknown and indeed opposed to the theory of English law, ultimately entails upon those who break it direct conflict with the undoubted law of the land. We have then a right to assert that *the force which in the last resort compels obedience to constitutional morality is nothing else than the power of the law itself*. The conventions of the constitutions are not laws, but, in so far as they really possess binding force, derive their sanction from the fact that *whoever breaks them must finally break the law and incur the penalties of a law-breaker*.[99]

The above expressed views of Dicey should be subjected to some degree of scrutiny. *First* of all, we should consider Dicey's claim that conventions are obeyed because violation of a convention leads ultimately to the violation of a law. It is not possible, in the limited scope of the present paper, to consider each convention separately and inquire into the reasons for its compliance. It may, therefore, be enough to mention that Dicey's thesis has been wholly accepted by *no subsequent* authors of English constitutional law. Jennings, for example, accepts his thesis in this limited sense only: "In fact, Dicey's argument applies *only to those comparatively few*, though important, conventions which determine the relations between the Cabinet and House of Commons."[100] For Barnett, the consequence of violation of a convention is, for the most part, political rather than legal.[101] The consequences which Dicey contemplate are, therefore, only exception and not the rule – Barnett concludes.[102]

Secondly, Dicey's way of stating the things suggest that he felt it *not necessary*, either advertently or inadvertently, to draw any distinction between 'sanction' and 'reasons for compliance' with rules of the constitution. I have just explained that the term 'sanction', in its 'most perfect legal theoretical sense', should be applied only to 'consequence of non-compliance' with the provision of law. Thus, in this understanding, it may, therefore, be said that Dicey in fact did not draw distinction

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96 *Ibid*, 34.

97 See, Jennings (n 4) 128.

98 See, Dicey (n 91) 449.

99 *Ibid*, 450-51 (emphasis added). Jennings also summarizes a similar conclusion of Dicey's view: "where *they* (conventions) were obeyed, the reason must be that a breach of convention produced ultimately a breach of law." (Emphasis and explanation in the brackets added). See, Jennings (n 4) 128.

100 See, Jennings (n 4) 130.

101 Barnett (n 42) 34.

102 *Ibid*.

between 'consequence of non-compliance' and 'reasons for compliance' with any provision of law. From one point of view, Dicey may be said to be *incorrect* because he uses the expression 'sanction' (and, as such 'consequence of non-compliance') in dealing with 'obedience', a term related mostly to the 'reasons for compliance' with the provision of law. From another point of view, Dicey may be said to be *not wrong* since 'one of the consequences' of non-compliance may be the 'reason for compliance' with the concerned law. When viewed in this light, one may find this discussion of mine 'purely academic' or 'too much legalistic' or in the extreme an 'unnecessary futile academic exercise'. It may be that there are merits in these assertions. But is it not true that the expressions 'reasons for compliance' describe a person's relationship with law mostly before the rule is breached, whereas the expressions 'consequence of non-compliance' determine such relationship after the rule is breached. If true, then this discussion of mine bears some significance not only from the point of view of a legal philosopher, but also from the perspective of a sociologist or a political scientist.

Now coming down to the specific question on *obedience*: how are laws of the constitution different from conventions on this basis? It may be stated that in case a provision is law, there may be both legal and non-legal reasons for its compliance. Sanction – in legal theory, the 'consequence for non-compliance' in a 'most accurate' sense – serves as the legal reason for such compliance. On the other hand, the reasons for compliance (indeed, also the consequences of non-compliance) with conventions are mostly political.[103] Mahmudul Islam rightly comments: "Deviations from these conventions evoke serious criticism and create political difficulties in running the government."[104] It may, therefore, be concluded approving the apt remark of Jennings that obedience to law is a "fundamental duty", whereas obedience to conventions is only "among the political virtues."[105]

I may claim that we now have at least a bit better understanding regarding the *consequence* and *obedience* as grounds for differences between laws and conventions of the constitution. However, the most important of all the points of differences between them is perhaps the ground of their *recognition* and *enforcement* in a court of law. This I would prefer to discuss at some length as provided below.

F. *Recognition* and *Enforcement* in a Court of Law

In England, the Diceyan distinction between laws and conventions is still maintained. Conventions being *non-legal* rules, the attitude of the courts towards them is different from their attitude to *legal* rules of the constitution. In the realm of law, it is the recognized duty of judges "to consider whether acts are legally

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103 This may be subject to some exceptional cases as Dicey exemplified, for example, with reference to the British convention that requires the Parliament to assemble at least once a year.

104 See, Mahmudul Islam (n 72) 6.

105 Jennings (n 39) 3.

valid and to take such steps as they can to see that the law is obeyed."[106] But the situation is quite different with conventional rules of the constitution. The courts in England do not have jurisdiction to adjudicate upon conventions. This is obvious from this unambiguous remark of Jennings: "While it is equally the duty of public authorities to obey the conventions, there is *no formal* method of determining when they are *broken* or of setting in motion the train of consequences which this breach should bring."[107]

Two cases are often cited to claim that courts do not enforce conventions: *Madzimbamuto v. Lardner-Burke*[108] and *Manuel v. Attorney-General*[109]. The short fact of *Madzimbamuto* [110] was that Rhodesia was a dominion of the United Kingdom (UK) but declared unilateral independence and the revolutionary government thus passed also some laws. By convention, the British Parliament would not legislate for dominions unless so requested by the concerned dominion. But in 1965, the British Parliament enacted the South Rhodesia Act which declared that Rhodesia remained a dominion of the UK and invalidated all legislations passed by the revolutionary government upon such unilateral declaration of independence. The complainant in the case questioned the legality of his detention under the Rhodesian detention law. The Privy Council, in determining the legality of such detention, refused to accept the contention that the Act of 1965 should not be applied because of British Parliament's enacting the law in breach of the convention. The Privy Council, thus, in effect, refused enforcement of the convention in the instant case. Similar issue was raised in *Manuel*.[111] This time the Court of Appeal refused to enforce the convention holding that it could not inquire whether the convention was complied with or not.[112]

However, courts do not enforce conventions should not mean that they can take no cognizance of conventional rules although they may very rarely be called upon to do so. In such a case, courts give recognition to while still not enforcing the

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106 *Ibid*.

107 *Ibid*, 3 & 4 (emphasis added).

108 [1967] 1 AC 645 (hereinafter *Madzimbamuto*).

109 [1983] Ch. 77 (hereinafter *Manuel*).

110 *Op. cit*.

111 *Op. cit*.

112 The UK Supreme Court has reiterated the distinction between mere *recognition* and *enforcement* of conventions in a recent case also. See, *R. (Miller) v Secretary of State for Exiting the European Union* [2017] U.K.S.C. 5. For detail of the case, see, Farrah Ahmed, Richard Albert, & Adam Perry, 'Judging Constitutional Conventions' (2019) 17(3) International Journal of Constitutional Law 787. See also, Farrah Ahmed, Richard Albert, & Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17(4) International Journal of Constitutional Law 1146 (holding the view that courts should limit themselves to enforcing power-shifting conventions only).

convention. Here also two cases are illustrative: *Attorney-General v. Jonathan Cape Ltd.*[113] and *Reference re Amendment of the Constitution of Canada* [114].

In *Jonathan Cape Ltd.*[115], an ex-Cabinet minister decided to proceed with publication of the diaries he had kept while in government. The diaries included records of Cabinet discussions which may never be revealed under the doctrine of 'collective ministerial responsibility' except under the conditions specified by law or on the authority of the Cabinet Secretary.[116] The government, therefore, "sought an injunction to restrain publication on the basis that Cabinet meetings are, by convention, confidential and that the diaries, accordingly, represented a breach of confidentiality."[117] The court though refused the injunction held in favour of the government in relation to the doctrine of confidentiality. In view of the court, "unless national security was involved, an eight to ten year embargo was the maximum period that such material would be protected."[118] In the instant case, "the court declined to suppress 'secrets' which were over ten years old."[119] Thus, the court, though did not enforce against the ex-Cabinet minister the convention, recognized that the conventional doctrine of confidentiality (collective ministerial responsibility) does in fact exist in English constitutional system.

The *Patriation Reference* [120] is the other leading case reflecting on the distinction between laws and conventions of constitution. The Supreme Court of Canada had to determine two principal questions.[121] *First*, whether, as a matter of law, the Constitution of Canada could be amended without first obtaining the consent of the Provinces. *Second*, whether the consent of the Provinces was required as a matter of convention of the constitution. By a majority, the Supreme Court ruled that the consent of the Provinces to amend the constitution was required not by law but by convention only.[122] And regarding the question of *enforcement* of conventions in a *court of law*, the Supreme Court held:

> The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to *enforce* them would mean to

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113 [1976] QB 752(hereinafter *Jonathan Cape Ltd.*).
114 See, *supra* (n 72) (hereinafter *Patriation Reference*).
115 *Op. cit*. See, for detail of the case, Barnett (n 42) 37&38.
116 Barnett (n 42) 37.
117 *Ibid*.
118 *Ibid*.
119 *Ibid*.
120 See, *supra* (n 114).
121 See, for detail of the case, Barnett (n 42) 38&39.
122 *Ibid*, 39.

> administer some *formal sanction* when they are *breached*. *But, the legal system from which they are distinct does not contemplate formal sanctions for their breach.*[123]

It is obvious from the abovementioned observation that the Court maintained the Diceyan distinction between law and convention and accordingly could not go beyond the recognition of the convention (that is, the requirement of consent of Provinces to amend the constitution) and enforce it in the instant case. Barnett correctly appreciates that both in *Jonathan Cape Ltd.* [124] and *Patriation Reference*[125], "the lack of a legal remedy is explained by the strict distinction between law and convention and by the courts' refusal to go beyond recognition of the convention to enforcement thereof."[126]

It is thus established that courts may recognize conventions even after holding that conventions are not 'court enforceable'. Besides the courts' decisions, this view gains support also from some academic opinions. Alex Carroll, for example, observes: "It would be misleading, however, to represent judicial refusal to enforce conventions as symptomatic of a reluctance to recognize the existence and significance of non-legal rules in the workings of the constitution."[127] Thus, in Carroll's observation, conventions are *non-legal* rules and hence are not 'court enforceable', but *significant* (which I have also admitted in earlier discussion) and courts may not be reluctant to *recognize* their *existence* if called upon to do so in an appropriate case constituted before them.

Dealing with the same question, Bradley and Ewing commented: "In view of the political nature of most conventional rules, the stress on *political or parliamentary remedies* is appropriate. Moreover, many conventional rules, for example, those relating to Cabinet system, do not affect a citizen's rights closely enough for a judicial remedy to be justified...It may however be necessary for a court to take into account the *existence* of a conventional rule in making its decision on a point of law."[128] These authors also emphasize on the *extra-legal* remedies for violation of conventions but at the same time remind us of a court's authority to give *recognition* to conventions if necessary in a given case.

Thus far I have presented the view that constitutional conventions are not *judicially* enforceable although their existence may be recognized in courts of law. There is, however, a different explanation of the issues from Ivor Jennings. Jennings is one

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123 Quoted in Barnett, *ibid* (emphasis added). For the case, see, *supra* (n 114).

124 See, *supra* (n 113).

125 See, *supra* (n 114).

126 See, Barnett (n 42) 40. Referring *Manuel* (see, *supra* note 109) and *Jonathan Cape Ltd.* (see, *supra* note 113), Barnett on another occasion also observes to the same effect: "Being non-legal rules, there is no question of a breach of convention being enforced by the courts: the courts do not have the jurisdiction to enforce convectional rules, although they may give recognition to them." See, Barnett (n 42) 33.

127 Alex Carroll, *Constitutional and Administrative Law* (4th edn) 61.

128 Bradley and Ewing, *Constitutional and Administrative Law* (14th edn) 29 (emphasis added).

of the very few distinguished (and highly esteemed) exponents of English constitutional law. His writings on constitutional questions are regarded as authority and studied not only in England but throughout the world. This discussion, therefore, would remain somewhat incomplete without examining the merits of his arguments in this regard. I, therefore, seek to evaluate his analysis below in brief.

Dicey drew distinction between laws and conventions on the basis of their enforcement: laws are rules which are enforced by the courts and conventions are rules which are not enforced by the courts. Jennings found this method of stating the case "a little too simple."[129] The efficacy of judicial decisions in important governmental matters, according to Jennings, "lies not in enforcement, but in the precision of judgment, the recognized sanctity of law, and the power of public opinion."[130] To be more express, "the courts themselves do not enforce anything; they do no more than give a decision or make an order."[131] The so-called enforcement thus is nothing but the "application of sanctions by administrative officers who themselves obey law in applying them. Such sanctions might be applied to a subordinate officer or authority; it is difficult to imagine them applying to the central governmental body."[132] Law, therefore, "generally is enforced and can be enforced only against law breaking groups and individuals. It cannot be enforced at all against the government, and most constitutional law as well as most constitutional conventions relate to the government."[133] And regarding the nature of a *Constitution* embodying those laws and conventions, Jennings holds his view as under:

> A constitution necessarily rests on acquiescence, whether it be established by referendum or tacit approval or force. If an organized public opinion regards it as noxious it will be overthrown. If a Louis Napoleon or a Mussolini or a Hitler considers that he can induce or compel acquiescence in a change, he will not hesitate to overturn it merely because it is enacted as law.[134]

This view of Jennings holds good even for states with written constitutions. For a country with a written constitution, it is still necessary to legitimate its constitution, that is, to find rules which will validate the constitution itself. In Kelsenian analysis such a rule is regarded as *initial hypothesis* or *Grundnorm* that "this constitution ought to be obeyed". In an analysis of this kind, a written constitution is law not because somebody or some institution has formally made or enacted it but because it has in reality been accepted. Jennings, therefore, rightly comments that "Anyone can draft a paper constitution, but only the people

[129] Jennings (n 39) 4.
[130] *Ibid*.
[131] See, Jennings (n 4) 131.
[132] *Op.cit*.
[133] *Op.cit*.
[134] Jennings (n 39) 3.

concerned in government can abide by it; and if they do not, it is not law".[135] Jennings establishes his arguments citing a very nice example from English jurisdiction: "What made William and Mary monarchs instead of James II and the person who called himself James III was the fact of recognition, not a pre-existing rule of law. All revolutions are legal when they have succeeded, and it is the success denoted by acquiescence which makes their constitutions law".[136] The conventions, therefore, are similar to most fundamental rules of law of any constitution in that they also rest essentially upon *general acquiescence* of those concerned in the government. Whole things viewed in this light, Jennings could not but make these unimpeachable remarks regarding the question of *enforcement* of constitutional rules in a court of law:

> A legal remedy against the Crown or a minister is useful not because it could be enforced but because it would be obeyed. If the Government decided to break the law, it could not be enforced against them except by revolution; and anything can be enforced against anybody by a successful revolution.[137]

The arguments of Jennings seem to be correct and very strong in the context of its subject of analysis. However, if correctly analyzed, it establishes no more than the fact that the distinction between laws and conventions on the basis of *enforcement* by *courts* is not as simple and unambiguous as Dicey suggested. The arguments of Jennings lead to the conclusion that a wider definition of law may be adopted to include conventions since conventions like most fundamental laws of the constitution also rest on *general acquiescence*. However, even if they are laws, they are different from laws strictly so called. In the own words of Jennings:

> However, emphasis on rules in and not in the constitution would make a useful formal distinction. With us no such distinction is possible. All the governmental institutions have been established either by custom or convention, or by the authority of an institution so established, and their powers are derived either from custom or convention, or from institutions established by custom or convention. The rules which govern these institutions, as well as the rules enunciated by them, *are of the same kind*, whether *they are called laws or customs or conventions*.
>
> *If they are called laws, however,* it is essential to remember that *the word is used in a much wider sense* than in the phrase *"the laws of England" or "English law."* [138]

And that the conventions (in wider sense "laws") are still different from laws strictly so called ("laws of England" or "English law") mainly regarding the question of their 'court enforceability' is obvious from this another remark (although made somewhat in a different context) of Jennings himself: "We may

[135] See, Jennings (n 4) 117.
[136] *Ibid*, 117-18.
[137] *Ibid*, 132.
[138] *Ibid*, 107 (emphasis added).

note in passing that these rules of law, which are conventions in Great Britain, *are not "enforced" in courts*." [139]

Thus, even if it is accepted that conventions in broader sense are laws, *to agree with Jennings*, the distinction between the two sets of rules still remains on the basis of the roles of courts in enforcing them. This I consider needs a bit more elaboration. Violation of laws of the constitution by government would invariably lead to some court orders declaring the existence of the rule in the system, its breach by any governmental agency, and the consequential 'relief or remedy' stipulated mostly in the legal provision itself. Jennings is, of course, correct at this point that no one can ensure obedience of an unwilling government to the court orders as to 'relief or remedy' for violation of laws of the constitution except by a successful revolution. But, to use the words of Jennings himself, due to the *recognized sanctity of law* and the *power of public opinion*[140], government in fact obey the court orders passed against them for breaching the laws of constitution in respective cases. Otherwise one would have seen one revolution in the morning and another in the evening just to ensure obedience of government to the court orders passed against them. But no country in the world in reality passes through such an experience. If William and Mary are really to be recognized as monarchs instead of James II and James III, that is never a regular phenomena since such situations only rarely occur and may not occur even for once in more than a century for a concerned country. Thus, the consequence of breach of laws of the constitution *even by the government* is mostly contained in the provision of law itself, may usually be contemplated in advance, and does not in ordinary parlance depend on revolutions.

The situation is completely different with conventions of the constitution. When they are regarded as *not* 'court enforceable', the courts usually do not go beyond recognition of the convention in a concerned case. So, the question of *enforcement* and hence *obedience* of government to the court orders as to 'relief or remedy' in case of their violation does not arise. Rather, the consequence remains in large measure 'political' and hence uncertain, indefinite and also unpredictable.

Thus, although the view of Jennings (regarding *general acquiescence* and *successful revolution*) may be useful in elucidating the nature of a *Constitution* in its ultimate analysis that should in no way be interpreted to undermine the somewhat differing role and approach of courts in recognizing and enforcing the two sets of rules embodied in such *Constitution*. I may now, therefore, conclude with some credibility that the laws and conventions of the constitution stand on a different footing as regards the question of their *recognition* and *enforcement* in a court of law. Colin Munro justifies the usefulness of maintaining the distinction:

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139 *Ibid*, 121(emphasis added).

140 Jennings (n 39) 4.

> The validity of conventions cannot be the subject of proceedings in a court of law. *Reparation for breach of such rules will not be effected by any legal sanction*. There are no cases which contradict these propositions. In fact, the idea of a court enforcing a mere convention is so strange that the question hardly arises.
>
> If, in fact, laws and conventions are different in kind, as is my argument, then an accurate and meaningful picture of the constitution may only be obtained if this distinction is made. *If the distinction is blurred, analysis of the constitution is less complete*; this is not only dangerous for the lawyer, but less than helpful to the political scientist.[141]

The analysis thus far made clearly establishes that courts make (or rather should make) distinction between 'legal' and 'non-legal' rules of the constitution on the basis of their *consequence* of violation, reasons for *obedience* as well as their *recognition* and *enforcement* in courts of law. At this point a question may arise: should a convention always have the status of a 'non-legal' rule? Colin Munro answers: "On grounds of principle, and on the evidence of these cases, it may safely be concluded that conventions are *unable* to make the leap from being rules of political obligation to being part of the common law."[142] I, however, respectfully disagree with this view of Munro. I only hold the view that conventions are different from laws (on the grounds just stated above) so long they remain as conventions and as such the 'non-legal' rules of the constitution. I do not hold the view that they cannot become law under any circumstances.[143] Indeed conventions may become part of the law of the land by *legislative* incorporation and also by *judicial* recognition and enforcement under specified circumstances and conditions.

3. Conclusion

The Appellate Division of Bangladesh Supreme Court in its *Idrisur Rahman*[144] decision failed to draw any distinction between *laws of the constitution* and an *established constitutional convention*. The Court also failed to appreciate the distinction drawn in English jurisdiction between *unconstitutional* and *unlawful* conduct of political and constitutional actors of the state. These failures in effect both contributed and expedited the Court's enforcement of the convention of 'consultation' (in the matter of appointment of Judges of the Supreme Court) against the executive organ of the government in the instant case. The Court thus simply failed to distinguish between *mere recognition* and actual *judicial enforcement* of conventions in a given case. The present paper in course of its critical

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141 CR Munro, 'Laws and conventions distinguished' (1975) 91 LQR 224, 228 (emphasis added).

142 CR Munro, *Studies in Constitutional Law* (2nd edn) 74 (emphasis added).

143 Importantly, Jennings also shares the same view: "Nor is it impossible for the conventions to be converted into laws because they are conventions." See, Jennings (n 4) 119.

144 See, *supra* (n 3).

comparative discussion between laws and conventions of constitution establishes these failures of the Supreme Court of Bangladesh.

The paper also shows that the English literature on which the Court heavily relied on[145] for its reasoning and reaching conclusion also maintains distinction between *laws* of the constitution and an *established convention*. Jennings provides a different explanation of the issues from that of Dicey and his analysis based on *general acquiescence* is useful in illuminating the nature of *constitutional rules* and *court orders* as to 'relief or remedy' especially when the decision deals with an issue of constitutional significance. But he, too, ultimately maintains distinction between *laws strictly so called* and *conventions*, and importantly he maintains such distinction mainly on the ground of their 'court enforceability'.[146] His lordship MA Matin J, therefore, committed an error in holding that Jennings rejects Dicey's drawing of distinction between laws and conventions on the ground of their 'court enforceability'.[147] This misunderstood view of Jennings of the learned judge contributed for the Court's not drawing any distinction between *recognition* and *enforcement* of conventions in its jurisdiction. The Court was satisfied establishing simply the *existence* of the convention of 'consultation' for *enforcing* the same without entering into any further inquiry as to the attending circumstances and conditions of judicial enforcement of conventions in its jurisdiction.

However, conventions of the constitution are indeed different from its laws on the ground of their *mode of creation* or *method of formulation*. But this procedural difference alone could not make any distinction of substance between the two sets of rules on the ground of their *certainty* of existence and meaning, *flexibility* in operation and *significance* as rules of the governmental system. Rather, on these grounds, the paper establishes, they are different in terms of *degree* only but not in *kind*. On the contrary, the paper identifies distinction of some substance between these bodies of rules of constitution on the ground of their *consequence* of violation, reasons for *obedience* and as regards the question of their *recognition* and *enforcement* in a court of law. If distinction on these grounds is blurred, to agree with Munro, the analysis of the constitution is less complete; this is not only dangerous for the lawyer, but less than helpful to the political scientist.[148] Thus, an accurate and meaningful picture of the constitution may only be obtained if distinction on these grounds is maintained.[149]

Unfortunately, the Appellate Division of Bangladesh Supreme Court in its leading *Idrisur Rahman*[150] decision on constitutional convention failed to appreciate these distinctions between laws and conventions of the constitution. This paper

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145 See, *supra* (n 31).

146 See, *supra* notes 138 and 139 and the accompanying texts.

147 See, *supra* (n 34).

148 See, Munro (n 141) and the accompanying text.

149 *Ibid*.

150 See, *supra* (n 3).

identifies the reason for failure in Court's measuring "conventions" in the same parlance with "laws" of Constitution as opposed to measuring them with "customary rules" of its system. Regarding the nature of operation of conventions in Bangladesh constitutional system, his lordship MA Matin J held: "Convention when recognized and acted upon is as good as Constitutional law and the provisions of the constitution and is binding like any other principles of law."[151] This view of the learned judge regarding the operation of conventions of its Constitution resembles more with a *Historical* approach towards the status of 'custom or usage' of a legal system.[152]

Article 152 of the Bangladesh Constitution means by "law" "any Act, ordinance, order, rule, regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh". It is not clear from this text whether the expression 'having the force of law' qualifies only 'custom or usage' or all the forms of law included in the definition. However, if one reads the Bengali text of the definition, it becomes clear that the said expression qualifies only 'custom or usage' and not all the forms of law included in it. And proviso to Article 153 of the Constitution makes it clear that "in the event of conflict between the Bengali and the English text, the Bengali text shall prevail." Thus, all the forms of law except 'custom or usage' are *per se* law under the definition of "law" contained in Article 152 of the Bangladesh Constitution. On the contrary, 'custom or usage' is not law *per se* under its definition. It is law only when incorporated in statutes or embodied in judicial decisions in appropriate cases. The Bangladesh Constitution, therefore, reflects the approach of *Positivist* school of jurisprudence towards the status of 'customary rules' existing in its system.[153] This approach of Bangladesh Constitution commensurate in large measure with the approach of modern day courts for the Superior Courts of any jurisdiction, at modern times, take recourse to 'customary rules' only in the absence of any guidance from statues. And any such 'customary rule' becomes part of law only when that forms the basis of judgment of the Superior Court satisfying the attending conditions and circumstances of its recognition and enforcement under the respective case.

The term 'convention' has not been expressly included in the definition of the term "law" under Article 152 of the Bangladesh Constitution. In such absence, constitutional conventions could at best be measured in the same parlance with 'custom or usage' mentioned in the said Article of the Constitution. But the *Idrisur Rahman* [154] Court gave conventions somewhat a *per se* law status in its

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[151] *Ibid*, 106 at para. 250.

[152] To state in very brief, the tenets of historical school of jurisprudence hold that custom is law *per se* i.e. law independent of any declaration or recognition by the state.

[153] Positivist approach, contrary to the view of historical jurisprudence, holds that custom is not law *per se* i.e. not part of the law of the land unless it has received the judicial recognition or it has been embodied in some statute.

[154] See, *supra* (n 3)

constitutional system. His lordship MA Matin J while holding the above quoted view[155] reflecting on the status of conventions in Bangladesh jurisdiction neither referred to the definition clause of Article 152 in its analysis nor provided any justification for adopting somewhat a *Historical* approach towards the operation of conventions in its jurisdiction. Contrary to the view of the learned judge, however, the Constitution of Bangladesh manifestly prefers the *Positivist* approach towards the status of 'custom or usage' existing in its system. As opposed to mere *recognition* applying the Jennings test, judicial *enforcement* of conventions in Bangladesh involves the proper appreciation and resolution of the above identified interrelated themes and inquires within the framework of its Constitution. But the *Idrisur Rahman* [156] Court in its judgment completely omitted their analysis equating "conventions" with "laws" of its Constitution which simply necessitated for undertaking a research venture reflecting again on the distinction between "laws" and "conventions" of the constitution.[157]

To conclude, the present paper through a critical comparative discussion between laws and conventions in effect reflects on the *nature* and *status* of these bodies of rules of constitution which any person responsible for constitutional interpretation or interested in constitutional law should have enough mastery to fully comprehend or appreciate its constitution. Having said the aforesaid observations on the exact nature and relationship of laws and conventions in general, I conclude by emphasizing one final point relating especially to the aspects of 'significance' and 'court enforceability' of these bodies of rules of constitution. We have seen that conventions may be *no less* 'significant' than laws of constitution as rules of governmental system of a country. This fact of conventions must not be too stressed by one to hold the view that they, therefore, should be enforced in a court of law like laws of constitution.[158] At the same time, when one holds conventions are *not* 'court enforceable', he should not imply by this fact alone that conventions are then less 'significant' than laws of constitution as rules of governmental system of a country.

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155 See, *supra* text accompanying note 151.

156 *Op. cit*.

157 However, a detail examination of the attending *circumstances* and *conditions* of judicial enforcement of conventions, as I suggest, fell beyond the limited scope of the present paper. Again, the *Idrisur Rahman* Court found the reasons for existence of the convention of 'consultation' in its system in the independence of judiciary, rule of law and supremacy of the constitution (see, *supra* note 10). The primary object of the paper was also not to examine the judicial enforceability of the convention of 'consultation' in light of these findings of the Court. To reiterate again, the paper only sought to draw the demarcating line between "laws" and "conventions" in the wake of *Idrisur Rahman's* misleading approach in enforcing a convention in its jurisdiction. See also, *supra* notes 10 and 22 in this regard.

158 A Superior Court may certainly weigh the 'significance' of conventions as rules of governmental system of its country. But from analysis and arguments made in the paper, it should be clear that 'significance' alone does not determine the *enforceability* status of a convention within the framework of any constitution.

The Positive Complementarity: An Alternative Approach for the ICC's Engagement

Tapos Kumar Das[*]

Abstract: Restricted membership limits the full exercise of the criminal jurisdiction by the International Criminal Court (ICC). Moreover, the accusation of African bias and selectivity in examination and investigation have substantially impaired its acceptance even among the state parties. The past engagement of the ICC represents the inclination for The Hague based trial rather than encouraging prosecution at the national level; this neglect to the complementarity principle disincentivizes universalization of the ICC. Similarly, the OTP's complete disregard for peace and reconciliation jeopardizes achieving sustainable peace in a conflict situation and generates a considerable challenge to its authority. Hence, this paper proposes that the "complementarity" mandate, if employed "positively" i.e., to enhance collaboration with the states to manifest national/regional prosecution of serious crimes - might help in sidestepping accusation of politicized justice, and pushback and backlash against the ICC. Moreover, the ICC's extension of territorial jurisdiction over the Myanmar/Bangladesh situation has opened a new front where the positive complementarity might be instrumental in gaining cooperation from and confidence of the non-party states. This paper finds that more attention on the positive complementarity might help universalization of the ICC and achieving both peace and justice through multilayered accountability.

Keywords*:* African bias, objectivity of the ICC, complementarity, multilayered accountability, and universalization of the ICC.

1. Introduction

The Rome Statute envisaged the ICC's role complementary to the national jurisdiction and permitted intervention only when a state party is unable or unwilling to investigate and prosecute. The Statute requires effective prosecution at the national level through international cooperation which also includes support of the ICC. Though complementarity is the core agreement to respect sovereignty along with accountability, it is mostly ignored in practice. Despite member states' willingness to investigate and prosecute, the inclination for The Hague based proceeding is acute. This over-enthusiasm resulted in pushback and backlash against the ICC and minimized opportunity for its universal jurisdiction.

Due to the selectivity in examination/investigation and bias against Africa, the ICC's credibility as a judicial institution is compromised. Mamdani observed that

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the ICC has symbolized itself as a "western court to try African crimes against humanity... targeted governments that are US adversaries and ignored actions the US doesn't oppose ... effectively conferring impunity on them".[1] In this backdrop, shifting of the ICC's attention towards "positive complementarity" irrespective of the membership might help minimizing accusation of politicized justice.

Amongst others, Ainley [2] proposed that "positive complementarity" – a collaborative approach between the ICC and member states for national prosecution of international crimes – might help restoring institutional acceptance. This approach adopted by chief prosecutor Moreno-Ocampo - aimed at the judicial capacity building (other than structural or logistic) through policy advocacy, helping relevant national legislation, and training judges and prosecutors - was a success in Colombia. This joint venture avoids backlog in investigation and prosecution and allegation of inappropriate selectivity in the Office of the Prosecutor (OTP).

This paper critically reviews the scholarly works, ICC's decisions, statement of position, and situational investigations to comprehend the present trend of the complementarity. Initially, Part A of the paper explains the issues that led to the concerns regarding the ICC's recent practice and credibility of the complementarity. Part B explores the instances and causes of the African backlash against the ICC. Finally, Part C advances the tools and techniques which might be instrumental in transforming the current trend of complementarity into positive complementarity. The tensions between the ICC and member states are analyzed with reference to the situations in Kenya, Libya, Sudan, Central African Republic, Uganda, Coˆte d'Ivoire, Mali, Democratic Republic of Congo, South Africa, Burundi, Gambia, and the Philippines and are sited when and where deem fit. This paper examines the contrasting complementarity practices and follows the inductive reasoning to substantiate the proposition.

This paper finds that the ICC's response to the complementarity mandate is not encouraging for national prosecution of international crimes, and the "admissibility test" often does not correspond to the "actual position and intention" of the situation states. The author argues that on account of increasing pushback and backlash against the ICC, the positive complementarity might be an alternative approach of engagement. Different techniques of positive complementarity including judicial diplomacy, recognition of and cooperation with regional criminal forums, and decentralization of the ICC might help in universalizing its jurisdiction and establishing multilayered accountability.

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1 Mahmood Mamdani, 'The New Humanitarian Order' (The Nation, 10 September 2008) <https://www.thenation. com/ article / new-humanitarian-order/> accessed on 27 Nov 2019.

2 Kirsten Ainley, 'The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis' (2015) 91(1) International Affairs 37-54.

2. Part A: The Complementarity in Question

***The Ignored Complementarity*:** The complementarity principle requires the OTP to respect local investigation and prosecution of the Statutory crimes. The ICC follows the "same person, same conduct" test to leave any alleged crime for domestic jurisdiction. The prosecution of Thomas Lubanga Dyilo revealed the limit of this approach.[3] When Lubanga was indicted by the ICC for offences like conscripting and enlisting child soldiers, a domestic investigation against him for serious crimes (murder, torture, etc.) was in progress in the Democratic Republic of Congo (DRC).[4] Lubanga's trial before the ICC represents preemptive mistrust on the national justice system and a bad selection of case without proper analysis of "either gravity or complementarity."[5]

Again, Jacobs observes that in Kenya situation, the ICC was not patient enough to allow the performance of the domestic accountability mechanisms for the 2008 post-electoral violence.[6] The ICC permitted *proprio motu* investigation in March 2010 disregarding Kenya's progress in establishing accountability commission and legislation for national prosecution.[7] The civil society and NGOs working in Kenya expected the ICC's engagement in enhancing judicial capacity for domestic trial. Unfortunately, the OTP refused to "expressly engage in training and technical support" for the national accountability mechanism.[8] Kenya expressed unequivocal intention to prosecute suspects domestically, enacted legislation criminalizing crimes against humanity, prepared Bills for a Special Tribunal, and pledged referral to the ICC if the national initiatives failed.[9] Though nothing really indicated that Kenya was "unwilling or unable", the OTP started investigation disregarding national justice initiatives. Such incidents undermine the value of the complementarity principle and indicate judicial imperialism of the ICC.

Indeed, the ICC cannot function likewise to any NGO, also its limited resource does not allow much leverage to engage in judicial capacity building in member or non-member states. Similarly, the investigation by the OTP and prosecution at The Hague are not free rides. If a member or non-member state attempts to initiate

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3 Dov Jacobs, 'The ICC and Complementarity: A Tale of False Promises and Mixed up Chameleons' (Post-Conflict Justice, 11 December 2014) < http://postconflictjustice.com/the-icc-and-complement arity-a-tale-of-false-prom ises -and-mixed-up-chameleons> accessed 9 January 2020.

4 *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06.

5 William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 Journal of International Criminal Justice 731-61.

6 Dov Jacobs (n 3).

7 Chandra Lekha Sriram and Stephen Brown, 'A Breakthrough in Justice? Accountability for Post-Election Violence in Kenya' Centre on Human Rights in Conflict, Policy Paper No. 4, August 2010.

8 Ibid.

9 Lionel Nichols, 'ICC Prosecutor Seeks Permission to Investigate Kenyan Crimes Against Humanity' (EJIL: Talk! 17 November 2009) <https://www.ejiltalk.org/icc-prosecutor-seeks-permission-to-investigate-kenyan> accessed 2 January 2020.

national accountability measures at its expenses, a simple sharing of expertise and monitoring by the ICC might add momentum. For multilayered accountability, rather than disregarding the national accountability measure, however "sluggish" it is, the OTP might target the real "unable and unwilling" states.

***The Objectivity is Challenged*:** The states refer politically troublesome cases to the ICC even when they themselves could initiate proceedings. The self-referrals from Congo, Central African Republic, Uganda, Coˆte d'Ivoire, and Mali represent this abuse of the process of the Court. Allegedly, the self-referring governments strategically manipulate article 13(a) to "delegitimize and incapacitate political enemies." [10] Such self-referrals though keep the ICC alive, risk its judicial objectivity.

The ICC's relationship with the Security Council also has impaired its credibility. Until now, the Council has referred two African situations (Sudan and Libya), ignoring the local and regional disapproval. South Africa alleged that the Council, though referred African situations, ignored similar or worse situations in Afghanistan, Iraq, North Korea, Palestine, Sri Lanka, Syria, Ukraine, and the USA regarding the breach of targeting rules, disproportionality in the use of force, and counterterrorism measures including clandestine interrogations and detention.[11] Thus, the ICC is losing its acceptance by responding to the Council's referral "characterized by double standards, lack of consistency and coherence".[12] The OTP also face challenge over alleged selectivity, namely, one-sided indictment, sequential investigation, and targeting only non-governmental forces where the government is also implicated in abuse; lopsided indictments in the DRC, Coˆte d'Ivoire, and Kenya attracted much criticism.[13]

***Decoupling Peace and Justice*:** The accountability for atrocious crimes might be either criminal or non-criminal. Due to the formidable challenges in implementing criminal accountability at the national and international level, the non-criminal accountability - in the forms of truth telling, public apology, reparations for victims, and initiative for public memorialization – has been widely practiced for transitional justice in the post-conflict society. [14] This approach allows compromising hard criminal accountability for the interest of sustainable peace

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[10] C. Hillebrecht and S. Straus, 'Who Pursues the Perpetrators? State Cooperation with the ICC', 39 Human Rights Quarterly (2017) 162-88.

[11] Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court (19 October 2016) <https://treaties.un.org/ doc /Publication/CN/2016/ CN. 786.2016-Eng.pdf.> accessed 2 January 2020.

[12] Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia' (2018) 29 Criminal Law Forum 63–119.

[13] Matiangai Sirleaf, 'The African Justice Cascade and the Malabo Protocol' (2017) 11 International Journal of Transitional Justice 71–91.

[14] Frank Haldemann, 'Another King of Justice: Transitional Justice as Recognition' (2008) 41(3) Cornell International Law Journal 675-737.

and democracy because these are the ultimate objectives that any criminal justice process intends to achieve.

The Rome Statute does not recognize any procedural immunity whether under national or international law.[15] But in the pre-ICC era,– "the UN itself pushed for, helped negotiate, or endorsed the granting of amnesty as a means of restoring peace and democratic government" in Cambodia, El Salvador, Haiti, Sierra Leone, and South Africa.[16] Countries like Argentina, Brazil, Cambodia, Chile, El Salvador, Guatemala, Haiti, Honduras, Ivory Coast, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay have granted amnesty to their former oppressive regimes to avail peace agreement.[17] Also, there are instances[18] of amnesty in exchange of self-abdication and exile in a foreign country[19] or restricted public life in the home country[20].

Article 6(5) [Additional Protocol II, Geneva Conventions] also encourages granting of wide amnesty at the end of a non-international armed conflict to achieve reconciliation.[21] In *Azapo v. South Africa* case[22] the Supreme Court of South Africa favors amnesty in exchange of full disclosure of the truth. The truth telling is likely to meet the right of the victims and their families to know what atrocities happened during the conflict and why; it ensures acknowledgement from the perpetrators that what they did is wrong. The assumption – revealing is healing - implies that uncovering past abuses can itself bring about political resolve and non-violent co-existence in a post-conflict society.[23] Nino suggests that

> prosecutions may have some limit and must be counterbalanced with the aim of preserving the democratic system. This last caveat is all the more sensible once we realize that the preservation of the democratic system is a prerequisite of

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15 Rome Statute, article 27. Also confirmed by the Appeals Chamber in the *Prosecutor v. Omar Hassan Ahmad Al-Bashir* case [ICC-02/05-01/09], judgment on 6 May 2019.

16 Ibid.

17 Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (Autumn, 1996) 59(4) Law and Contemporary Problems 41-61.

18 Dave Gilson, 'The Exile Files, 2003' (GPF, 21 August 2003) < https://www.globalpolicy.org/ component /content /article /163/28255.html > accessed 7 March 2020.

19 Example: Jammeh (Gambia), Mengistu Haile Miriam (Ethiopia), Hissíne Habré (Chad), Raoul Cedras (Haiti), Jorge Serrano Elias (Guatemala), Alberto Fujimori (Peru), Milton Obote (Uganda), Alfredo Stroessner (Paraguay).

20 Example: P.W. Botha (South Africa), Efrain Rios Montt (Guatemala), Valentine Strasser (Sierra Leone).

21 ICRC, 'Commentary of 1987-Penal Prosecutions' < https://ihl-databases.icrc.org/applic/ihl/ ihl.nsf/ COM/475-760 010? OpenDocument > accessed 12 June 2020.

22 (1996) 4 SA 671.

23 Nevin T. Aiken, 'Rethinking Reconciliation in Divided Societies: A Social Learning Theory of Transitional Justice' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friderike Meith (eds.) *Transitional Justice Theories* (Routledge 2014) 40-65.

> those very prosecutions and the loss of it is a necessary antecedent to massive violation of human rights.[24]

Justice, peace, and democracy are mutually reinforcing imperatives.[25] The ICC might restrain jurisdiction if its intervention is likely to jeopardize lasting peace and democracy in the conflict situation.

Another aspect weakening the ICC's authority is the issuance of indictments during the midst of conflict. Kersten suggests that there may never be a consensus regarding the effects of the ICC on peace, justice, and conflict processes.[26] Yet, experience from Sudan and Uganda suggests that the ICC's intervention in live conflict blocked the peace process and opportunity for transitional justice and caused more harm than the original crime it purported to address.[27] In Uganda, the Juba Peace Accord stalled in 2008 because of the LRA leaders' refusal to attend peace talks due to the threat posed by the ICC's indictments against them and the OTP's decline to drop the indictments.[28]

Similarly, arrest warrants against the Libyan leaders "bolstered widespread perceptions of the conflict as a one-sided revolution between 'good' opposition forces and an 'evil' regime," thereby legitimizing regime change in Libya.[29] The warrant against Muammar al-Gaddafi and his entourage was capitalized by the NATO to legitimize their bombing in Libya.[30] Ainley opines that "the NATO bombing which followed quickly after the referral … had the effect of making the ICC seem like a tool that the Council, or some members of it, can use to justify violence."[31]

Initially, the African Union (AU) had no objection against the ICC's interventions in Uganda, DRC, and CAR. Issuance of a warrant against President Al-Bashir tainted their relationship, stalled peace negotiation, and refueled the conflict. Similarly, the ICC's arrest warrant[32] against top Libyan leaders quashed AU's "efforts aimed at finding a negotiated political settlement to the crisis in

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24 Carlos S. Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100(8) The Yale Law Journal 2619-2640.

25 Report of the UNSC on the Rule of Law and Transitional Justice, 23rd August, 2004, S/2004/616.

26 Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (OUP 2016) 210.

27 Victor Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) 31 Human Rights Quarterly 655-91.

28 Steven C. Roach, 'Multilayered Justice in Northern Uganda: ICC Intervention and Local Procedures of Accountability' (2013) 13 International Criminal Law Review 249–268.

29 Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (OUP 2016) 74.

30 NATO, 'Press briefing on Libya' (28 June 2011) <http://www.nato.int/cps/en/ natolive/ opinions _75808.htm> accessed 25 December 2019.

31 Kirsten Ainley (n 2).

32 In 2011, the UNSC unanimously referred the Libyan situation to the ICC via Resolution 1970 (2011).

Libya, … address, in a mutually reinforcing way, issues related to impunity and reconciliation."[33]

The above discussions illustrate the ICC's neglect to the complementarity and missed opportunity for sustainable conflict resolution at the national and regional levels. For the legality of intervention, the ICC must respect national and regional justice initiatives and priority for the sequencing of peace and justice.[34] In a struggle between rigid accountability and absolute impunity, non-criminal accountability might be a considerable achievement to make a balance between peace and justice. Any national accountability initiative including amnesty, truth commission, indigenous dispute resolution, etc., having the prospect of coupling peace and accountability in post-conflict society should be recognized and respected for achieving the greater objective of the Rome Statute via complementarity.[35]

3. Part B: Backlash against the ICC

After the indictment of Al-Bashir, the African leaders characterized the ICC as a racist, imperial white man's court "hunting" African dignitaries and a "tool for manipulation and neo-colonialism of African States."[36] The AU passed a resolution not to cooperate in arresting Al-Bashir; even "threatened member states with the imposition of sanctions" if they failed to obey the resolutions.[37] The tension intensified when Kenyan President Kenyatta and Vice President Rutto were indicted in 2013 for alleged involvement in post-election violence.[38]

In *Al-Bashir* case,[39] the Pre-trial Chamber failed to explain how the absence of immunity can be justified in relation to states that do not consent to the Rome Statute. The fact that a head of the state enjoys no immunity before the ICC, does not *per se* mean that this exclusion also applies automatically in the horizontal relationship between state parties and non-state parties.[40] Therefore, AU non-cooperation resolution seems lawful for the states not party to the ICC.

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33 Matiangai Sirleaf (n 13).

34 Charles C. Jalloh, Kamari M. Clarke, Vincent O. Nmehielle, 'Origins and Issues of the African Court of Justice and Human and Peoples' Rights' in Kamari M. Clarke, Charles C. Jalloh and Vincent O. Nmehielle (eds.) *The African Court of Justice and Human and Peoples' Rights in Context development and challenges* (CUP 2019).

35 Philippa Webb, 'The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"' (2005) 50 Criminal Law Quarterly 305

36 Konstantinos D. Magliveras, 'The Withdrawal of African States from the ICC: Good, Bad or Irrelevant?' (2019) 66 NILR 419–439.

37 Assembly, 'Decision on the ICL', Assembly/ AU/Dec. 590(XXVI), 31 January 2016, para 3-4.

38 Peter Ford, 'After South Africa's withdrawal, how does the ICC stay relevant?' (*Christian Science Monitor*, 24 October 2016) < https://www.csmonitor.com/After-South-Africa-withdrawal-how-does-the-ICC-stay-relevant> accessed 3 January 2020.

39 ICC- PTC I, Malawi/Chad, *Decision Pursuant to Article 87 (7)*, 12 December 2011 (Arrest of Bashir).

40 Ibid.

In 2016, three African states namely South Africa, Burundi, and Gambia submitted written notifications for withdrawal from the Rome Statute pursuant to article 127; Kenya, Namibia, and Uganda also threatened similar measure. In 2017, the AU adopted the "ICC Withdrawal Strategy" and commended the withdrawing states as pioneer implementers.[41] Burundi and Philippines effectively withdrew membership, whereas, Gambia and South Africa cancelled the notifications.

Such withdrawal perhaps reflects only the will of the government, not of the nation; the degree of parliamentary scrutiny over the withdrawal process also might be questioned. But, in absence of cooperation from the withdrawing states, the preliminary examination or investigation will be difficult, expensive, and perhaps inaccurate.[42] The withdrawal strategy, even though seems to be calming, prudence requires a viable solution to the tension between accountability and respect for African sovereignty.[43] Presently, 21 (out of 55) African states are not parties to the Rome Statute; the continuing hostility with the AU and gradual decline of membership will jeopardize ICC's ambition for universality. More importantly, the gradual withdrawal leaves the populations of withdrawing states "without any (transnational legal) protection."[44]

4. Part C: From Complementarity to Positive Complementarity

The tensions discussed above require the renewed engagement of the ICC to regain the confidence of the resented states. The positive complementarity might be an effective policy to reconnect the missing trust and mapping multilayered accountability.

The Rome Statute intended that the states will be encouraged, "by the mere presence of the ICC, to prosecute" statutory crimes through national courts.[45] The domestic prosecution is advantageous in terms of access to evidence and witness, *in-situ* investigation, and participation of victims; it makes justice visible and enhances the legitimacy of the prosecution.[46] However, manifesting national prosecution is complex as Ellis noted that:

> [D]omestic prosecutions … must reflect international norms of justice… The domestic actors can thwart the course of justice, jeopardizing both the legitimacy and the universality of international norms. The challenge for the international community is to preserve the balance between state and international authority

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[41] Manisuli Ssenyonjo (n 12)

[42] 'ICC judges authorise opening of an investigation regarding Burundi situation' <https://www.icc-cpi.int/Pages / item.aspx?name=pr1342> accessed 3 January 2020.

[43] K.D. Magliveras, 'The Withdrawal of African States from the ICC: Good, Bad or Irrelevant?' (2019) 66 NILR 419-39.

[44] Ibid.

[45] Mark S. Ellis, *Sovereignty and Justice: Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunals* (Cambridge Scholars 2014).

[46] Ibid.

> while strengthening the ability of domestic war crimes courts to prosecute gross violations of international law according to a set of universally accepted, binding legal mechanisms.[47]

To strengthen national jurisdiction by way of complementarity, the Assembly of States Parties in 2010 devised ICC's new policy of engagement in the name of "positive complementarity". It "refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of [statutory] crimes".[48] The policy envisaged voluntary cooperation among states for the national capacity building, financial support, and technical assistance. [49]

The positive complementarity involves an examination of the existence of genuine national proceedings to ensure accountability and engaging in the institutional capacity building if so required. This minimal intervention of the OTP might avoid resistance from the extreme nationalist states. Moreover, the experience from Sudan and Uganda suggests that a robust role (arrest warrant) may not be conducive to peace and stability in the conflict/post-conflict situation.

The OTP is mandated to investigate and prosecute those most responsible for the most serious crimes; but, what about the low-rank perpetrators? Obviously, they need to be prosecuted domestically, and for that enabling national legislation and jurisdiction is urgent. The positive complementarity might allow the OTP to engage in this situation.

The Positive Complementarity in Practice: In 2016, the Government of Colombia and the FARC-EP signed the Final Agreement to end 52 years long "armed conflict and build a stable and lasting peace". The Agreement consisted of a comprehensive scheme for "truth, justice, reparation, and non-repetition" and established a "Special Jurisdiction for Peace" to investigate and prosecute serious atrocities committed during the conflict. There, the OTP engaged with the judiciary, attorney general, investigators, civil society, members of the congress, international organizations for strengthening institutional capacity in respect of legislation, investigation, and prosecution.

Since 2004, the OTP has been examining the situations in Columbia and in 2012, the Colombian Government commended ICC's cooperation in achieving:

> i) around 50,000 demobilized individuals; ii) over 18,000 weapons given up and destroyed; iii) the main leaders of the self-defense groups and their accomplices

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[47] Ibid.

[48] ICC, Assembly of States Parties, *Report of the Bureau on Stocktaking: Complementarity: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap* (13 March 2010), para. 16 < https:// asp.icc-cpi.int /en _menus/asp/complementarity/Documents/ICC-ASP-8-51-ENG.pdf> accessed 15 December 2019.

[49] Ibid.

> behind bars awaiting trials; iv) more than 280,000 people recognized and registered as victims; v) more than 36,000 criminal actions, previously unknown, being investigated.[50]

In 2017, Fatou Bensouda's visit to Colombia and interaction with stakeholders added momentum in bringing army commanders to justice. In Columbia, the positive complementarity reinforced both peace and justice, and enhanced confidence on the ICC.

Regrettably, the ICC's engagement in Coˆte d'Ivoire's post-election accountability measures does not match the Columbian experience. In 2011, Coˆte d'Ivoire started an investigation into post-election crimes which only targeted supporters of former President Laurent Gbagbo; the lopsided domestic prosecutions convicted over 75 Gbagbo's entourage.[51] In 2011, the OTP also initiated *proprio motu* investigation and prosecution; at trial Laurent Gbagbo and Charles Ble Goude were acquitted whereas, the proceedings against Simone Gbagbo remains postponed.[52] While the massacre committed by the pro-Ouattara forces was evident, the OTP's sequenced prosecutorial strategy initially targeting the Gbagbo regime is widely criticized.[53] National prosecution in Coˆte d'Ivoire is hindered due to capacity constraints and failure to meet international fair trial standards. Keeping Columbian success in mind, the ICC needs to engage positively in Coˆte d'Ivoire and other situation states where national justice measure is in progress.

Judicial Diplomacy: Presently, 122 states are parties to the Rome Statute;[54] the crime of aggression adopted in the 2010 Kampala conference has been ratified only by 39 states.[55] Absence from the ICC of the powerful states like the USA, Russia, and China substantially lessened its efficacy and exposed it to resistance and hostility. The universalization of the ICC through expanding membership might be effective for the prosecution of statutory crimes domestically; because the state parties should respect complementarity and implement ICC's requests for

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[50] Ibid, para. 48.

[51] 'Ivory Coast's Former First Lady Simone Gbagbo Jailed' (BBC News, 10 March 2015) <http://www.bbc. co.uk / news/world-africa-31809073> accessed 4 January 2020.

[52] ICC, 'Coˆte d'Ivoire' <https://www.icc-cpi.int/cdi> accessed 31 December 2019.

[53] Sophie T. Rosenberg, 'The International Criminal Court in Cote d'Ivoire: Impartiality at Stake?' (2017) 15 Journal of International Criminal Justice 471.

[54] Of them 33 are the African States, 18 are the Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and the Caribbean States, and 25 are from Western European and other States. ICC <https://asp.icc-cpi. int/en_menus/asp/states%20parties%20to%20the% 20rome%20 statute. aspx> accessed 4 January 2020.

[55] The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression <https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> accessed 4 January 2020.

cooperation in good faith.[56] Even though the states are at liberty to accept or not obligation under the Rome Statute, the prospect of cooperation for criminal justice might encourage them to accept membership.[57] To make it happens, the ICC must engage in diplomacy to gain the confidence of the states.

It is widely alleged that African consent to the ICC was driven by Western-liberal interests and shaped by dependency in donor agreements. A strong judicial diplomacy and outreach program might help embracing membership voluntary, and more compliance and cooperation between the ICC and states. Former ICC President Philippe Kirsch observed that accurate and complete ideas about the Court's activity help in achieving support to accomplish its mission.[58] He visited many counties, received many governmental and inter-governmental delegations at the Court to avail cooperation from the states and universal ratification of the Statute.[59] Robert Cryer opines that such engagements are consistent with the *Code of Judicial Ethics* as judges have freedom of expression, and extra-judicial activities - until it impairs "judicial independence and impartiality".[60] So, there should be considerable outreach activity to increase knowledge of, and support for the ICC amongst those outside the Rome Statute. The countries with conflict situations including Myanmar, Israel, Syria, Libya, Iraq, Sri Lanka, Nepal, etc. might be the appropriate target to this end.

Again, the ICC's assumption of jurisdiction over the crimes committed in a non-state party[61] requires strong judicial diplomacy for the effective exercise of judicial power. Currently, the ICC is "asserting jurisdiction to investigate crimes orchestrated in Myanmar, the actions of CIA agents and other Americans in Afghanistan, of Russians in Georgia and Ukraine, and it may quite possibly soon be investigating the actions of Israeli officials in Palestine."[62] This renewed activism dictates strong judicial diplomacy to ensure access to evidence and the presence of the alleged perpetrators before the ICC.

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[56] Remarks by H.E. Tsuneo Nishida Ambassador Extraordinary and Plenipotentiary and Permanent Representative of Japan on the Occasion of an Informal Interactive Dialogue on the Responsibility to Protect <http:// responsibility to protect. org/ Japan% 20stmt.pdf> accessed 4 January 2020.

[57] ICC, ASP (n 48).

[58] Robert Cryer, 'The International Criminal Court and its relationship to Non-Party States' in Carsten Stahn and Göran Sluiter (eds.) *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 131.

[59] Ibid.

[60] Ibid; Code of Judicial Ethics, articles 9-10.

[61] For example, Myanmar, ICC-01/19-27, Pre-Trial Chamber III, Decision on 14 November 2019, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar.

[62] Douglas Guilfoyle, 'Is the International Criminal Court destined to pick fights with non-state parties?' (EJIL: Talk!, 14 July 2020) <https://www.ejiltalk.org/is-the-international-criminal-court-destined-to-pick-fights-with-non-state-parties/> accessed 16 July 2020.

Engagement with the Regional Forums**:** In May 2014, the AU adopted the Malabo Protocol, which if ratified, will create the first-ever regional Criminal Chamber in the African Court of Justice and Human Rights (ACJHR). Due to overlapping jurisdiction *ratione materiae* between the ICC and the proposed Criminal Chamber, an apprehension for losing ground by the former arises. But the Protocol should not be viewed "as a rebel created by the AU to undermine the ICC,"[63] rather it is likely to introduce a regional mechanism to share and complement the ICC's activities.

The proposed Chamber intends to address real African problems that lead to heinous crimes and destabilize the region. Compared to the ICC, its jurisdiction is wider, encompassing both transnational and international crimes, corporate criminal responsibility, environmental crime, illicit exploitation of natural resources, and unconstitutional change of the government.[64] Moreover, due to affiliation with a political body like the AU, and the "existence of geographic, historical and cultural bonds among states, decisions of the proposed Chamber might meet less resistance than the ICC".[65] The proposed Chamber, if comes into being, will offer leverage to dedicate the ICC's limited capacity elsewhere.

The Protocol though provided for complementarity with other domestic and regional courts, keeps distance with the ICC;[66] also, it fails to clarify issues like cooperation and surrender of suspects in case of overlapping jurisdiction. Nevertheless, articles 54(3)(c) and 87(6) of the Rome Statute allow cooperation between the ICC and regional organizations and could be utilized to engage with the ACJHR.[67] Besides, dual membership is not a bar to an existing obligation to cooperate under the Statute. Hence, the ICC ought to devise a strategy to allow the growth of regional criminal forums. It must engage the ACJHR and AU positively, and act as a "last resort" only when there is a self-referral with full cooperation. If the regional court's actions amount to credible or genuine investigations and prosecutions, it must make the case inadmissible before the ICC. [68]

While criticized for providing temporary immunity for the existing heads of the state or governments,[69] the Malabo Protocol is likely to add a new layer in regional accountability and human rights protection. The temporary immunity clause though inconsistent with the Rome Statute, offers a balance between justice and

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[63] Charles C. Jalloh (at el.) (n 34).

[64] ACJHR Statute, article 28A.

[65] Matiangai Sirleaf (n 13).

[66] ACJHR Statute, article 46(H).

[67] Amnesty International (2015), 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court' <https://www.refworld.org/pdfid/56a9ddcf4.pdf> accessed 5 January 2020.

[68] Charles C. Jalloh (at el.) (n 34).

[69] ACJHR Statute, article 46A bis.

African claim for sovereignty; moreover, the alleged perpetrator could be prosecuted after tenure. This immunity clause would not be unreasonable if contrasted against the reality that, 71 states representing 73 percentage of the world population do not belong to the ICC, and their high dignitaries enjoy jurisdictional immunity.[70] Their absence from the ICC generates both impunity and vulnerability.

Despite some disapproval, the past African criminal justice mechanisms have earned respect in terms of cost and disposal time and rate. The Rwandan Gacaca court[71] or trial of Hissène Habré[72] in the Extraordinary African Chamber might better reflect the achievements. In 2015, Kenya suggested amendment to the Rome Statute to incorporate complementarity with regional criminal forums and ensure *in-situ* proceedings of the international crimes.[73] Kenya is yet to make a further move, so any AU member state can regenerate the proposal. By allowing the proposal, the Assembly of States Parties might secure collaboration with the future regional forums including the ACJHR. The ICC never intended to be the sole judicial response to international crimes; recognition of regional accountability mechanism would rather strengthen complementarity between the ICC and African states.[74]

***Decentralization of the ICC*:** Magliveras proposed the creation of the "ICC regional circuit chambers" as a solution to "alleviate any (real or perceived) African fears and … allow the ICC to perform its mandate more efficiently, to accelerate its work, and to ensure tangible results."[75] Creation of the circuit chamber seems permissible under article 39(2)(c) of the Rome Statute, which allows simultaneous constitution of more Chambers if required for efficient management of the judicial workload.[76]

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70 Of 193 recognized states 122 states are parties to the ICC.

71 Matiangai Sirleaf (n 13). Between 2000-12, with an estimated 12,000 community-based courts and 169,000 judges, gacaca completed almost two million genocide-related cases at the cost of USD 48.5 million.

72 The trial of Habré began on 20 July 2015. On 30 May 2016, the EAC pronounced its verdict, sentencing Habré to life imprisonment for his complicity in the torture; crimes against humanity of rape, forced slavery, murder, massive and systematic practice of summary executions; kidnapping of persons followed by their enforced disappearance, torture and inhumane treatment; and of the war crimes of murder, torture, inhumane treatment and unlawful confinement. See, Trial International, 'HISSENE HABRE' < https://trialinternational.org/latest-post/hissene-habre/ > accessed 6 July 2020.

73 ICC, Assembly of States Parties, Fourteenth Session, 'Report of the Working Group on Amendments', ICC-ASP/14/34, 16 Nov 2015, para. 18.

74 Charles C. Jalloh (at el.) (n 34).

75 KD Magliveras, 'The Withdrawal of African States from the ICC: Good, Bad or Irrelevant?' (2019) 66 Netherlands International Law Review 419-39.

76 Rome Statute, article 39(2)(c): "Nothing ... shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires."

For better engagement with the African states, the Assembly might create a new regional circuit chamber as per the amending authority provided in article 122.77 The future African regional circuit chamber may imitate the jurisdiction and composition of the ICC having a sit in any of the African states; moreover, to regain confidence, its composition must represent nationals of the contracting parties of the African region.[78] Being regional in nature and scope, it might consider African customs, legal traditions, societal values, and rituals, provided that they are consistent under article 21(1)(c) of the Statute. [79]

Thus, the present proposition aims at transforming the ICC more user friendly, reliable, and responsive to the developing needs of the African states.[80] "Instead of foreclosing the option of regional prosecutions", the ICC needs to be decentralized to create more access to justice to tackle impunity. [81]

5. Conclusion

The states consented to the Rome Statute relying on the complementarity. So, the promotion of national prosecution and minimal intervention should be the ICC's principle of engagement.

The objectivity and fairness of a judicial body enhance its legitimacy and compliance. The ICC's procedural selectivity, untimely, and uninvited intervention in live conflict hinders the peace process and generates a considerable backlash. Therefore, prioritizing or sequencing peace and accountability should not be the sole prerogative of the ICC, rather must secure the greater interest of the people in the area of conflict. For multilayered accountability, more emphasize should be given on the positive complementarity between the ICC and state parties and the shortcomings of national justice initiatives need to be mitigated by mutual cooperation. In this connection, the Assembly of States Parties may authorize the OTP or form a committee of experts for removal of disparities between national and international justice.

For universalization of jurisdiction and mitigation of tension with withdrawing states and non-party states, the ICC needs to strengthen judicial diplomacy. Regional judicial forums including the proposed Criminal Chamber of the ACJHR

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77 Magliveras (n 75).

78 Ibid.

79 Ibid. As per article 21 (1) (c), the Court can apply: "... general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

80 Ibid.

81 Charles C. Jalloh (at el.) (n 34).

should be recognized and engaged as a part of positive complementarity, and in case of overlapping jurisdiction, the ICC must show restraint.

The advantages of national and regional prosecution should not be ignored due to the fear of an "empty case list" in the ICC. "The absence of trials before the ICC, as a consequence of the regular functioning of national institutions, would be a major success."[82] Decentralization of the ICC through regional circuit chamber might be the most ambitious technique for future engagement with the prospect of satisfying the increasing demand for the regional criminal justice system without being diversification or fragmentation in international criminal law.

[82] The Prosecutor Moreno-Ocampo, in his speech of 16 June 2003 at the swearing in ceremony at The Hague.

Medical Waste Management and Processing System in Post-COVID Bangladesh: A Legal Analysis

Preeti Kana Sikder*

Abstract: Medical wastes (MWs) have always been a serious issue in the domain of public health. Such wastes generated in hospitals and clinics are disposed of through a specific management and processing system. In light of the ongoing global pandemic, urgency has developed in addressing the surge of MW and their proper management. This paper aims to reflect upon the theoretical significance of the laws relating to MW management and processing in Bangladesh. By painting the picture of a sound medical waste management and processing system, the paper continues to explore how the environmental legal regime of Bangladesh can benefit from strengthening it.

Keywords: Medical Wastes, Legal Framework, Environmental Pollution, COVID-19 Pandemic, Healthcare Services.

1. Introduction:

Medical wastes (hereinafter MWs), also known as biomedical wastes or health care wastes, are part of the waste management issues leading to environmental pollution worldwide. Generally, this term indicates wastes arising from hospitals, clinics or institutions that provide healthcare services. In parallel, the medical waste management and processing system refers to an organised system through which MWs are collected and disposed of. Numerous problems occur when harmful MWs are not carefully handled. However, such health hazards accompanied by environment pollution are just tip of that iceberg. When the problems caused by improper dumping of MWs are not addressed, many lives fall in jeopardy. The reality is, even a very small amount of hazardous health care waste can affect a large number of people as it constitutes a public health hazard, if not managed properly.[1]

The dangerous spread of novel coronavirus through surface contamination, which has affected billions of people around the world and caused the COVID-19 pandemic, can be considered as a very practical portrayal of such risk. Current scientific research has not provided evidence that waste management is a vector

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[1] Ministry of Health and Family Welfare, Government of the Peoples' Republic of Bangladesh, Environmental Assessment and Action Plan: For the Health, Population and Nutrition Sector Development Program (HPNSDP), (February 2011) 8

for the transmission of this deadly virus.[2] Nonetheless, considering that waste workers are everyday on the streets despite isolation and quarantine measures taken for the whole population, additional measures should be considered.[3] It is widely reported that in response to this pandemic, hospitals, healthcare facilities and individuals are producing more wastes than usual, including masks, gloves, gowns and other protective equipment that could be infected with the SARS-CoV2 virus.[4] Concern regarding such increase has been shown by Keith Alverson[5] in the following words: "The unfortunate reality worldwide is, however, that an enormous amount of healthcare waste, including waste generated as a result of our pandemic responses, is either mistreated with improperly maintained technologies, or not treated at all."[6] Therefore it is apparent that, the COVID-19 pandemic is causing unprecedented increases in MW generation, whose unsound management can lead to additional environmental and health hazards.[7] At this point, it is important to remember that, waste generation in healthcare establishments cannot be regulated under the same framework for industrial establishments. In case of industrial wastes, the concern stems from a very different perspective where the nature of the wastes themselves can be altered through careful initiatives and attempts can be taken at reducing the impact. Whereas, regarding MWs, its generation is necessary for protection of lives and well-being of people through generations. For these obvious but important reasons, the MW management system has always required careful supervision. It is of no surprise that, the process of collecting and disposing MW is subjected to strict legal directions and organisational supervision in the modern world.

In addition, from a human rights perspective, the benefits of establishing a sound MW management and processing system has many benefits. Back in July 2011, the Special Rapporteur of the UNHRC presented his report at the UN General Assembly on the adverse effects of unsound management and disposal of MW which, he concluded, impacted the human rights of a significant number of people including the medical staff, patients, workers in support services, workers in waste disposal facilities, recyclers, scavengers, and the general public. He called on —all

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2 International Solid Wastes Association, Waste Management during the Covid-19 Pandemic, (April 2020) <https://www.iswa.org/fileadmin/galleries/0001_COVID/ISWA_Waste_Management _During_COVID-19.pdf> accessed 1st June 2020

3 ibid

4 UNEP, Factsheet 1 – Introduction to Covid-19 Waste Management, (Covid-19 Waste Management Factsheet 2020) < https://www.acrplus.org/images/project/Covid-19/UNEP_1_Intro_COVID-19_waste.pdf> accessed 1st June 2020

5 Director of the United Nations Environment Programme International Environmental Technology Centre

6 UNEP, Healthcare Waste: What to do with it? <https://www.unenvironment.org/news-and-stories/story/healthcare-waste-what-do-it> accessed 3rd June, 2020

7 UNEP, Factsheet 4 - Policy and legislation linked to COVID-19 and pandemics, (Covid-19 Waste Management Factsheet, 2020) <https://wedocs.unep.org/bitstream/handle/20.500.11822/32777/FS4.pdf?sequence=1&isAllowed=y> accessed 1st August, 2020

relevant stakeholders, including States, international organizations and mechanisms, the donor community, public and private health-care facilities, the pharmaceutical industry and civil society to strengthen their efforts to achieve safe and sustainable management of medical waste.[8] Being based on dignity, fairness, equality, respect and autonomy, these rights ensure us freedom to control our own lives. Therefore, waste management practices, which affect each and every person on the Earth also has a unique relation with these inherent rights all of us are entitled to. In the latest months, such importance has increased manifold in the context of the COVID-19 pandemic which has spread globally in an unprecedented rate. Deadly viruses, like the SARS CoV-2, become capable of crippling the entire world's functioning when necessary MW disposal practices fail.

In Bangladesh, with the advancement of medical sciences, the nature of MW has altered and is not limited to gauges and bandages anymore. Yet the scientific evidence is very limited to determine the actual public health problems from MW here.[9] However, few risks are very visible. Since our land is susceptible to frequent flooding, waste from health care facilities can easily be spread with water and can cause regular outbreak of water-borne diseases like diarrheal disease during and after flooding, mainly caused by improper management of MW.[10] Moreover, the amounts of infected waste is increasing here with fast spreading of blood- infected HIV/AIDS incidence among certain groups of population.[11] Despite such risks, very few healthcare establishments, taking help from both Governmental and Non-Governmental institutions, follow the systematic procedure in disposing their wastes. Most of such arrangements are confined within the Capital. As a result, a large number of people are being exposed to life threatening circumstances every day due to absence of proper management mechanisms. Being already burdened with faulty waste management systems, it has become difficult for us to address the threat accompanied with dysfunctional MW management. Therefore, it is now crucial to investigate and establish how an efficient medical waste management and processing system can save our lives.

This paper focuses on the significance of implementation of an effective system which allows MW management and processing to be carried out without a glitch. Therefore, the discussions explore the importance of getting such management and processing system to be up and running rather than elaborating the most

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[8] UNEP, Compendium of Technologies for Treatment/Destruction of Healthcare Waste, (2012) 7

[9] Emdadul H. Syed, Mahmuda Mutahara, and Mosiur Rahman, 'Medical Waste Management (MWM) in Dhaka, Bangladesh' (2012) 24(3) HHCP p. 144 < https://www.researchgate.net/publication/254096670> accessed 3rd June, 2020

[10] Ministry of Health and Family Welfare, Government of the Peoples' Republic of Bangladesh, Environmental Assessment and Action Plan: For the Health, Population and Nutrition Sector Development Program (HPNSDP), (February 2011) 17

[11] ibid

effective practices of disposal and processing, which shall be an excellent field for public health research by its own merit. For the purpose of this article, a sound MW management and processing system can be defined as such which abides by all the legal requirements. Recognising the interdependent nature of MW management and processing activities, both of these steps will be referred as one integrated system dedicated towards proper disposal of MWs.

Management and processing of MW indeed plays an exceptionally delicate role in protecting the environment. That is why this paper puts forward the issue as to why it is important to maintain a strong and effective MWM system in Bangladesh from the legal perspective. After introducing the definition and nature of the MW management and processing system in Bangladesh, the third part of the article explores the basic legal framework dealing with steps and directions of MW management and processing from both international and national perspectives. In exploring that issue, the discussion focuses on the imminent risks posed by the COVID-19 pandemic which are necessary to deal with through a proper enforcement of the laws relating to MW. The third part of this paper explains how this field of law is functioning in the societal and practical context of Bangladesh. With this combined portrayal of functionality in display, it should be clearer for the practitioners and policy makers to identify better course of action for implementing a sound MW management and processing system.

Therefore, through a doctrinal approach, this paper aims at establishing the significance of sound MW management practices within the environmental legal regime. Being a qualitative study, the major discussion is put from a theoretical angle. Legislation, treaties and policy documents have been consulted as primary sources while organisational reports and journal articles were used as secondary sources of research. At the end of this research, certain recommendations have been made to clarify how establishing an effective MW management and processing system can enhance environmental rule of law in Bangladesh.

2. What is the Medical Waste Management and Processing System?

At the onset of embarking upon the core query of this research, it is important to find out not only the nature and definition of MW but also the requirements of sound MW management and processing practices. MWs have been defined as a specific type of waste which is generated in the course of providing medical services by the healthcare establishments, i.e. hospitals, clinics and diagnostic centers. It is an integral part of any health-care service. As per Rule 2(v) of the Medical Waste (Management and Processing) Rules, 2008, medical waste means any solid, liquid, aerobic, or radioactive material generated from medical treatment, antidote system, diagnosis or disease related research for humankind,

which causes harmful changes to the environment by being emitted, thrown or stacked.[12]

As these wastes are automatically generated in the course of various diagnosis, monitoring and curative activities, a wide variety of MWs are piling up every day. Judging by their toxicity, these wastes are mainly divided into two major categories: hazardous medical waste and non-hazardous medical waste. Non-hazardous wastes include food or paper wastes and some biological wastes as well. So far as the kitchen wastes and non-clinical wastes are concerned, they do not pose any great threat. On the other hand, when it comes to hazardous bio wastes; a proper guideline for their disposal is a must. The WHO has provided an estimate for average distribution of health-care wastes regarding planning of waste management in developing countries such as Bangladesh.[13] Adhering to such calculation, it can be deduced that approximately 80% of the total MW generated in our country falls under the category of general health-care waste. Among the rest 20%, pathological and infectious waste takes up 15%. While wastes containing sharps take up only 1% waste, 3% can be contributed to generation of chemical or pharmaceutical waste. That leaves even less than 1% of special waste, such as radioactive or cytostatic waste, pressurized containers, or broken thermometers and used batteries. Noting that there are multiple risks inherent in MW including toxic chemicals and radioactive materials, the WHO has chosen to use the term health care risk waste instead of medical waste.[14] Being germ laden, hazardous wastes are the prime focus of MW management process. Even if these wastes constitute smaller portion of the MW bulk, these are never negligible.

Moreover, the systematic process through which MWs are disposed of is widely known as medical waste management system. This disposal process contains quite a long list of activities due to the variations in the components of MW. There are separate step-by-step directions to follow for each type of wastes. Some parts of this process are often time consuming and require careful moves. As a result, it tends to be a bit complicated as a system. Wastes that are deemed potentially infectious may be treated prior to disposal by a number of different technologies that either disinfect or sterilize them. These technologies include incineration, steam sterilisation, dry heat thermal treatment, chemical disinfection, irradiation, and enzymatic (biological) processes among others. In 2002 there were more than one hundred specific technologies in use.[15] However, while defining the term

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[12] The Medical Waste (Management and Processing) Rules of 2008 also contains a detailed list of medical wastes in its Schedule 1.

[13] Emdadul H. Syed, Mahmuda Mutahara, and Mosiur Rahman, 'Medical Waste Management (MWM) in Dhaka, Bangladesh' (2012) 24(3) HHCP 142 <https://www.researchgate.net/publication/254096670> accessed 3rd June, 2020

[14] Pollution Issues, 'Medical Waste', <http://www.pollutionissues.com/Li-Na/Medical-Waste. html# ixzz6VjepqYMX>, accessed on 1st August, 2020

[15] ibid

Medical Waste Management it is necessary to differentiate it from Medical Waste Processing. It is not uncommon for us to use these two terminologies interchangeably and sometimes even synonymously. Nonetheless, from a legal perspective, there are concrete differentiations between these two concepts. While the steps of collection, segregation, packaging, decomposing, incineration, refining, purification and removal of MW have been defined as Medical Waste Processing, the activities including transportation, storing, record keeping, monitoring, observation and supervision of the whole process are defined as Medical Waste Management.[16] Simple observation of these two abovementioned definitions explains that medical waste processing takes place at an earlier stage and involves activities that require direct handling of the waste. On the other hand, the steps of medical waste management contribute in keeping the whole mechanism effective in the long run. Both of these are continuing activities and appear to be interdependent in nature.

3. Analysing the Legal Framework of Medical Waste Management and Processing:

In identifying the best impacts of effective MW management and processing practices, it is necessary to explore the existing legal framework. Adhering to a dualist nature of legal system, Bangladesh has to transform or adopt international legal principles into its municipal laws by the use of appropriate constitutional machinery.[17] The prevailing practice in Bangladesh suggests that most of the international treaties that Bangladesh has ratified need to be transformed into national law before being applicable in our legal system.[18] Indeed there are quite a few domestic legal provisions that determine the course of action for processing and management of MWs in Bangladesh which have followed the directions promulgated in international legal instruments. As a result, the existing legal framework regulating the MW management and processing practices in Bangladesh range from international obligations to specific laws enacted through the Parliament. The discussion on legal framework regulating MWs can therefore be covered from both international and national perspectives.

Primarily, three basic principles of international environmental laws can be identified based on which most of the national legal instruments deal with the MW processing system and ensure its effectiveness. These basic principles have been described in the ICRC Manual on Medical Waste Management in light of

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16 Rules 2(vi) and 2(vii) of the Medical Waste (Management and Processing) Rules, 2008

17 Sheikh Hafizur Rahman Karzon, Abdullah Al Faruque, 'Status of International Law under the Constitution of Bangladesh' (1999) 3:1 BJL < http://www.biliabd.org/article%20law/Vol-03(1)/Sheikh%20Hafizur%20and%20Abdullah%20Al-Faruque.pdf> accessed on 8 November 2020

18 ibid

establishing best practices.[19] Firstly, the polluter pays principle implies that any producer of waste is legally and financially liable for disposing of that waste in a manner that is safe for people and the environment. Therefore, the health care institutions remain liable for the wastes produced in their areas. Secondly, the precautionary principle portrays that when the risk is uncertain it must be regarded as significant and protective measures must be taken accordingly. This principle confirms the responsibility of health care institutions in treating the produced wastes. Finally, under the proximity principle, hazardous wastes must be treated and disposed of as close as possible to where they are produced. This is how prevention of the spread of pollution becomes possible through legal implementation.

Though the issue of hazardous wastes has been under scrutiny for a while, there is no international convention solely focused on MW. Bangladesh has ratified thirty international conventions, treaties and protocols (ICTPs) relating to protection of the environment[20] and a few national laws were influenced by some of those ICTPs containing provisions regarding waste management. Hence, a brief look at the international legal provisions will be helpful in describing the legislation and policies put forward by the Government of Bangladesh (hereinafter GoB). The major environmental treaties which regulate specific aspects of management and disposal of MW are: Agenda 21,[21] Basel Convention,[22] and Stockholm convention.[23] While Agenda 21 aimed to minimise the generation of waste and introduced guidelines for treatment and disposal of waste products by safe and environmentally sound methods and promoted placing all residue in sanitary landfills[24], Basel Convention was the very first instrument which introduced "clinical wastes from medical care in hospitals, medical centers and clinics", "wastes from the production and preparation of pharmaceutical products" and "waste pharmaceuticals, drugs and medicines" in the list of hazardous wastes.[25] Moreover, Basel Convention added "substances or wastes containing viable micro-organisms or their toxins which are known or suspected

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19 ICRC, Medical Waste Management (2011) p. 28-29 available at: < https://www. icrc.org/ en/doc/assets/files/publications/icrc-002-4032.pdf> accessed on 20 July 2020

20 Md. Iqbal Hossain, International Environmental Law: Bangladesh Perspective, 2004

21 It was adopted by more than 178 Governments at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, 3 to 14 June 1992, < https://sustainable development.un.org/content/documents/Agenda21.pdf > accessed on 1 May 2020

22 Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal was adopted on 22 March, 1989 and entered into force on 5 May, 1992, this convention currently stands to be ratified by 181 States.

23 Stockholm Convention on Persistent Organic Pollutants was adopted on 22 May 2001 and entered into force on 17 May 2004, available at: < http://www.pops.int/> accessed on 20 March 2020

24 ICRC, Medical Waste Management (2011) p. 28-29 available at: < https://www.icrc.org/en/doc/assets/ files/publications/icrc-002-4032.pdf> accessed on 20 July 2020

25 UNEP, Annex I, Basel Convention, p. 46 < https://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf> accessed on 20 July 2020

to cause disease in animals or humans" as hazardous which addressed MWs more directly. On the other hand, Stockholm Convention included MW incinerators in the list of industrial source categories that can result in significant emissions of persistent organic pollutants into the environment. In addition, open burning of waste, including burning of landfill sites, has been included in the list of other source categories in the Convention that may generate dioxins and furans. Therefore, it was the adoption of these international instruments that identified the necessity of a sound MW management and processing system.

Subsequently, in 2005, WHO published a guidance manual[26] describing the minimum requirements to be contained in any MW regulating legislation, which included: general provisions of the law, authorities of enforcement, provisions related to health-care waste producers and operators, provisions related to management, treatment and disposal procedures, and specific penalties. Later on, WHO published the Core Principles[27] which demonstrates the importance of achieving safe and sustainable management of MWs. These principles require that all associated with financing and supporting health-care activities should provide for the costs of managing health-care waste amounting to their duty of care. Under this manual, manufactures also share a responsibility to take waste management into account in the development and sale of their products and services.[28] As a member of the WHO, Bangladesh is duty bound to implement these suggestions put forward by the international organisation. Even though with the advent of worldwide movement relating to curbing pollution the environmental legal regime of Bangladesh has transformed widely, due to lack of national chemical policy and law, management for MW in Bangladesh is fragmented.[29] Among the legal instruments that discuss necessary steps relating to controlling pollution caused by MWs, only one legal document fulfills most of the requirements put forward by the WHO as mentioned above.

Efforts for improvement in managing MW has initiated in this country since the beginning of 2005.[30] Prior to this era, there was a Medical Practice, Private Clinics and Laboratories Ordinance, in 1982. This ordinance only described some criteria

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[26] WHO, Preparation of National Health-Care Waste Management Plans in Sub-Saharan Countries, available at: <https://www.who.int/water_sanitation_health/publications/healthcare-waste-guidance-manual/en/> accessed on 20 July 2020

[27] WHO Core Principles for achieving safe and sustainable management of health care waste, during the International Health Care Waste meeting in Geneva on June 20 - 22, 2007 <https://www.who.int/water_sanitation_health/publications/hcwprinciples...care.> accessed on 20 July 2020

[28] WHO and UNEP, National Health Care Waste Management Plan: Guidance Manual, <https://www.who.int/water_sanitation_health/medicalwaste...manual1.pdf> accessed on 20 July 2020

[29] Akter N, Kazi NM, Chowdhury MR, Medical Waste Disposal in Dhaka City: An Environmental Evaluation (1999) ICDDR, B

[30] Ministry of Health and Family Welfare, Government of the Peoples' Republic of Bangladesh, Environmental Assessment and Action Plan: For the Health, Population and Nutrition Sector Development Program (HPNSDP), (February 2011)

for obtaining a license to establish a hospital or clinic stating the proper accommodation with hygienic environment. The hospitals were also mentioned in the environmental laws of Bangladesh to be categorised with other industries and to be brought under the restriction of being built only in non-residential areas. As per the Schedule 1 of the Bangladesh Environment Conservation Rules 1997, hospitals fall under the 'Red' category carrying highest degree of environmental risks and clinics along with pathological laboratories which fall under the 'Orange-B' category being comparatively less harmful for environment. Later on, the Department of Environment (hereinafter DoE) had developed a Hospital Waste Pocket Book in 2010 which included the procedures for effective MW management for all health care establishments. However, beyond such initiatives, national level legislative instruments also play an important role in determining the guideline for best practices in controlling MW. Brief discussions on such instruments are as follows:

i) *National Environmental Policy, 2018:* The first national environmental policy of 1992 was not very direct about maintaining a sound management system of medical wastes. That dearth has been addressed in the latest policy. The national environmental policy of 2018 puts an exclusive focus on public health and health services.[31] It advocates for saving public health and the environment from detrimental impact of ensuing from use and activities of all radioactive materials including x-ray and MW. For this purpose it empowers the Ministry of Health and Family Welfare along with the Department of Health as corresponding authorities.

ii) *Medical Waste (Management and Processing) Rules 2008:* Under the provision of Section 20 of the Bangladesh Environment Conservation Act 1995, GoB is empowered to enact subsequent rules in order to achieve the goals of conservation of environment. Identifying the severe environmental impact caused by mismanagement of MW, GoB has framed a Rule in 2008 introducing an administrative framework responsible for MW management and processing. The primary task this 2008 Rule[32] fulfills is purely administrative. Here, rule 3 sets up an 'Authority' to provide license of MW management to selected persons. This authority with three members remains responsible for observing the performance of the licensees. They are also responsible for collecting and publishing information related to pollution created by MWs. Another Committee established under rule 16 is termed as the 'Advisory Committee' which is held responsible for examining successful waste management policies and advise GoB about this. Besides giving directions relating to proper management of MWs, this document also outlines the penalties for violating the directions. The highest penalty has been determined to be simple imprisonment for two years or fine of BDT 10,000.[33]

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[31] National Environmental Policy, 2018, p. 10

[32] Published in Bangladesh Gazette (Extraordinary), dated November 5, 2008, p. 6679-6705

[33] Rule 11 of the Medical Wastes (Management and Processing) Rules, 2008

Such structure of the 2008 Rule adheres to the basic direction provided by WHO in preparing legislative documents in regulating MWs as mentioned in prior part of the chapter.

iii) *National 3R Strategy for Waste Management:* The issue of proper management of MW has also been brought under a national waste management strategy in Bangladesh. The DoE has formulated the National 3R (Reduce, Reuse and Recycle) strategy[34] with an intention to meet the challenges related with the continuous increase in waste generation and resource demand.[35] The sector responsible for managing biomedical wastes has been identified as a priority sector within the 3R strategy along with municipal solid waste, industrial waste, commercial waste and agricultural waste.[36] Under this strategy, recycling of medical waste has been discouraged in order to prevent health hazards. Aside from prioritising capacity building and waste management education programmes, this document also declares its aim to manage such wastes in an environmentally sound manner. The major steps in promoting source separation and management of medical waste under this strategy paper are as follows:

- Producers of bio-medical and other hazardous waste that can threaten public health will be made primarily responsible for disposing such waste under the supervision and care of the Ministry of Health and the Ministry of Environment.
- Biomedical and pathological waste including body parts of humans will be disposed of through methods that conform to safety standards stipulated by the government and will be treated by the producer using environment friendly technology under City Corporations/Pouroshavas supervision. In some cases regional treatment facility will be established for treating MW.
- The City Corporations/Pouroshavas will insist on placing special containers at sorting stations, recyclables collecting centers or other public places for the deposit of hazardous waste.

iv) *Additional Environmental Action Plan under Health, Population and Nutrition Sector Development Programme (HPNSDP):* In September 2015, the Directorate General of Health Services published an action plan focusing specifically on the current issues relating to MW management and processing in the health care facilities in Bangladesh.[37] Aiming to improve health services, service provision,

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[34] Department of Environment, National 3R Strategy for Waste Management, <http://www. doe. gov. bd/site/publications...National-3R-Strategy-for-Waste-Management> accessed on 4 January 2020

[35] ibid

[36] ibid

[37] Ministry of Health and Family Welfare, Additional Environmental Action Plan under Health, Population and Nutrition Sector Development Programme (HPNSDP), (2015) <http://www. mohfw.gov.bd/index.php?option=com_docman&task=doc_download&gid=6927&lang=en> accessed on 20 July 2020

and strengthening the health system in Bangladesh, the Ministry of Health and Family Welfare prioritised the environmental impacts brought upon by MWs. This document provided an elaborate action plan containing twelve urgent issued and identified responsible institutions to carry out such actions. In order to adequately address the environmental issues regarding Civil works-related activities, a revised checklist for environmental screening was also included. The proposed timeline for this action plan was completed on 2016 but no follow up to such tasks carried out by DoE and Directorate General of Health Services could be accessed in public domain.

Throughout the analysis above, the basic strategy for prioritising MWs in order to protect the environment is apparent. However, there are some gaps to be covered in our national medical waste management policy and legislation. None of these documents provide for solutions linked to emergency situations; such as an epidemic or a pandemic. There is no existing provision which can be used for authorising the expedited adoption of short-term and emergency measures needed for a pandemic. Hence, it can be deduced that, the existing legal structure in treating and controlling the impact of MWs are falling short under the ongoing risk factors posed by the COVID-19 pandemic.

4. Practicalities of Medical Waste Management and Processing System Post-COVID Bangladesh:

Good health is inevitably dependent on a healthy environment. Likely, the core purpose of health care related institutions is to ensure good health for everyone. Hence, in the basic course of their action arises a responsibility of addressing environmental degradation. For instance, an assessment of waste generation rate data from around the world shows that about 0.5 kg of MW per bed is produced in hospitals per day.[38] While providing for treatment of illness and other health care services to ailing people, these health care providing institutions generate these MWs which pollute the environment in a large scale. Even though there are very few documented cases of disease transmission from contact with medical waste,[39] that non-documentation simply reflects the basic negligence regarding this sector. It cannot be ignored that mismanagement in the MW disposal sector negates the basic purpose of the medical service. Therefore, the significance of a sound MW management and processing system is essentially high. On the one hand it is necessary to reduce the suffering of diseased and unwell population, and on the other hand it is equally important to ensure clean environment for them to thrive. However, this circle of activities is not linear. As a result, such responsibility lies not only upon the health care providers, but also upon the State.

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38 UNEP, Compendium of Technologies for Treatment/Destruction of Healthcare Waste (2012)

39 Pollution issues, Medical Waste <http://www.pollutionissues.com/Li-Na/Medical-Waste.html #ixzz6VjeFCCID> last accessed on: 10th August, 2020

With the advancement of medical science, we have come to learn more and more about the long lasting impacts that MWs cause. It can be easily identified that the cautious treatment of MWs, by separating them from general wastes, is a relatively new concept. It took us, the humankind, quite a while to realise why these substances should be separately treated and disposed of and how the duties of such disposal can be distributed. Therefore, development of legal directives for careful management of MW is also a product of modern times. Undoubtedly, the current situation relating to an ongoing pandemic puts an added impetus on the authorities worldwide to implement the relevant legal provisions. As Arnold Kreilhuber[40] explains: in order to ensure that the world population avoids negative, long-term health and environmental effects relating to COVID-19 waste management issues, strong laws and institutions are essential.[41]

On one hand, it can be agreed upon that the improvement of health care system is bound to result in increased production of health care wastes. In Bangladesh, back in 2011, the Ministry of Health and Family Welfare had projected an assumption about an 8% increase in the number of patients per year.[42] This projection indicated that, such increase would lead to a 5% increase of MW generation every year and there would be 3% net increase in generation of MW.[43] This report also mentioned that in the year 2009, from the total annual generation of MW of 33,221 tons, 8,208 tons were hazardous.[44] These wastes are of such nature that putting an end to its production is not possible at all. It is a part and parcel of the health care system. Therefore, the rule is, the more improved any health care system is, it disposes of healthcare wastes more safely. On the other hand, the discussed risks show us how serious the effects of mismanagement of medical wastes can be. The descriptions from previous chapters also confirm that management of healthcare or medical waste is complex in nature. In the following paragraphs it shall be explained as to how the significance of legislation controlling MW management and processing has been on the rise even before the outbreak of COVID-19 pandemic.

Responding to these practicalities, the bar and bench of the Supreme Court of Bangladesh had also become active concerning proper management of MWs in Bangladesh. For instance, back in April 2018, after hearing a writ petition filed by Md. Ahmed Al Amin, a reporter of the daily, Bangladesh Protidin, a bench consisting of Justice Moyeenul Islam Chowdhury and Justice Md Ashraful Kamal

[40] The Acting Director of Law Division, UNEP

[41] UNEP, Factsheet 4 - Policy and legislation linked to COVID-19 and pandemics, Covid-19 Waste Management Factsheet, 2020, available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/32777/FS4.pdf?sequence=1&isAllowed=y> accessed on 18th June, 2020

[42] Ministry of Health and Family Welfare, Government of the Peoples' Republic of Bangladesh, Environmental Assessment and Action Plan: For the Health, Population and Nutrition Sector Development Program (HPNSDP), (February 2011)

[43] ibid

[44] ibid

of the High Court Division had issued an important rule.[45] Coming across a newspaper article, which reported how hospitals and diagnostic centres in Chattogram were disposing MW in open bins, the petitioner came forward before the court on February 4, 2018. The newspaper also published that total of 87 hospitals and 180 diagnostic centers were operating in that district while only one private organisation, named Chattagram Seba Sangstha, was working to dispose the MWs. The Secretaries to the ministries of environment and forest, health, and home affairs, DGs of DoE and DGHS, deputy director of the DoE in Chattagram, and Bangladesh Private Clinic and Diagnostic Owners' Association were made respondents to this writ petition by the petitioner's lawyer Syed Mohidul Kabir. The rule imposed by the High Court had ordered those respondents to explain why they should not be directed to take necessary action to protect the environment regarding MW disposal, recycling and transportation for the safeguard of nature and health care of the citizens.[46] It also ordered these abovementioned authorities to explain why they should not be directed to set up Effluent Treatment Plant (ETP) in every hospital, diagnostic and other medical center for the disposal and treatment of MW.[47] Moreover, the health secretary and the director general of DoE were ordered to submit a report by July 22, 2018 on the progress over forming the authority in every administrative division by complying with provisions of the Medical Waste (Management and Processing) Rules 2008.[48] It is important to note how pragmatic and proactive the judiciary has been in addressing this urgent issue. In fact, to prioritise a quick solution, the respondents were given a time frame of 4-weeks to start complying with the directions given by the Court. However, such follow up steps were never undertaken by the concerned authorities.

Nowadays, there is a definite increase in the recent trend in generation of MW because of the pandemic worldwide, which is yet to be officially reported by the GoB. Even though the GoB has made it mandatory for the public to use masks and other protective gears, no special disposal mechanism for such wastes has been

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[45] Star Online Report, 'HC Rule over medical waste management' *The Daily Star* <https://www.thedailystar.net/country/bangladesh-high-court-hc-rule-over-medical-waste-management-1559824> accessed 18 November 2020 and 'Monitor medical waste disposal' *The Daily Star* <https://www.thedailystar.net/backpage/monitor-medical-waste-disposal-1560049 > accessed 18 November 2020

[46] Star Online Report, 'HC Rule over medical waste management' *The Daily Star* <https://www.thedailystar.net/country/bangladesh-high-court-hc-rule-over-medical-waste-management-1559824> accessed 18 November 2020

[47] 'Monitor medical waste disposal' *The Daily Star* <https://www.thedailystar.net/backpage/ monitor-medical-waste-disposal-1560049 > accessed 18 November 2020

[48] Star Online Report, 'HC Rule over medical waste management' *The Daily Star* <https://www.thedailystar.net/country/bangladesh-high-court-hc-rule-over-medical-waste-management-1559824> accessed 18 November 2020

implemented. In addressing this issue, a public interest litigation was filed[49] this year seeking a directive for implementation of the Medical Waste (Management and Processing) Rules, 2008 in the wake of the countrywide littering of used COVID-19 treatment equipment and protective materials, such as: masks, gloves, and PPE. Responding to this Public Interest Litigation filed by Ms. Anika Ali and Mr. Humayun Kabir Pallob, on July 19, 2020 the High Court asked the Secretary of Ministry of Environment, Forest and Climate Change to submit a report by August 10, 2020 on what steps the GoB had taken to collect, treat and dispose of MWs. The rule yet awaits disposal. However, the issue that we cannot take full precaution from the spread of the pandemic if we neglect the MW disposal system is quite clear.

Nonetheless, it is not only during a pandemic that MW disposal system becomes relevant in our lives Keeping the serious effects of MW management and processing on human rights worldwide, the UN mandated Mr. Calin Gerogescu as a special rapporteur by Human Rights Council Resolution 9/1 in 2011.[50] In his report, Mr. Gerogescu rightly focused on sound management and disposal of MW and recommended specific measures to achieve safe and sustainable management of such wastes. Based on the recommendations from the report of the special rapporteur following steps can be considered in improving the current situation:

Firstly, raising awareness among the stakeholders has to be the prime concern. This single step can deal with a lot of problems in MW disposal system. Awareness about the harm MWs impose can reduce the percentage of infections and diseases to a great extent. However, this responsibility does not lie into personal level only. Therefore, the State has to take all appropriate measures to raise awareness of the problems, especially among policymakers and communities living in the vicinity of sites where MW is incinerated or landfilled. Secondly, non-governmental organisations working in the field of public health or environmental protection should include the promotion of sound health-care waste management in their advocacy and conduct programmes and activities that contribute to sound health-care waste management. Thirdly, professional training is one important tool in the fight of establishing human rights. MWs are generated because of various diagnosis, monitoring and curative activities on patients which vary in nature and therefore the systems of their disposal tend to be separate as well. The relevant national health authorities have to include such varied systems of waste management in the curricula of future medical practitioners and nurses, to provide appropriate information on the occupational risks to which medical and

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[49] M. Moneruzzaman, 'High Court Seeks Report on Medical Waste Management' *The New Age* (Dhaka, 20 July 2020) <https://www.newagebd.ne...article/111604> accessed 18 Nov 2020

[50] Human Rights Council, Mandate of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, < https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_1.pdf> accessed 18 Nov 2020

paramedical staff may be exposed, and to organise training opportunities on safe health-care waste management for staff handling MWs. Finally, without funding and technical support none of these abovementioned steps can be carried out in our country. For the period of 2011-2016, cost for MWM of public HCFs of the country was BDT 508.08 million (about 7.21 million US$).[51] In general, the MW generation rate is estimated to be 0.8 to 1.67 kg/bed/day, so that the annual MW generation rate is approximately 93,075 tons per year in Bangladesh.[52]

Moreover, in a country where the basics of MW management remain unknown to the stakeholders, international support can be of real help. States which are advanced in controlling the hazardous effects of medical wastes shall come forward. Without sitting idle, our state shall also take all appropriate steps, to the maximum of its available resources, to allocate adequate financial resources to all public and private institutions and bodies responsible for the safe and environmentally sound management of health-care waste. These include health authorities, the national environmental protection body, managers of health-care facilities and managers of private or public waste-disposal agencies.

Nonetheless, in context of the ongoing COVID-19 pandemic, it has become extremely urgent for us to put greater focus on proper management of MW. About the disposal of MW in home, the situation is worse because people at home are not aware of health effects of MW.[53] The extent of using all categories of medical protective equipment is on the rise. Surgical mask and gloves, which were mostly being used within the area of hospitals, have now dramatically become an inseparable part of our daily lives. Yet, the type and the origin of waste covered by the legal measures are excluding all household sources of MW. As already discussed in prior part of the article, GoB has instructed the patients with mild symptoms to take treatment from home[54] but failed to provide any emergency process for segregating the infected MW. Such exclusion of household generation of MW from the management process can cost us big time. By following all the urgent directions, we can ensure cleaning our hands and using masks while maintaining physical distance. Still, the risk of infection that remains hidden within a used facemask can only be mitigated by a proper waste management system.

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51 Ministry of Health and Family Welfare, Government of the Peoples' Republic of Bangladesh, Environmental Assessment and Action Plan: For the Health, Population and Nutrition Sector Development Program (HPNSDP), (February 2011)

52 Emdadul H. Syed, Mahmuda Mutahara, and Mosiur Rahman, 'Medical Waste Management (MWM) in Dhaka, Bangladesh' (2012) 24(3) HHCP 140–145 <https://www.researchgate.net/publication/254096670> accessed 3 June, 2020

53 ibid 144

54 Corona Info, Press Release on Coronavirus Prevention <https://corona.gov.bd/storage/press-releases/June2020/CvOCZobyC4DkDsn1kPes.pdf> accessed 3 June, 2020

While other countries, like Italy[55] have taken up urgent processes in treating such MWs, Bangladesh is surely lagging behind. In the context of this pandemic, the national 3R strategy of waste management has become futile. Infectious MWs cannot be reused nor recycled. Therefore, as an emergency stop gap solution, adherence to the 3S solution is now needed. This solution implied the following steps: Sorting, Segregation, and Storage. Following the UNEP Guideline[56], COVID-19 waste shall be separated from general medical waste volumes at point of generation. Such waste shall then be stored to assess waste volumes and allow the development of an appropriate response/stop-gap solution. The shocking amount of disposable wastes needs proper disposal methods. As more and more Covid-19 positive patients are taking treatment from home, the protective equipment used by them should also be brought under a strict management system. We are lacking the additional measures to monitor the export/import of increased quantities of potentially COVID-19-contaminated/hazardous waste as well. It has now become essential to provide clear mandate through administrative steps and determine how such used facemasks are categorised. In absence of such a direction, it is possible for the life threatening virus to spread far and wide even when the patients are maintaining isolation. As medical wastes are collected separately from hospitals and clinics, the local government should bring the residential areas under similar system. It is also important for us to outline the necessary measures to prevent negative effects on the environment and/or to restore the environment in case it was damaged by increased volumes of waste and by the application of the measures.[57]

It should also be kept in mind that, the patients do not always visit the hospitals for treatment. This scenario has become even more relevant since the spread of COVID-19 pandemic. The guidelines provided by the Government encourage both the suspected and affected COVID patients to consult doctors through telephone and provides specific directions avoiding hospital visits.[58] As a result, the number of patients availing telemedicine services has risen extraordinarily during the national lockdown declared by the GoB in response to the pandemic. However, the portions of population who are being treated in home still are generating MW which is not being processed as required and have not been categorised under the relevant legislation either. It has been a common practice in

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[55] Municipal waste management and COVID-19 Summary of observed trends (March 2020), < https://www.acrplus.org/images/project/Covid-19/ACR_2020_03_Waste_ management_ covid19 _graph.pdf> accessed 3 June, 2020

[56] UNEP, Factsheet 1, available at: <https://www.acrplus.org/images/project/Covid-19/UNEP_1_Intro_COVID-19_waste.pdf> accessed 5 June, 2020

[57] UNEP, Factsheet 4 - Policy and legislation linked to COVID-19 and pandemics, Covid-19 Waste Management Factsheet, 2020, available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/32777/FS4.pdf?sequence=1&isAllowed=y> accessed on 20th August, 2020

[58] Corona Info, Press Release on Coronavirus Prevention <https://corona.gov.bd/storage/press-releases/June2020/CvOCZobyC4DkDsn1kPes.pdf> accessed 6 June, 2020

our country for the caregivers and family members to throw away the used needles, syringes, and other items in open places.[59] This is how hazardous health-care waste; also known as health-care risk waste has become highly difficult to trace in our country. While management of general wastes is also an important factor in environment protection, such discussion is not intended to be carried out here. The COVID-19 pandemic is a health emergency and the measures to tackle such emergency are directly connected to legislative action. When not managed soundly, infected medical waste could be subject to uncontrolled dumping, leading to public health risks, and to open burning or uncontrolled incineration, leading to the release of toxins in the environment and to secondary transmission of diseases to humans.[60] Therefore, it is an urgent demand of our times that the State undertakes concrete measures to separate and treat the infectious MWs in an efficient way.

5. Concluding Remarks:

Management and processing of MW does not mean mere dumping of biomedical wastes in a specified area. This process goes much further than that as it requires meticulous planning in order to be executed. That is why MW management is the most critical environmental issue that is within the remit of the health sector.[61] It is quite obvious that this issue of MW cannot be handled only through personal steps. Without organisational awareness, only individual awareness among few groups of people stands to be insufficient. Even though health care facility providers are the main actors in this aspect, such institutions' lone endeavours cannot ensure completion of the disposal process of wastes. This is where the contribution of the Government authorities become relevant. Therefore, in facing this serious challenge combined effort of the State, its general people and the concerned organisations is indispensable.

It is recommended that GoB focuses on establishing standardised, routine and homogenised management procedures in all the health care facilities of the country. The focus should also expand toward identifying hazardous MW streams inside and outside such facilities; implementing a tracking system that enable to monitor and control the hazardous MW production and management in the health-care facilities; reducing occupational risk and control nosocomial infections

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59 Emdadul H. Syed, Mahmuda Mutahara, and Mosiur Rahman, 'Medical Waste Management (MWM) in Dhaka, Bangladesh' (2012) 24(3) HHCP 144 <https://www.researchgate.net/publication/254096670> accessed 3 June, 2020

60 UNEP, Factsheet 1 – Introduction to Covid-19 Waste Management, Covid-19 Waste Management Factsheet, 2020 available at <https://www.acrplus.org/images/project/Covid-19/UNEP_1_Intro_COVID-19_waste.pdf> accessed 13 June, 2020

61 Strategic Plan for Health, Population and Nutrition Sector Development Program (HPNSDP), 2011-2016 <http://www.mohfw.gov.bd/index.php?option=com_docman&task=doc_download&gid=1384&lang=en> accessed 15 June, 2020

as well as protect the environment; and finally, enabling to treat the waste at a reasonable cost and reducing environmental pollution. However, the biggest adjustments need to be made in the sector of monitoring, compliance and enforcement of MW related laws in Bangladesh. The analysis of the given legislative measures can not specifically point out any reporting obligations of those responsible for carrying out the waste management process. Economic tools employed to promote compliance (such as tax incentives and subsidies) are also absent. Our need to revision of the legislation, to make it more agile to deal with similar future situations, without compromising the state of the environment has become urgent.

In conclusion, the MW management and processing system can be compared to a two edged sword - absence of which results into widespread violation of human rights and when enforced improperly, it still results in deterioration of public health and environment. Improper management system poses a great threat not only to the people directly involved with it but also to the people who are around. The quantity of MW is increasing day by day due to the variety and ever growing number of medical services and nursing homes, facilities. Immediate steps should be taken by the authority to face the defects in managements. We need to prevent uncontrolled dumping and stop open burning of MW. In order to avoid these types worst environmental and health effects, there is no alternative to definitive and effective legal steps. Due to the fatal spread of the novel coronavirus, it has become imperative [62] to protect ourselves from droplet infection by using facemasks and other protective gears. Such facemasks used by suspected coronavirus patients shall immediately be categorised as medical wastes in order to contain the level of damage caused by the pandemic. It is the only logical way through which our legal regime can adapt to the emerging crisis and establish environmental rule of law.

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[62] Government of Bangladesh, Corona Info, Press Releases <https://corona.gov.bd/storage/press-releases/May2020/uaq6fknvAlbHczLVE5kF.pdf>,<https://corona.gov.bd/storage/press-releases/June2020/CvOCZobyC4DkDsn1kPes.pdf>,<https://corona.gov.bd/storage/press-releases/May2020/809308ee5817d840c7864e062640360a.pdf> accessed 18 June 2020

Virtual Classrooms in Bangladesh: Assessing Child Vulnerability in the Light of International Law

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Abstract: The ongoing global pandemic caused from COVID-19 has opened up new challenges and has created innovative ideas in order to address the consequences caused from it. Virtual schooling system could be seen as such an idea in Bangladesh which has resulted a number of vulnerabilities for the children, from the viewpoint of international law. The article focuses on the major violations of child right observed in the virtual classrooms, searches for suitable approaches how as to manage the online teaching program in more efficient way; also, analyses the debates conceived within international law - in particular rethinking the right to education.

Keywords: Child vulnerability, virtual classroom, right to education, and human rights.

1. Introduction

The ongoing pandemic started during the beginning of 2020 caused from Coronavirus Diseases (COVID-19)[1] which has restricted the world to perform regular activities, also introduces a number of innovative alternatives. To maintain social distance is one of the key prescriptions in order to prevent individuals from infecting the diseases since the contamination outbreaks via physical touches. Whereas, virtual communication has appeared as a popular mode of transmission that makes it possible to connect individuals by following the prescription - to maintain social distance - practised around the globe during the pandemic condition. The educational institutions practise virtual communication as a means of teaching and learning during the challenging situation in order to continue the schooling system.

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[1] COVID-19 causes severe respiratory syndrome which symptoms include fever, cough, fatigue, breathing problem and smell loss. The virus transmits via physical touch; while, in certain cases the symptoms in an infected person can be even unexpressed. Yet, neither any medicine for the treatment of the diseases nor preventive vaccine is available. However, preventive measures include maintaining social distance, hand washing, using face mask, etc. The outbreak was first diagnosed in Wuhan, China during November 2019 and has spread in more than 188 countries. *See* 'Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It' <https://www.who.int/emergencies/diseases/nsovel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it> accessed 27 August 2020.

The child schooling system in Bangladesh is not an exception in terms of using virtual method - a large number of school teachers are using virtual classrooms to teach their students, subject to availability of resources. In one sense, the virtual teaching and learning system seems supportive to rescue the children[2] from the discontinuation of their student life, and to get rid of loneliness resulted from staying home for a long period. However, the system has caused diverse vulnerabilities to the children including physical, mental and emotional degradation on one hand and violated certain rights of the children articulated in public international law on the other hand.

The article aims to determine the major vulnerabilities that the children face at virtual classrooms in Bangladesh, also searches for suitable suggestions for the betterment of the children from the viewpoint of international human rights law. In fact, this study covers mostly doctrinal perspectives which encompasses socio-legal issues carried out following documentary analysis and close observation. Nevertheless, explaining the method of virtual learning in general would provide the readers with an easy understanding of the topic. While, analysing the concept 'child vulnerability' in the context of virtual classrooms in Bangladesh perspectives would enhance knowledge on how to protect the children from violation of human rights, and contribute knowledge to the development of modern international law.

2. Virtual Classrooms

The virtual classroom is fairly a new idea in Bangladesh although it was originated and practised mostly in the developed states, widely known as Virtual Learning Environments (VLE). However, the application of VLE is also available nowadays in the rest of the world due to the consequences arisen out of COVID-19.

The Joint Information Systems Committee in the United Kingdom has provided a definition of VLE as 'the components in which learners and tutors participate in "online" interactions of various kinds, including online learning.' [3] Another relevant concept in this regard is Learning Management System (LMS) which refers to 'a software application or web-based technology used to plan, implement, and assess a specific learning process'.[4] In addition, Paulsen has described LMS as 'broad term that is used for a wide range of systems that organise and provide

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2 In fact, the definition of child differs from the purposes of certain international conventions. The Convention on the Rights of the Child includes the right of education of the children; for the purposes of the Convention, a child is defined as "every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier" (Ar 1). While, the Children Act 2013 considers any persons up to the age of 18 years as child (S 4).

3 Joint Information Systems Committee, 'MLEs in Further Education: Progress Report' (2000) <http://www.jisc.ac.uk/index. cfm?name=news_circular_7_00> accessed 27 August 2020.

4 Morten Flate Paulsen, 'Online Education Systems: Discussion and Definition of Terms' (2002) 202 NKI Distance Education 1.

access to online learning services for students, teachers and administrators.'[5] The services may include communication tools, access control and content learning facilities, according to the thought.

In fact, both VLE and LMS are used to describe classroom facilities and learning management in online sphere. Whereas, virtual learning enables teachers and students to maintain several tasks that may include sharing files and information; downloading information; email sending and receiving; using discussion boards; undertaking tests and surveys; organising time schedules and resources; along with linking teaching and learning application and activities under single information management system.[6] The major VLEs and LMSs currently available are Google Classroom, Moodle, Canvas, BrightSpace, TalentLMS etc. Besides, there are several video conferencing tools such as Zoom, Google Meet, Skype, Facebook Room, etc. that offer free video calls and enable to connect a large group.

During the pandemic situation, the Ministry of Education and the University Grants Commission of Bangladesh have taken up online teaching policy as an interim strategy that could be pondered as alternative to the regular teaching method. The government has arranged multiple mediums for teaching and learning such as television programmes and internet. Such strategy could be seen timely in Bangladesh, like most other countries, it was never imagined that it should be prepared for such a devastating pandemic situation, and has to encompass VLE in primary education policy. In fact, the government had almost no preparation at the beginning stage of the pandemic although the VLE has enabled the students to get access to learning. However, ensuring the access of all children in an equal footing is currently impossible due to lack of institutional capacities - in both intellectual and infrastructural levels. Moreover, a government report recently released shows that the current number of internet users in Bangladesh is 103.47 million and while, 94.9 million among them use mobile internet.[7] The number is quite significant which appears that 58.4% of the total population in the country have access to internet. Yet, mere the percentage does not cover all who need online access to get into online teaching system.

3. Child Vulnerabilities in Virtual Classroom

International law is primarily concerned with number of key aspects of child rights. Looking at the aspects in the context of virtual classroom in Bangladesh,

[5] ibid; Martin Weller, *Virtual Learning Environments: Using, Choosing and Developing Your VLE* (Routledge 2007), p 3.

[6] Helena Gillespie (ed), *Learning and Teaching with Virtual Learning Environments* (Learning Matters 2007) 1.

[7] 'Internet Subscribers in Bangladesh June, 2020. | BTRC' <http://www.btrc.gov.bd/content/ internet-subscribers-bangladesh-june-2020> accessed 21 August 2020.

along with opening up the concept 'vulnerability' may provide a good sense of assessing the vulnerabilities of children.

The term 'vulnerable' is rooted to Latin terms *vulnerare* and *vulnus* which means 'to wound' or 'wound.' Dictionary meaning of vulnerable suggests 'capable of being physically or emotionally wounded' or 'open to attack or damage'.[8] While, the concept 'vulnerability' indicates such a condition whereby a person is affected or can potentially be affected by physical, mental or emotional harm.[9] Whereas, scientific endeavour supports that vulnerable groups of people are disproportionally exposed to risk, but who is included in the groups can change dynamically.[10]

Vulnerability is a relative term, changes from circumstance to circumstance *i.e.*, a person otherwise not considered vulnerable at the outset of a pandemic can become vulnerable depending on the policy response. For the purpose of this study, vulnerability would be understood as variability in physical and mental health, living standard and socioeconomic status. Amid the pandemic, a new class of vulnerable individuals has arisen – the students; while, the children among the students are experienced as more vulnerable in virtual classes. In fact, they are exposed to multi-dimensional damage under this complex situation which has led the government to a stagnant environment. The negative impacts of the vulnerabilities are likely to affect the learning capacity of the students and to cause other social risks for the children and vulnerabilities could be compared to a continuous vicious cycle of dis-advancements.[11]

Physical appearance of teachers and students in the classroom is the classical method of general teaching in Bangladesh. The teachers at all different levels (such as primary, secondary, higher secondary, graduation and post-graduation) directly guide the students being physically appeared in the classrooms and laboratories. Besides, classrooms equipped with modern instruments such as whiteboards, projectors, audio-visual display are also visible in urban areas and higher studies institutions. However, since the inception of the pandemic broken in, the entire schooling system has been interrupted and the government ordered to suspend the traditional learning system in April 2020 due the outbreak of the

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8 'Definition of Vulnerable' <https://www.merriam-webster.com/dictionary/vulnerable> accessed 20 August 2020.

9 Ingrid Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law* (Routledge 2017); Marisa O Ensor and Elzbieta M Gozdziak (eds), *Children and Migration: At the Crossroads of Resiliency and Vulnerability* (Palgrave Macmillan 2010).

10 The Lancet, 'Redefining Vulnerability in the Era of COVID-19' (2020) 395 Lancet (London, England) 1089.

11 Catherine Drane, Lynette Vernon and Sarah O'Shea, *The Impact of 'Learning at Home' on the Educational Outcomes of Vulnerable Children in Australia during the COVID-19 Pandemic* (National Centre for Student Equity in Higher Education, Curtin University 2020).

pandemic. [12] Subsequently, different educational institutions have started delivering lectures in virtual classrooms, in particular LMS and VLE, which is fairly a new method in Bangladesh vastly introduced and practised throughout the country due to COVID -19.

The government has made primary education compulsory for all citizens, which starts from elementary level when a child becomes five years old. In addition, other parallel curriculums include madrasa and vocational education along with English medium schooling system. The nature of each curriculum is different and thus the vulnerabilities appeared throughout the system are diversified. Moreover, a number of socio-economic components and other factors affect the overall scenario of online teaching. Thus, the child students are exposed to multi-level vulnerabilities in the online schooling system.

a) Unequal access to digital technologies

Access to digital technologies considers not only the access to internet facilities but also connects a wide number of issues such as encompassing physical, digital, human and social resources and relationships. [13] The Convention against Discrimination in Education (CADE) primarily focuses on depriving or limiting any person or group of persons to education of an inferior standard.[14] In fact, the right to education has not yet been a justifiable right under the legal regime of Bangladesh although the Constitution pledges for adopting effective measures in order to provide the appropriate education in the light of societal needs.[15]

Given the urgency in the pedagogical transformation, the government of Bangladesh had to start online method quickly which suffers from numbers of limitations in both capacity and planning. On top, the sudden downturn in the health situation and a rapid transformation in the pedagogical way have left both teachers and students puzzled. Moreover, access to distance learning through digital technologies observed distinctly unequal among the child students in many respects.[16]

b) Socio-economic disruption

The pandemic has created economic disruption, layoff from part-time job and employment at private sectors has squeezed the financial strength of significant

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[12] Sir John Daniel, 'Education and the COVID-19 Pandemic' [2020] PROSPECTS <http://link. springer. com/10.1007/s11125-020-09464-3> accessed 20 August 2020.

[13] Mark Warschauer, *Technology and Social Inclusion: Rethinking the Digital Divide* (MIT Press 2003) 7.

[14] Convention against Discrimination in Education 1960, Article 1.

[15] The Constitution of the People's Republic of Bangladesh, Article 17.

[16] See Richard Armitage and Laura B Nellums, 'Considering Inequalities in the School Closure Response to COVID-19' (2020) 8 The Lancet Global Health 644.

number of guardians caused challenges to afford their children to online study.[17] Further, a few floods[18] along with the recent cyclone named 'Amphan'[19] have caused a lot of sufferings to human lives and properties, also destroyed lot of infrastructures in Bangladesh which has impacted on online studies as well. In addition to available internet connection, there are other resources necessary to take part in virtual classes, like electricity, requisite devices and accessories etc. which in turn needs to pay extra money. The desired expectation to the school authorities is that they would pay special attention to the children considering the factors harmful to them in the changed environment due to the pandemic. For instance, a recent rule issued by the High Court Division of the Supreme Court of Bangladesh includes to formulate a scheme of fixing the amount of tuition fees of private schools during COVID-19 outbreak and how to collect the fees, while two English medium schools claim the regular fees for conducting only virtual classes.[20]

Moreover, Natural disasters such as cyclone and flood are common phenomena in Bangladesh which negatively impact on the livelihoods of the coastal and rural people, wreaking havoc on their economy. A significant number of children in the country come from the villages and they are unable to get access into online learning activities in the emerging situation.

As Bowles has pointed out that "against potential alterations to social contract is the fact that the gap between rich and poor is likely to be exacerbated by the pandemic."[21] Thus, the post pandemic world will become more unequal and less healthy in terms of economic trends, also will cause financial infirmity to the children, which might affect the whole education system of Bangladesh once again.

c) Physical and psychological disruption

Previous studies support that the children are physically less active during their vacation period, get longer screen time, irregular sleep patterns and less

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17 For instance, see, Devin C Bowles and Marguerite C Sendall, 'COVID-19: The Elephant in the Virtual Classroom' (2020) 6 Pedagogy in Health Promotion 156.

18 '3 Lakh Flood-Hit People Face Drinking Water Crisis in Kurigram' (*The Daily Star*, 18 July 2020) <https://www.thedailystar.net/flood-in-bangaladesh-2020-3-lakh-people-face-drinking-water-crisis-1932229> accessed 21 August 2020.

19 Aljazeera, 'Cyclone Amphan Kills Dozens, Destroys Homes in India, Bangladesh' <https://www.aljazeera.com/news/2020/05/cyclone-amphan-leaves-trail-destruction-bangladesh-india-200521035745307.html> accessed 21 August 2020.

20 'Why Usual Fee for Online Classes, HC Asks' *The Daily New Age* (25 August 2020) <https://www.newagebd.net/article/114468/why-usual-fee-for-online-classes-hc-asks> accessed 30 August 2020.

21 Bowles and Sendall (n 15); Lenore Manderson and Susan Levine, 'COVID-19, Risk, Fear, and Fall-Out' (2020) 39 Medical Anthropology 367; Xudong Zhu and Jing Liu, 'Education in and After Covid-19: Immediate Responses and Long-Term Visions' [2020] Postdigital Science and Education s42438.

favourable diets which may result to weight gain and loss of cardiorespiratory fitness.[22] This scenario is true for the children attached to digital technologies during the pandemic situation in Bangladesh, also victims of the pandemic.[23] Whereas, engaging to virtual classrooms may exert adverse influences on lifestyle of the children during the pandemic, likely to be worse when they are confined in homes.[24] For example, psychological disruption may cause a child to be drug-addicted, mentally retarded, or even committing suicide.[25] In fact, this is a new situation that the world is currently going through where the children are exposed to a high risk of psychological breakdown. While, according to Sprang and Silman, the mean result of post-traumatic scores were four times higher among the children who had been quarantined than in those who were not.[26]

Under the challenging circumstances, the physical and psychological condition of the children in particular the students of elementary grade will adversely elevate when the whole learning process is confined into internet and device-based technology. Article 31 of the CRC[27] urges for ensuring the right to relax and play.

While, the National Education Policy 2010 suggests creating a frolic and creative environment for the students at primary and secondary levels.[28] However, the Policy suffers from having any guideline in order to develop a sustainable and healthy environment during any adverse condition occurred due to any natural calamity or a pandemic as such. As a result, virtual classroom compels the children to be exposed to screen for a long period of time which may cause several medical conditions including blurry eyes, myopia, tiredness, etc. Subsequently, the situation gets worsen when private coaching of the children takes extra screen

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22 Keith Brazendale and others, 'Understanding Differences between Summer vs. School Obesogenic Behaviors of Children: The Structured Days Hypothesis' (2017) 14 International Journal of Behavioral Nutrition and Physical Activity 100.

23 Shahnaz Parvin, 'Coronavirus: How the Children are the Silent Victim of this Pandemic' *BBC News Bangla* <https://www.bbc.com/bengali/news-53098344> accessed 9 November 2020.

24 Guanghai Wang and others, 'Mitigate the Effects of Home Confinement on Children during the COVID-19 Outbreak' (2020) 395 The Lancet 945.

25 For instance, a student and his mother jointly committed suicide in Bogra as result of a family quarrel caused from mental depression of the family members generated from managing internet connection for online classes. The reported suicide is different compared to usual causes for committing suicides in Bangladesh in a sense of following the typical pattern of self-harm. See Mohammed A Mamun, Rubaiya Matin Chandrima and Mark D Griffiths, 'Mother and Son Suicide Pact Due to COVID-19-Related Online Learning Issues in Bangladesh: An Unusual Case Report' [2020] International Journal of Mental Health and Addiction <http://link.springer. com/ 10.1007/ s11469-020-00362-5> accessed 24 August 2020.

26 Ginny Sprang and Miriam Silman, 'Posttraumatic Stress Disorder in Parents and Youth After Health-Related Disasters' (2013) 7 Disaster Medicine and Public Health Preparedness 105.

27 The Convention on the Rights of the Child 1990 (General Assembly Resolution 44/25 of 20 November 1989).

28 Ministry of Education, The People's Republic of Bangladesh, 'National Education Policy' (2010) <https://moedu.gov.bd/site/page/318a22d2-b400-48a7-8222-303ab11cc205/National-Education-Policy-2010-> accessed 20 August 2020.

time. Furthermore, a large number of children depend on digital devices for entertainment - watching movies, playing video games. Lack of parental supervision and extreme pressure of tuition reversely affect the children. Thus, their right to entertainment moves to a different stream.[29]

d) Infrastructural obstacle

Lack of proper internet connection with stable speed is a common problem in developing states which causes difficulty to the children in order to continue uninterrupted online classes.[30] Dearth of network coverage, unstable speed of internet and cost for mobile data discourage poor children to participate in virtual classes. In fact, the infrastructural weakness regarding online classrooms hampers the overall quality of remote learning; eventually, many children face trouble getting high-speed broadband connection or adequate digital devices in Bangladesh since they are mainly from low and middle-income families.[31] Moreover, many school children do not even have a computer or smart mobile phone set which is an absolute essential for LMS and VLEs.

e) Adaptation challenge

In fact, the decision of introducing virtual class for child education has been taken within a short period of time and without having enough preparation and training for both the teachers and students. However, Children are naturally vulnerable to adapt to new environment; and the conflict between habit and transformation results to anxiety and loss of motivation on one hand.[32] While, limited technological skill of teachers hinders the ability of the children to grasp perfectly the topics discussed in virtual classes, on the other hand.[33] Besides, additional workload, strict time limitation, technical difficulties, scarcity of hard copies of materials frustrate the children.

[29] Daniel Kardefelt Winther and Jasmine Byrne, 'Rethinking Screen-Time in the Time of COVID-19' [2020] UNICEF Global Insight & Policy <https://www.unicef.org/globalinsight/stories/rethinking-screen-time-time-covid-19> accessed 28 August 2020.

[30] Md Golam Ramij and Afrin Sultana, 'Preparedness of Online Classes in Developing Countries amid COVID-19 Outbreak: A Perspective from Bangladesh' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3638718> accessed 20 August 2020.

[31] The World Bank Education Global Practice, 'Guidance Note: Remote Learning & COVID-19' <http://documents1.worldbank.org/curated/en/531681585957264427/pdf/Guidance-Note-on-Remote-Learning-and-COVID-19.pdf> accessed 27 August 2020.

[32] Bibi Eshrat Zamani, Azam Esfijani and Syed Majid Abdellahi Damaneh, 'Major Barriers for Participating in Online Teaching in Developing Countries from Iranian Faculty Members' Perspectives' (2016) 32 Australasian Journal of Educational Technology.

[33] Peter Reed, 'Staff Experience and Attitudes towards Technology Enhanced Learning Initiatives in One Faculty of Health & Life Sciences' (2014) 22 Research in Learning Technology <https://journal.alt.ac.uk/index.php/rlt/article/view/1490> accessed 21 August 2020.

4. Legal Concerns Caused from Virtual Classroom

Operating virtual classrooms in Bangladesh has arisen a few legal concerns in Bangladesh, which could be analysed under two main segments - right to education and vulnerabilities of children - within the areas of human rights law.

4.1. Right to education

The major legal instruments concerning right to education include the Universal Declaration of Human Rights (UDHR)[34] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[35]

Article 26 of the UDHR along with Article 13 and 14 of the ICESCR recognises that everyone has a right to education. Article 13 of the ICESCR recognises the right and sets the general obligations of the state parties in achieving the goal; while, Article 14 articulates specific rules and state obligations towards primary education.[36] In addition to these international instrument, the Convention on the Rights of the Child (CRC) 1990 encompasses provisions regarding the right to education of children: Article 28 identifies its content and Article 29 determines the objectives and encourages to establish educational institutions.[37] Both articles are interlinked and should be read together in order to get meaningful understanding.[38]

Moreover, the international covenants determine the right to education as a human right, although there is an eternal debate between the enforceability of such rights. The debate includes whether economic, social and cultural rights should be part of human rights. Subsequently, the utmost legal status of the right to education falls under such a category that does not have judicial enforceability.[39] Thus like many other states, right to education is not considered as a fundamental right in Bangladesh, also cannot be judicially enforceable.[40] However, Maurice Cranston considers human rights to be moral rights figuring out that the ICESCR

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[34] UN General Assembly, 'Universal Declaration of Human Rights' [1948] 217 A (III) <https://www.refworld.org/docid/3ae6b3712c.html> accessed 27 August 2020.

[35] UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights' [1966] United Nations, Treaty Series, vol. 993, p. 3 <https://www.refworld.org/docid/3ae6b36c0.html> accessed 27 August 2020.

[36] Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights* (Martinus Nijhoff Publishers 2006).

[37] Mieke Verheyde, *Article 28: The Right to Education* (Martinus Nijhoff Publishers 2006).

[38] Mustapha Mehedi, 'The Realisation of Economic, Social and Cultural Rights. The Realisation of the Right to Education, Including Education in Human Rights' (1999) UN Sub-Commission on the Promotion and Protection of Human Rights <https://www.refworld.org/docid/ 3b00f26c4. html> accessed 27 August 2020.

[39] Beiter (n 31).

[40] 'The Constitution of the People's Republic of Bangladesh', Ar 17 <http://bdlaws.minlaw.gov.bd/ act-details-367.html> accessed 21 April 2020.

is held to require more than mere legislation where special attention should be given considering the nature of the circumstances. Hence, the ICESCR urges for progressive and prompt realisation in special situations like ongoing COVID-19 pandemic condition where right to education has raised a demand for prompt action.

4.2. Child vulnerabilities

The CRC suggests implementing a general, non-discriminatory teaching method for the children, which serves for the best interests of the child;[41] ensures right to life and development,[42] also prospects of the child.[43] These principles should be considered as the general principles of the international law while implementing the rights to education.[44] However, the pandemic situation has posed several challenges to international standards set forth in the fields of online teaching and learning. The obligations of a state party cover to develop a national system on the basis of equal opportunities in terms of access to education.[45] However, there are number of discriminations prevailing caused from the current pandemic situation. Several studies and news show that the educational institutions, mainly the non-government urban schools started online teaching programmes already in May 2020. Whereas, the same method is not yet available in the government primary schools located in rural areas. Although the government has started curriculum-based teaching via television programmes; yet, television is inaccessible to a large number of people. Moreover, the statistical report supports that only 50% of the total number of students all over the country have access to television and the rest of children are being deprived of education while the urban privileged children are anyway carrying out their studies.[46] A recent press release of UNICEF reveals that at least one third of the child students around the globe do not have access to remote learning programmes during the pandemic situation.[47]

The Food for Education programme provides in-kind stipend to poor children at primary schools, which facilitates the right to education and the right to food in an

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41 Convention on the Rights of the Child.

42 ibid, Ar 6.

43 ibid, Ar 12.

44 Laura Lundy, 'United Nations Convention on the Rights of the Child and Child Well-Being' in Asher Ben-Arieh and others (eds), *Handbook of Child Well-Being* (Springer Netherlands 2014) <http://link.springer.com/10.1007/978-90-481-9063-8_94> accessed 24 August 2020.

45 Convention on the Rights of the Child, Ar 28(1).

46 Rakib Hasnat, 'Coronavirus: Advantages are in urban areas, disadvantages for the rural students' *BBC News Bangla* <https://www.bbc.com/bengali/news-53001115> accessed 20 August 2020.

47 According to the press release 70% of them are from pre-primary school and 29% from primary school. Among the total deprived children of the whole world, 38% belong to South Asian countries. 'COVID-19: At Least a Third of the World's Schoolchildren Unable to Access Remote Learning during School Closures, New Report Says' <https://www.unicef.org/press-releases/covid-19-least-third-worlds-schoolchildren-unable-access-remote-learning-during> accessed 28 August 2020.

integrated manner. The goals of the programme include to increase school enrolment and attendance, reduce dropout rate, and improve the quality of education. The programme started in 1993 and accommodated nearly 2.3 million students until 2000.[48] However, due to the closure of educational institutions during the pandemic, those children are being deprived from such logistic supports. Thus, it would be an illusionary thought that they are capable of affording equipment for virtual classroom.

Bangladesh attended the Dakar Conference of World Education Forum in 2000[49] which has drafted a framework for the National Action Plan (NPA) II for the years 2003-2015.[50] The major concern of the Dakar Conference is to ensure standard quality of education. The framework includes to ensuring equal access to all by addressing socio-cultural, financial, and structural impediments. It identifies universal access to basic learning opportunities for all young people and adults by the year 2015,[51] which is also incorporated under the Millennium Development Goal (MDG). Nevertheless, an intricate link of standard education can play a key role in the full realisation of the MDG.[52] In fact, Bangladesh has taken the initiative to ensure universal access to basic learning opportunities; however, the country was never prepared for the availability of technological equipment and infrastructures to all children. The reality is that Bangladesh is struggling to cope with the suddenly created gaps in the use of technology for the means of educational purposes - it would be wise to allow some time for assessing the actual efforts of the country addressing the challenges faced by the children during the pandemic conditions.

The CRC stresses for taking all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse,[53] in order to safeguarding the psychological well-being of the children, along with failure to meet their physical and psychological needs or obtain other services.[54] Virtual classrooms permit exposure to internet at a tender age, which has negatively impact on the mind of a child. International law does not support that children are supposed to be exposed to unsafe material, potential bullying and obscure methods of

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48 Mustafa K Mujeri, 'The Rights-Based Approach to Education in Bangladesh' 33 (1–2) The Bangladesh Development Studies 139.

49 'The Dakar Framework for Action' (World Education Forum 2000) <https://sustainabledevelopment.un.org/content/documents/1681Dakar%20Framework%20for%20Action.pdf> accessed 28 August 2020.

50 'Education for All: National Plan of Action II (2003-2015)' <https://planipolis.iiep. unesco. org/sites/planipolis/files/ressources/bangladesh_npa_efa.pdf> accessed 28 August 2020.

51 'The Dakar Framework for Action' (n 48), p 8; 'Education for All: National Plan of Action II (2003-2015)' (n 49), p 22.

52 Mohammad Badruzzaman and Md Nannu Mian, 'Right to Education in Bangladesh: An Appraisal for Constitutional Guarantee' (2015) 12 Journal of Studies in Social Sciences 1.

53 Convention on the Rights of the Child.

54 ibid, Ar 19.

communication. Thus, COVID-19 situation has exposed the children to a risk of potential internet harms in absence of having low rate of internet awareness among them.[55]

Virtual class discourages students from going to school; while, Chris Whitty has observed that not going to school may in the long run cause children mental and physical ill health.[56] This sickness may affect the children with pre-existing disabilities. Moreover, children with special needs need more communication and assistance for their studies which is absent in the VLE practised in Bangladesh. Thus, online teaching and learning creates discrimination among the children and inaccessibility to their right to education.

These negative physical and psychological costs have also been reported in previous studies, also include substantial anger and sleep disorders.[57] Furthermore, evidence shows that the post-trauma situation may become more stressful because of lack of development of coping techniques under the new system.[58] As a consequence of absence of emotional and spiritual support from teachers, family members and friends, the children with the home confinement become disappointed and looking to get back to their normal school life previously prevailed.[59]

5. Conclusion

The government of Bangladesh has imposed online teaching method to the students including children to comply with the rights to education during the pandemic caused from COVID-19 although online teaching method has not been proven as perfect alternative to the classical method of education in terms of merit. However, implementing the new system generates to contravene a number of child rights recognised in international law, and thus has posed several legal concerns.

In fact, there is a need for supplying proper equipment to insolvent children and providing training to teachers and students on the operating system of VLE and LMS in order to make the virtual means of teaching and learning more effective. The interim curriculum could be tiny taking into account the mental pressure of

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[55] 'One Million School Children to Receive Online Safety Certification by next Year' <https://www.unicef.org/bangladesh/en/press-releases/one-million-school-children-receive-online-safety-certification-next-year> accessed 24 August 2020.

[56] 'Missing School Is "Worse than Virus for Children"' *BBC News* (23 August 2020) <https://www.bbc.com/news/uk-53875410> accessed 24 August 2020.

[57] Donna Barbisch, Kristi L Koenig and Fuh-Yuan Shih, 'Is There a Case for Quarantine? Perspectives from SARS to Ebola' (2015) 9 Disaster Medicine and Public Health Preparedness 547.

[58] Alexandra Roussos and others, 'Posttraumatic Stress and Depressive Reactions Among Children and Adolescents After the 1999 Earthquake in Ano Liosia, Greece' (2005) 162 American Journal of Psychiatry 530.

[59] Sprang and Silman (n 22).

the children, less number of classes could be conducted in the daily routine of children which must include motivational courses for both physical and mental refreshment. Moreover, the guardians should be aware of unsafe material, potential bullying and obscure methods of communication, the contents and potential threats that become available to the children while using internet. The government should seek opinions from children how to formulate national laws dealing with children concerns at this adverse circumstance.

The global pandemic seems to be demanding a new way of thinking of human rights law - the question has raised beyond the boundaries of classical international law; while, special emphasis should be given to the provisions of law dealing with the rights of the children. The new situation urges for proper rules and policy at national level, considering the standards set forth in international law. However, the questions are sensitive in true sense due to peculiar characteristics of COVID -19, also lack of readily available solutions beforehand to cope with the challenging situations emerged.

Medical Negligence Issues in Bangladesh: An Urge for a Separate Medical Negligence Law

Rafea Khatun*

Abstract: The most precious thing for one is nothing but his life. Consequently, doctors enjoy the highest regard in society as they protect human lives and heal their physical and psychological wounds. However, sometimes their treatment may cost valuable lives or loss of other valuable organs of the body due to negligence in professional conduct. Though the Constitution of the People's Republic of Bangladesh does not identify the right to health care as a fundamental right, the broader explanation of the right to life under article 32 can be relevant for further explanation on this issue. Till 2013, no verdict from the honorable High Court Division regarding medical negligence can be found. Despite having laws on the institutional mechanisms for checking and controlling medical negligence, Bangladesh Medical & Dental Council is not performing its duties up to the pleasing level. In considering the above complications, one of the main aims of this paper is to find out the loopholes in the existing laws and legal frameworks related to medical negligence. Besides, the paper will analyze some of the renowned past and present judicial decisions on medical negligence along with various legal principles for medical negligence cases. Also, it will attempt to identify the gaps between laws and practices on medical negligence cases by referring to some relevant judicial principles and laws from other jurisdictions. Finally, this paper will try to establish an urge for a separate and special law including a comprehensive mechanism for medical negligence litigation in Bangladesh.

Keywords: Medical negligence, due diligence, duty of care, expert opinion, and public interest litigation.

1. Introduction

Anyone who lives in society is morally as well as legally bound not to harm to other fellow beings. A duty of care may be considered as a legal obligation of any person while doing any act, particularly when lack of care could cause harm to someone else[1]. Unlike other professions, in the medical profession, maintenance of reasonable care with due diligence is excessively needed as it is directly connected with human life.[2]

According to the World Medical Association Declaration of Geneva 1948,

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[1] *Donogue vs. Stevenson* [1932] AC 562.

[2] The Code of Professional Conduct, Etiquette and Ethics (adopted by Bangladesh Medical and Dental Council, BM&DC) 2010.

'A member of the medical profession shall solemnly pledge that health of the patient will be a doctor's first consideration.'[3]In recent times, along with many other problems, the medical negligence issue has become a matter of concern for its repeated occurrence. Besides, this frequent occurrence of medical negligence indicates a very delicate mechanism that we have for preventing medical negligence. Consequently, we are failing to ensure a balanced and trustworthy relationship between doctor and patient.

2. Research Methodology

In this article, mainly the doctrinal qualitative research methodology was followed to analyze the existing legislations for finding out the actual legal protections given to the victims of medical negligence. Additionally, this paper adopted a comparative qualitative research design to examine the mechanisms followed by some developing and developed countries for supporting the hypothecation of the research. In case of following both of the above methodologies, numerous judicial decisions from home and abroad were illustrated. Furthermore, data's been collected both from primary and secondary sources. The author also collected some data from the experiences of victims of medical negligence through personal interviews.

3. Concept of Medical Negligence

Medical negligence generally refers to any act or omission by a physician, dentist, nurse, medical assistant, pharmacist, or any other medical service provider in breach of requisite duty of care to the patient. Medical negligence itself is opened to wider interpretation. Medical negligence can be defined as the treatment by a medical professional that does not meet the medically accepted standard of care. On the other hand, medical negligence can be defined as a professional negligence by act or omission by health care providers when they deviate from accepted standards of practice in the medical community and causes injury or death to the patient. In the case of *Blyth vs. Birmingham Waterworks Company*, Justice Baron Alderson defined medical negligence as doing something a reasonable person would not do and not doing something a reasonable man would do.[4]Therefore, medical negligence can be defined as doing something a reasonable doctor would not do, and not doing something a reasonable doctor would do.[5]

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3 World Medical Association (WMA) Declaration of Geneva (Adopted by the General Assembly of the World Medical Association at Geneva) 1948.

4 *Blyth vs. Birmingham Waterworks Company* [1856] 11 Ex Ch781.

5 *Bolam vs. Frien Hospital Management Committee* [1957] 1 WLR 582.

A. Liability in case of medical negligence

Following our existing laws, medical personnel and institutions can be held liable. Torts as a common law product, general people are less conscious about tort law applications since there is no specific legislation in this regard; very recently our judiciary has become enthusiastic to explore and to apply this area of civil laws. It is also observed, a medical institution can only be held liable if there is administrative negligence, or negligence of not providing basic infrastructure, which results in some harm to the aggrieved person or for such negligence which is impersonal.[6] In the case of Seeramoney, the judge of the apex court said that any medical authority including doctors, nurses, or specialists who bear any part of the responsibility for patient care can be held liable. Not only the professionals who provide psychological care but also are the authority related to the hospital responsible for the wrong treatment.

To succeed in an action for negligence against a doctor one must prove the following issues[7]-

i. That the defendant was under a duty to take reasonable care towards the victim patient and breach the duty.
ii. Mental and physical damage to the patient.
iii. Breach of that duty was the real cause of damage complained of and such damage was reasonably foreseeable.

B. Historical Emergence of the Concept of Medical Negligence

The concept of 'every person who enters into a profession undertakes the exercise of a reasonable degree of care and skill' dates back to the laws of ancient Rome and England.[8]Writing on medical responsibility can be traced back to 2030 BC when the Code of Hammurabi provided that "if the doctor has treated a gentleman with a lancet of bronze and has caused the gentleman to die, or has opened an abscess of the eye for a gentleman bronze lancet and has caused the loss of the gentleman's eye, one shall cut off his hand".[9]

Under Roman law, medical malpractice was a recognized wrong. Around 1200 AD, Roman law was expanded and introduced in continental Europe. After the Norman Conquest in 1066, English common law was developed and during the

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6 KK Aggarwal, 'When can hospitals be liable for Medical Negligence Deaths? Indian Journal of Clinical Practice', (3 august 2013) Vol. 24, No. 3 Where Justice Dingra passed the order on a petition filed by Indraprastha Medical Corporation Limited Challenging a metropolitan magistrate's order for registration of a first information report against it for alleged medical negligence in the death of a patient in 2007.

7 *Caprao Industries PLC vs. Dickman* [1990]

8 B. Sonny Bal, 'An Introduction to medical Malpractice in the United States' (2009) Clin Orthop Relat Res, 467:339-347.

9 Powis Smith JM. Origin & History of Hebrew Law (University of Chicago Press. 1931).

reign of Richard Coeur de Lion close to the 12th century, the record was kept in the court of common law and the Plea rolls (recording details of legal suits and actions in a court of law in England). These records provide an unbroken line of medical malpractice decisions, all the way to modern times. One early medical malpractice case from England, for example, held that both a servant and his master could sue for damages against a doctor who had treated the servant and made him more ill by employing "unwholesome medicine"[10]

During the reign of Charles V, a law was passed that required expert testimony from a member of the profession in medical negligence claims to establish the standard of care.[11]

In the ancient Indian medical literature, negligent medical treatment was considered as the "mithya" which means false, wrong, and improper. It is stated that the physician who acts improperly or for wrong treatment, he/she was liable to be punished and the quantum of punishment varies according to the status of the victim i.e. 500 panas (means silver coin).[12]

4. Medical Negligence in Bangladesh: Causes and Classification

Acute medical malpractices are common in Bangladesh. From reading many scholars' writings and observing the practical scenarios, it is opined that a lot of catalysts are working behind this huge medical malpractice in our country. Among which-less numbers of doctors for a huge number of patients, lack of proper knowledge, lack of equipment facilities, lack of professional responsibility, lack of proper institutional mechanism, a gap in medical malpractice related laws, an over-burdened adjudication system, lack of material evidence to prove the allegations, lack of training of other medical personnel and lack of awareness among the middle and lower class of the society etc. are few.

As of the complex nature of medicine, it is no surprise that even the smallest mistake by a doctor can have life-altering (i.e; wrong surgery) effects on his or her patients. Different types of medical negligence can be seen in medical practices. Some of the more commonly seen medical malpractices are –

a. Misdiagnosis

   Diagnosis is the first action taken by the doctor after the admission of the patient in a medical establishment. The doctor has to supervise the test carefully and correctly, so that the real problems can be sorted out and they

[10] *Everad vs. Hopkins*, [1615] 80 English Report 1164.

[11] B. Sonny Bal, 'An Introduction to medical Malpractice in the United States' (2009) Clin Orthop Relat Res, 467:339-347.

[12] Jaising Modi, Modi's' Medical Jurisprudence and Toxicology' (23th ed. Lexis Nexis, New Delhi, 2006) 154.

can prescribe proper Medicare. Inadequacy in diagnostic is also considered as example of medical negligence.[13]

b. Delayed diagnosis

A delayed diagnosis can lead to an undue injury if the illness is allowed to progress rather than being treated. However, this type of medical negligence can also be happened if the doctors have a heavy workload that diminishes his or her capacity to administer properly the medical treatment. For this type of medical negligence both doctors and hospitals can be held liable.[14]

c. Surgical error

Unfortunately, surgical errors occur far more often than many people realize. As of the most critical actions, both in case of common and complex surgery doctors need enormous level of skill and even a slightest mistakes (i. e.; post operation medication) can have profound effects on the patients.[15]

d. Negligent anesthesia preparation and error in anesthesia

Asit is a very risky and sensitive part of any major medical operation, anesthesia requires an expert hand with proper preparation. However, sometimes it is evident that anesthesiologist are performing his/her duty in a hurry and without taking proper care which may cause in some cases loss of various vital organs and even the in death of the patients. Consequently, an anesthesiologist can also be held liable for the loss of the patients on medical negligence ground.[16]

e. Failure to monitor anesthetic performance

Even if the pre-operation work is performed correctly, after giving him anesthesia there is potential risk for the anesthesiologist to monitor the condition of the patient during the operation and also after completion of operation in observatory stages. However, most often in post-operative stages patients are not properly cared by their doctors.[17]

f. Medical negligence and C-sections

A cesarean section (c-section) is often a requirement to preserve the baby in case of fetal distress such as a lack of oxygen to the brain and reduced heartbeat etc. However, if the medial staff fails to perform the c-section in

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13 *Dr. Kamal Saha vs. Dr. Sukumar Mukherjee and Ors*.[2006] III, CPJ 142(NC).

14 *Rajmal vs. State of Rajastahn*[1996] AIR Raj, 80.

15 Sheikh Mohammad Towhidul Karim and others, 'Medical Negligence Law and patient safety in Bangladesh: An analysis', (2013) Volume 5 No 2, 424-442, Journal of Alternative Perspectives in the Social Sciences.

16 *Rajmal vs. State of Rajastahn*[1996] AIR Raj, 80.

17 Ibid, above note 16.

time, delaying the procedure in hope of delivering the baby normally, that decision may lead to permanent brain damage to the baby.[18]

g. Mistreatment of difficult birth

In cases of difficult birth, the medical staffs usually use a combination of forceps and suction for forcing the extraction of the child. One of the risks associated with forced extraction is that any improper or negligent handling of the process can cause permanent injuries to the baby, especially nerve damage such as brachial plexus injury[19].

h. Complications with induced labor

In case of normal delivery of a baby, to speed up the process or to avoid c-section by inducing labor, medical staffs commonly use oxytocin (common brand used is called Pitocin). However, this drug may have side effects in case of fetal distress such as a prolapsed umbilical cord. Significantly, in this critical situation doctors have a few minutes to judge the situation and to decide the best course of action to prevent serious permanent injury to the new borne baby.[20]

i. Negligent long term treatment

Medical negligence can also be occurred in subtle ways throughout a long treatment period. In case of long term treatment, most often doctors involve their assistant, intern students or even the nurses for taking care of the patient, negligence may also be occurred by them due to their inexperienced hand.[21]

j. Misbehave with the patient and his/her relatives

It is a common complaint by all of the patients and their relatives that in Public Hospitals, medical staffs often misbehave with them and their relatives. Sometimes, this process is used in public hospital by medical staffs to make the patient a prey in their greedy traps.

5. Medical Negligence Laws in Bangladesh

There are various policies, Acts, Ordinances and Codes which directly or indirectly work for establishing the accountability in medical services. The followings are some that directly or indirectly deal with medical negligence issues in Bangladesh at present:

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[18] Sheikh Mohammad Towhidul Karim and others, 'Medical Negligence Law and patient safety in Bangladesh: An analysis', (2013) Volume 5 No 2, 424-442, Journal of Alternative Perspectives in the Social Sciences.

[19] Ibid

[20] Ibid

[21] Ibid

a. The Bangladesh Medical and Dental Council Act, 2010

This Act is the successor of previous Medical and Dental Council Act,1980. Section 4 provides formation of the council with ex-officio and other nominated members whereas section 5 provides powers and responsibility of the council such as to grant accreditation to institution going to conduct medical and dental education, to administrate the registrations of recognized medical and dental professionals, to inspect, educational and dental institutions and to take punitive measures against persons who are engaged in medical profession without registration under this Act. Moreover, to take punitive measure against use of false title, degree, fraudulent misrepresentation etc. to adopt the professional code of conduct and ethics for medical and dental professionals and such other or further acts as may be necessary for or incidental to fulfillment of other responsibilities are also within the ambit of this council's power. This council can also withdraw the accreditation granted to any medical and dental institution if it runs below the standard set by the council.

b. The Code of Medical Ethics

The Bangladesh Medical & Dental Council sets the normative guidelines of professional conduct as the Code of Medical Ethics to be followed by the registered physicians and dentists. This Code provides embargo on providing false medical certificate, attempting to make improper profit, abusing professional knowledge, skill, privileges, abusing of doctor's patient relationship and canvassing etc. Besides, this code included provisions regarding suspension and removal of name from the BMDC's register as a practitioner in case of gross negligence along with the provisions of taking disciplinary action in case of assisting an unregistered person to practice medicine and dentistry etc.

c. The Penal Code, 1860

The Penal Code does not provide any section which directly talks for medical negligence except miscarriage or negligent act likely to spread infection of diseases dangerous to life respectively under section 312 and 269. Besides these two sections, some other sections such as 270, 304A, 313, 314, 315, 316, 415, 416 and 417 talk about various types of medical malpractice related negligence.

d. Public Interest Litigation (PIL) through judicial review under article 102 of the Constitution of People's Republic of Bangladesh

Judicial review can be considered as an effective remedy for medical negligence litigations. As in case of criminal litigation, the process is so lengthy and the alleged party can easily take the defenses under Penal Code.[22] It can be filed by any person, being aggrieved or not directly and having no other efficacious

[22] The Penal Code 1860, ss. 88, 91 & 92.

alternative remedy, before the honorable High Court Divisions (HCD) in the form of Public Interest Litigation (PIL) or in the form of other writ petition. If the government fails to fulfill its legal and constitutional obligations regarding the health and medical care issues, the court has power to intervene in these matters and can force the government to perform its duties.

However, the following problems can be traced in judicial review of Medical Negligence Cases-

i. The *locus standi* (right to sue) is an important issue for filling review (public interest litigation is an exception), if anyone does not have the requisite *locus standi*, that person will not be allowed to file judicial review before the High Court Division.

ii. Though the process of judicial review is not always possible for an individual to get proper and appropriate benefit, public interest litigation can be a useful mechanism to get collective impact regarding medical negligence.

iii. In litigations against the government, the non-cooperation of government for hearing the case is generally seen.[23]

iv. Sometimes, the court is unable to compel the government to response within a particular period.[24]

e. Medical Negligence through the lenses of the Consumer Protection Act,2009 in Bangladesh

Alike other services, medical services may also be included within the periphery of the definition of services provided under section 2.22 in the Consume Rights Protection Act, 2009 by making some amendments. There are many leading Indian cases which have created significant observation upon the controversy of whether medical services will be within the frame of services under consumer protection law and finally it was settled as positive. Until a new specific Act is made, the complaint procedure under the Consumer Rights Protection Act, 2009 would be a worth solution for medical negligence grievances in our country.

f. Gap analysis under the existing domestic laws:

i. As the supreme law of the land, the Constitution of Bangladesh extricates the right to health and treatment.[25] The non-enforceability of fundamental state policy has been remained as an academic topic rather being developed

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[23] Tapos Bandhu Das, 'A study on Medical Negligence and Fraudulent Practice in Private Clinics: Legal Status and Bangladesh Perspective Consultant' (2013), Ain o Salish Kendra (ASK).

[24] Md Rafiqul Islam Hossaini. 'Medical Negligence and its constitutional protections in Bangladesh', (26 October, 2016) Bangladesh Law Digest.

[25] Kazi Latifur Reza, 'Medical Negligence: A review of the Existing Legal System in Bangladesh' (October, 2016), Volume 21, Issue 10, Ver. 7, IOSR Journal of Humanities and Social Science (IOSR-JHSS).

by judicial jurisprudence. However, it cannot be denied that an express recognition as fundamental rights could craft a broader avenue to enforce those rights. Though, lack of resources (i.e.; financial scarcity) has always been shown as safeguard for not making those right legally obligatory upon the state, it is now a matter of concern that how long this crisis issue will continue.

ii. The National Health Policy (NHP) of 2011 unequivocally emphasizes on the need for quality control of the private medical services and the private medical education institutions by strengthening BMDC, which is time worthy decision. In addition to this, it is easy for the NPH to provide for necessary policies and laws to ensure the accountability of all involved in providing health care services. However, it does not set any time limit to achieve its goals.

iii. Though the Bangladesh Medical and Dental Council Act, 2010has included the provision to take action against the misconduct done by the medical professionals, unfortunately, it did not provide any definition or list of activities that constitutes misconduct, which is one of the principal flaws in this Act.

iv. In the Medical Practices and Private Clinics and Laboratories (Regulation) Ordinance, 1982, the director-general is mainly responsible for monitoring. Though the provisions of this Act appear very strong, the problem lies in its implementation. Unfortunately, this act does not provide any accountability system for director-general and which may be one of the catalysts of this Act's debacle.

v. Likewise, in the Penal Code, 1860, one can directly lodge a suit on medical negligence ground under section 304A and sections 312-316. However, this scope can easily be vitiated by invoking the immunity granted under sections 88 and 92 in the same code.

6. Principle Relating to Medical Negligence

The followings are some of the renowned principles enumerated from the judicial bodies in different jurisdictions on medical negligence.

A. Bolam Principles

This principle is named after the renowned case *Bolam vs. Friern Barnet Hospital Management Committee*[26]. It sets a test to determine the standard of care by the doctor in case of medical negligence and that is reasonable duty of care by an ordinary skilled man exercising or professing in that special field. However, it was

[26] *Bolam vs. Friern Barnet Hospital Management Committee* [1957] 1WLR 582.

quite sufficient for a defendant doctor for being exculpated if his activities are supported by his peer having only ordinary skill on that matter.

This above view was also supported in *White House vs. Jordan (1981) 1WLR 246* in the following languages-

Medical men would not be found negligent simply because one of the risks inherent occurs or because in a matter of opinion, he legitimately took a view which unfortunately happened to produce an adverse result in particular circumstances.

The philosophy of the BOLAM Principle can also be observed in *Roe vs. Minister for health (1954) 2QB 66,*

> "…….. But I do not think that their failure to foresee that the ampoules might get cracked with cracks was negligence. It is easy to be wise after the event and to condemn as negligence that which is only a miss-adventure. We ought always to be on our guard against it, especially in cases against doctors and hospitals. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risk."

However, later this BOLAM principle brought few more convolutions in the realm of medical negligence cases regarding the court's liability to follow the medical expert's opinion in case of determining the medical negligence cases. Before the renowned Bolitho test, judicial deference to expert medical opinion/witnesses was in practice and supported by many judicial decisions, among them, Lord Justice Goddard observed in the following way in-*Mohan vs. Osborne*[27]

> "……. nor can I imagine anything more disastrous to the community than to leave it to a jury or a judge, if sitting alone, to lay down what is proper to do in any particular case without the guidance of witnesses who are qualified to speak on the subject……."

Besides this the case of *Sideways vs. Board of Governors of Bethlem Royal Hospital* and *the Maudsley Hospital*[28]is considered as the staunch follower of the Bolam principle emphasizing judicial deference to medical opinion. Later, this view and Bolam principle were dissentingly argued in the BOLITHO Test.

B. BOLITHO Test:

This test came from one of the renowned cases after Bolam which is *Bolitho vs. City & Hackney Health authority*[29]- where Lord Justice Browne-Wilkinson held that…

> The court is not bound to hold that a defendant doctor escape liability for negligent treatment or diagnosis just because he leads evidence from several

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27 *Mohan vs. Osborne [1939] 2KB 14.*

28 *Sideways vs. Board of Governors of Bethlem Royal Hospital* and *the Maudsley Hospital* [1985] 1 AC 871.

29 *Bolitho vs. City & Hackney Health Authority* [1997] 4 All ER 771.

> medical experts who are genuinely of opinion that the defendant's treatment and diagnosis accorded with sound medical practice.

He also added that the word "responsible" used by McNair J. in Bolam "show that the court has to be satisfied that exponents of the body of the opinion relied on can demonstrate that such opinion has a logical basis." It was also observed that if the opinion is supported by logical analysis, the judges are not bound to consider that opinion as reasonable and responsible.

The Bolitho test was also supported by-*F vs. R*[30]

In the following judgment-

> [P]rofession may adopt unreasonable practices…. The court has an obligation to scrutinize professional practices to ensure that they accord with standard of reasonableness imposed by the law...

C. Roger Test:

The test is related with the term informed consent of the patient regarding material risk of treatment by the doctor. This test extended the principle of Bolitho test towards doctor's duty to disclose/ communicate material risk of treatment to the patient. It is established by a leading Australian case *Rogers vs. Whitaker*[31]

Where it was observed that, how much of information would be disclosed should not be determined by a community or group of professional persons rather it should be determined by the other circumstantial factors and expert medical opinion will act like a guidance for the judicial body for determining the duty of disclosure of material risk in treatment by the medical person.

D. Qualified Bolam Principle:

The genesis of the qualified Bolam tests in the United Kingdom, Australia and Singapore may be traced to the English House of Lords' decision in Bolitho. In Singapore, the qualified Bolam test was introduced by its highest court, the court of appeal in *Dr. Khoo James vs. Gunapathy d/o Muniandy*[32]. This analogous principle was also applied in six Australian states under their respective Civil Liability Act[33] in different forms. The test in these jurisdictions is similar but not identical.[34]

In the United Kingdom and Singapore, this qualified Bolam principle confers upon the court a supervisory role in the practice of the medical profession. This authority of the court derived from the modification the Bolam principle and these

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30 *F vs. R* [1982] 33 SASR 189 (S.C. of South Australia).

31 *Rogers vs. Whitaker* [1992] 175 CLR 479.

32 *Dr. Khoo James vs. Gunapathy d/o Muniandy* [2002] 2 SLR 414.

33 [2002] (NSW); [2003] (Qld); [1936] (SA); [2002] (Tas); [1958] (Vic); [2002] (WA).

34 Joseph Lee, 'The standard of Medical Care in Malaysia: The Case for Legislative Reform' (2013) Vol. 14 No 2, Article 2:1-19, Australian Journal of Asian Law, p-10.

modifications are manifested in the 'logical basis' test, albeit there are considerable dissimilarities between them.[35]However, in Australia**,** this qualified Bolam test adopts either 'irrational [36] 'or 'unreasonable' [37] . The judges of the above jurisdictions need to emphasize expert medical opinion in determining the required standard of care aiming to cater to the lack of expertise of judges in the areas of medical diagnosis and treatment. Instead of the above identical factors, there are some dissimilarities of qualified Bolam principle among the above jurisdiction in case of application. In Australia model allows the judges to question expert opinion within the broad concept of the expectation of the Australian community.[38] Australian judges have the limited power to reject expert opinions in 'rare' or 'exceptional' cases and they defer to the testimony of 'distinguished'[39] or 'respectable'[40] experts.

In Singapore, according to the guidelines stated in the *Gunapathy case*, the judges are only allowed to analyze the internal consistency of expert medical opinion and to ensure that this opinion is supported by extrinsic medical facts or advances in medical sciences. By contrast with the Australian and the British rules, here the judges have greater liberty to dismiss the expert opinion if that does not satisfy the logical basis test irrespective expert's position. On the other hand, British judges are not restricted by the limitation like in Singapore and may have more rooms to scrutinize expert medical opinion. In case of rejecting expert opinion, the British judges have the same power of an Australian judge.

E. Other Principles in medical negligence cases

i. *Res Ipsa Loquitor*

Basically, this principle will facilitate the claimant victim patient who no fault of his own, is unable to adduce evidence as to how accident occurred and negligence is evident.[41]

ii. *Negligence Per Se*

A person does not know a particular system of medicine but practices in that system is a quack. Where a person is guilty of *negligence per se*, no further proof is needed.[42]

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35 Ibid.

36 The Civil Liability Act, 2002(NSW) S. 50(2), The Civil Liability Act, 1936 (SA), S. 41(2); The Civil Liability Act2002(Tas.), S. 22(2); The Civil Liability Act 2003 (Qld.), S. 22(2).

37 The Wrongs Act 1958 (Vic) S.59(2); the Civil Liability Act, 2002 (WA), S.5 PB (4).

38 *Dr Khoo James vs. Gunapathy d/o Muniandy* [2002] 2 SLR 414 (see panel of Eminent Persons, 2002:42, 3:24).

39 *Bolitho vs. City and Hackney Health Authority* [1998]AC 232 at 243.

40 The Wrongs Act [1958] (Victoria), S. 59 (1), the Civil Liability Act 2003 (Queensland), S. 22(1).

41 *Achutrao Haribhaukhodwa & others vs. State of Maharashtra & others* [1996] 2ssc 634.

42 *Poonam Verma vs. Ashwin Patel & others* [1996] 4 SCC 332.

iii. *Where* death of patient was occurred due to not operating for his critical conditions with all reasonable care[43] or death occurred due to process of disease and its complications, no medical negligence cause will be aroused.[44]

iv. *Where* the patient has not followed the doctor's advice, no medical negligence arise.[45]

v. *Unexpected* death and unable to conclude, medical negligence is not arise on the part of the doctor.[46]

7. Principle of Medical Negligence Cases in Bangladesh

In our country, in case of medical negligence litigation, courts are following age-old BOLAM principle[47]. However, in the case of the expert opinion the court is not bound to take the expert opinion directly according to the principle of expert opinion under section 45-51 of the Evidence Act, 1872. Consequently, it is easy in our court to adopt the qualified BOLAM principle by following the rules of expert evidence. Very recently, our honorable High Court division has given some remarkable rulings in various public interest litigation on medical negligence, i.e.;10 lakh taka for each victim in Chuadanga eye-sight lost case, etc.[48]

8. International Instrument on Medical Negligence

As a state party, Bangladesh has obligation under the following international instruments, both moral and legal, to fulfill its commitment to protect and promote health rights of the citizens, which includes easy access to medical and health care facilities, right to have appropriate and adequate treatment and thus, inferring the right to have an effective remedy in case of violations of those rights.

Article 25 of Universal Declaration of Human Rights (UDHR),1948, that talk about right to health care along with other rights of human being. Article 3 of the above declaration provides for right to life, liberty and security of person, while article 2

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43 *Narasimha Reddy & Ors vs. Rohini Hospital &Anr*.I [2006] CPJ 144 (NC).

44 *Dr. Ganesh Prasad and Anr vs. Lal Janamajay Nath Shahdeo* I [2006} CPJ 117 (NC).

45 *Md. Ashlam vs. Ideal Nursing Home and Ors.* [1986-99] Consumer 4233 (NS).

46 *Smt. Archana& 4 Ors vs. Chaudhari Chest Hospital &Ors* [1998(1)] CPR 556 State Commission Maharashtra.

47 BOLAM principle or BOLAM test, which derived its name from the English High Court case of *Bolam vs. Frien Hospital Management Committee (1957) 2 All ER 118,* Where justice McNair formulated a test to determine whether doctor's act fell below the required standard or not and it requires that the standard of care of doctors be measured against that of an ordinary competent doctor who possesses and exercises a particular field of expertise. In the context of medical negligence disputes, the determination of this standard is assisted by expert testimony which has to represent 'a responsible body of medical opinion' (at 121-122).

48 A newspaper report on 'TK 10 lakh each to Chuadanga eye surgery victim: HC' (Bangladesh Post on October 21,2018).

provides for principle of non-discrimination. The International Convention on Economic, Social and Cultural Rights (ICESCR), 1966 emphasized on right to health and medical care and the role of the state parties to progressively ensure full realization of those rights. Article 12 of the ICESCR prescribes steps for the realization of the right to health, which includes those that to access to health care, reduce infant mortality etc. For realizing its mandates, a general committee is adopted to monitor the compliances of the state parties under this convention. Moreover, articles 12(2) and 14 of Conventions on Eliminations of all forms of Discriminations against Women (CEDAW), 1979 also talk about right to health under various direct and indirect heads. Article 24 of the Convention on Rights to Child (CRC) emphasizes on right to health and child care. Articles 3, 4 and 25 talk about mechanisms of realizing the agendum under this convention.

The Declaration of Alma-Ata[49] is another important document on health rights. This declaration reaffirmed the World Health Organization's (WHO) definition of health as a state of complete physical, mental and social wellbeing and not merely the absence of diseases or infirmity and recognized it as a fundamental right. So, the reiteration of right to health care in various international instruments indicates the state party's legal and moral obligations towards its implementation.

9. Medical Mal-Practice Laws in other Jurisdictions

An overview of medical negligence laws in some developing and developed countries is included so that we can learn how other countries are efficiently handling medical negligence issue in their territories.

A. India

In India, remedies for medical negligence are available under two different statutes, The Indian Penal Code (IPC),1860, and Consumer Protection Act (CPA), 1986. Sections 304A, 52, 80, 81, 83, 88, 90, 91, 92, 337 all cover the act of medical malpractice. A consumer or any recognized consumer association, i.e., voluntary consumer association registered under the Companies Act,1956 or any other law for the time being a force, whether the consumer is a member of such association or not, or the central state government, may file a complaint. There is a minimal fee for filing a complaint before the district consumer redress forums. An appeal against the decision of the district forum can be filed before the state commission. An appeal will then go from the state commission to the national commission and from the National Commission to the Supreme Court. The time limit within which the appeal should be filed is 30 days from the date of the decision in all cases.

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[49] The Declaration of Alma Ata: International Conference on Primary Health Care, Alma Ata, [UssR,6-12 September, 1978].

B. Malaysia

There is no special Act for medical negligence in Malaysia. Currently, the tort system is using to regulate medical negligence in Malaysia, in which compensation is only a provided remedy. However, there are many Acts which discuss health rights protection against medical negligence. Sections 304A, 301, and 302 of the Malaysian Penal Code deal with doctors and other medical professionals' liability for rash and negligent act in treatment. In case of a child patient, who is physically and emotionally injured, the doctors are liable to inform the protector (director, deputy director, divisional director of social welfare, state director of social welfare in a state, and social welfare officer appointed under section-08) under the Child Act, 2001.

Section 19(2) of the Medical Act 1971 empowers the council to exercise disciplinary jurisdiction over medical practitioners who is convicted of a punishable offence with imprisonment, found guilty of "infamous conduct in any professional respect. Any member of the public can complain against medical negligence to the president of the MMC with the name of the practitioners, the place of practice, nature, details of the complaint, documents and, evidence in support of the complaint. Malaysian medical council will make three preliminary investigation committees (PICs) MMC hold a tribunal to inquire into the complaint about medical professionals. One of the preliminary investigation committees is specifically assigned to look into matters of advertisement and the other two look into matters of ethics and conduct. PICs can instantly dismiss an allegation if it is found to be indefensible. On the other hand, PICs may recommend an injury by the MMC, if they find reasonable ground to support the alleged. MMC may take disciplinary action, if a doctor is found guilty of "infamous conduct in a professional respect" during the inquiry. If any party is displeased by the decision of the MMC, he or she may appeal to the High Court. In Malaysia, the highest court also observed that the age-old BOLAM principle is no more relevant to the case of ascertaining the question of the duty of care by a medical professional. [50]Rather they are supporting the principle of the roger case as a latest one and they are advocating for a new policy on medical negligence and reformation of age-old legal principles followed in cases of medical negligence.

C. United States of America

In the United States, medical malpractice suits first appeared with regular beginning in the 1800s.However, before the1960s, legal claims for medical malpractice were rare and had little impact on the practice of medicine. Since the 1960s the frequency of medical malpractice claims has increased, and today, lawsuits filed by aggrieved patients alleging malpractice by a physician are

[50] *Dr. SooFook Mun vs. Foo Fio Na &Anor* [2002] 2 MLJ 129

relatively common in the United States.[51]In the United States, medical malpractice law has traditionally been under the authority of the individual states and not the federal government, in contrast to many other countries. To win monetary compensation for injury related to medical negligence, a patient needs to prove that sub-standard medical care resulted in an injury. The allegation of medical negligence must be brought promptly. Once the injured person has established that negligence led to injury, the court calculates the monetary damages that will be paid in compensation. Damages take into account both actual economic loss such as lost income and cost of future medical care, as well as noneconomic losses, such as pain and suffering.

Medical malpractice is a specific subset of tort law that deals with professional negligence. However, the legislations passed during the last 30 years throughout the states have further influenced the governing principles of medical malpractice law. Thus, medical malpractice law in the United States is based on common law, modified by state legislative action that varies from state to state. If a medical malpractice case is tried in federal court, state malpractice law is still applied, with federal procedural rules of jurisdiction. A very imperative legislation they have, is "Good Samaritan" -laws that address bystanders' [52] fear of being sued or prosecuted for unintentional injury or wrongful death. This law also varies from state jurisdiction to state jurisdiction. Good Samaritan laws can immunize the responder from legal liability for death, disfigurement, or disability of the victim as long as the responder acted in good faith according to his level of training and in a rational manner.

D. United Kingdom

The British medical malpractice system relies on its courts to adjudicate patient complaints, most doctors in England are insured by the National Health Services (NHS) that handles all the legal and business aspects of medicine. NHS employee doctors are not personally liable for malpractice claims and do not have to buy malpractice insurance coverage. Funds for the NHS indemnity come from the government's general fund. Jury trials are less common in England. However, the legal handling of malpractice claims is otherwise similar to the United States. Compliance with customary practice in England; reasonable care is defined as practice following that accepted opinion.

E. Australia

Like Canada, Australia also has a more socialized health system than the United States, although medical malpractice concerns are similar to those of the United States. Similar standards of medical negligence, grounded in English Common

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[51] B. Sonny Bal, 'An Introduction to medical Malpractice in the United States' (2009) Clin Orthop Relat Res, 467:339-347.

[52] Ibid.

law, apply to medical malpractice litigation in Australia. Earlier in this decade, two large Australian insurers that financed the defense of medical malpractice claims went bankrupt, necessitating a government bailout. Malpractice insurance premiums increased, leading to debate about tort reforms and capitation limits on claims.[53]

10. Remedies Available in Case of Medical Negligence in Bangladesh

The incidence of medical negligence can be remedied in the following mechanisms in our country.

A. Quasi-judicial

Though not all kind of medical negligence but only the grave dereliction of professional duty and serious breach of code of conduct may rise to a charge of a serious professional misconduct against which departmental disciplinary actions can be a relief for the aggrieved person.[54]

The Bangladesh Medical & Dental Council, as a regulatory body for the medical and dental profession, is authorized to take disciplinary actions against a registered physician and dentist. Under section 23 of the Medical and Dental Council Act, 2010 the BDMC can cancel the registration of any physician, dentists, or medical assistant for violation of any provision of the above Act. However, it is a matter of great flaw that BDMC seems reluctant to recognize medical negligence as misconduct taking the scope of the word 'May' used in the section of defining misconduct. Due to intricacies in determining what amounts to gross negligence or not, this mechanism can't be an efficient weapon to contribute to preventing medical negligence in our country.

B. Judicial remedy

   i. Civil:

   For medical negligence cases, a civil suit can be preferred under section 09 of the Code of Civil Procedure, 1908 in our country as it is not expressly barred by any other laws. Though claiming compensation through tort law in a civil case is the most unexplored area in our judiciary for medical negligence, but it can be a significant relief for medical negligence victims in our country.

   ii. Criminal:

   A victim of medical negligence can also bring a criminal proceeding against the medical professional under sections 312, 269, 270, 304A, 313, 314, 315, 316,

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[53] B. Sonny Bal, 'An Introduction to medical Malpractice in the United States' (2009) Clin Orthop Relat Res, 467:339-347.

[54] The Etiquette and Ethics [2010] by Bangladesh Medical and Dental Council (BMDC), Clause 5(5.1) (5.1.1.).

415, 416, and 417 of the Penal Code,1860. Though in practice it is very difficult to prove the *mensrea*, one of the vital elements to prove an action as a crime under the code, a substitute argument of constructive *mensrea* can sometimes be sufficient to prove someone as guilty.

iii. PIL

Medical negligence occurrences can also be remedied under the umbrella of public interest litigation in the High Court Division with the related concept of the writ under article 102 of our constitution.[55] In the notable Doctor's Strike Case (*Dr. Mohiuddin Farooque vs. Bangladesh & others,* Writ Petition No. 1783 of 1999), the continuous strike by government doctors was challenged wherein the court treated the strike as a failure to perform their statutory and Constitutional duties to ensure health services and medical care to the general public. The Court held that the willful absence of the government doctors from their statutory and public duties caused the threat to the life and body of the public is of no legal effect. In August 2011, Prof. Dr. Mridul Kanti Chakrabarty, a teacher at the University of Dhaka died at the Lab Aid Cardiac Hospital. On a PIL of negligence filed by Advocate Manzil Morshed, High Court Division summoned the accused doctor and awarded a compensation of BDT 50 Lacs to the patient's family. In 2016, a child died at the Japan Bangladesh Friendship Hospital at Dhaka. However, the staffs of the hospital kept the death secret and demanded money from the family for the treatment of the child. RAB arrested six persons in connection with the incident and a mobile court fined Taka 11 lakh to the Hospital. Furthermore, the Division Bench of the High Court Division issued a *sou-moto* rule against the hospital authorities and summoned the Management to the Court.[56] Besides these, two Public Interest Litigations (PIL) filed by Ain o Shalish Kendra (ASK) are very notable here.[57]

C. Problems in solving Medical Negligence cases

Unlike other regular criminal cases, medical negligence cases need to go through a long and lengthy procedure which most often vitiates the ultimate purposes of legal protection for medical negligence incidents in Bangladesh. Also, there are several laws in Bangladesh to mitigate medical negligence incidence but that lack of efficient implementation mechanisms. Besides, only a few non-governmental Organizations provide 'legal aid' regarding medical negligence. However, due to absence of consciousness among the mass people regarding legal remedies in medical negligence, doctors and hospitals usually

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55 The Constitution of Bangladesh, Art.102.

56 Shyikh Mahdi, 'Reviewing the Views, Judicial Activism to prevent Medical Negligence: Glimmer of Hope?' The Daily Observer (Thursday, 15 June, 2017 at 12:00 AM).

57 *Ain o Salish Kendra vs. Government and Others* [2006] Writ Petition No.624. *Ain o Salish Kendra vs. Government and Others* [2010] Writ Petition No.4319.

like to mitigate medical negligence situations through negotiation with the victims; as they apprehend that any sort of litigation will destroy their name and fame. Most often, medical negligence occurrences are not under continuous supervision rather people and the government become concerned about it if it is significantly covered by media. Lastly, general people are not willing to file a case against the hospital and doctors, apprehending that they are not on a level playing field.

D. The ways ahead

a. To modify the existing laws by including a compulsory accountability system in medical service administrations and to allocate a reasonable fund from annual national budget to improve the standard of medical services provided in public hospitals.

b. To enact a special law providing comprehensive definition of medical negligence and speedy procedures that will facilitate the general mass to exercise their right of access to justice fairly.

c. To ensure a level playing field, the medical negligence litigations should be prosecuted by the public prosecutor on behalf of the government and to mitigate medical negligence disputes through negotiation with the victims; a mandatory ADR mechanism can be introduced under the concept of a special tribunal or Health Court[58].

d. To enhance the media persons' vibrant role by covering all the medical negligence issues irrespective of any victims' individual or social identity and without any biases and to public awareness through media, seminar, symposium, and other direct or indirect means.

e. Not only the government should be much more serious about their constitutional and other statutory duties for the common goods of public health rights[59] but more non-governmental and private stakeholders should come forward to enlarge their helping hand in case of filing a petition against medical negligence.

f. Lack of expertise among the judges and the lawyers to deal with the litigation of medical negligence are also liable for delay in resolving the litigation of medical negligence. So, especial training facilities can be organized to ensure redress from the judiciary by competent judges. Besides, medical laws should be mandatorily incorporated within the academic curricula for both law and medical students.

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58 Khandakar Kohinur Akter, 'A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices' [2013] Volume IV, Northern University Journal of Law, 67.

59 Tapos Bandhu Das, 'A study on Medical Negligence and Fraudulent Practice in Private Clinics: Legal Status and Bangladesh Perspective.'

11. Conclusion

As a lower middle-income country, Bangladesh is encompassed by innumerable problems. Medical negligence is increasing at an alarming rate and entire medical services are losing the public trust upon it due to lack of accountability. Additionally, preferring their own profit, illegal motives, excess workload, poor management system, lack of knowledge about scientific invention, loopholes in the existing legal system, peoples' unwillingness to bring legal action against medical negligence, shortage of necessary equipment and medicines, an abnormally disproportionate ratio of the public health issues and health professionals are considered as fueling the rise of medical negligence incidences. However, these cannot anyway be the justifications for taking the negligence, misconduct, and unscrupulous activities of medical service providers as a usual issue. For ensuring the common good of public health and as a constitutional mandate, the government should revise the existing laws or enact special legislation including the provisions of an active accountability system in the entire medical services management system. Along with this, a special tribunal can be set up to deal with medical negligence complaints in-camera trials so that we can protect the public trust upon this noble profession. It can encourage doctors not to use defensive medicine and perform their duties according to their holy declaration.[60] This paper tried to focus light on existing scattered legislations and legal principles on medical negligence issue with references to many case decisions and laws from some foreign jurisdictions. Besides this, the future researcher can explore other contemporary issues following this such as clinical error, informed consent, pre-action protocol, and the principle of legitimate expectation in medical negligence.

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[60] Etiquette and Ethics [2010] Annexure I (Declaration) in the Code of Professional Conduct, by Bangladesh Medical and Dental Council (BMDC).

Non-State Actors and International Human Rights Law: What Obligations for Business Enterprises?

Md. Abdur Razzak*

Abstract: The classical paradigm of international human rights law is conceived to have explicitly placed duties only on states. The applicability of international human rights law to non-state actors has come under considerable debate and scrutiny in recent times. It is argued by many international human rights lawyers that imposing direct obligation on non-state actors warrants a re-thinking in the way we generally conceptualize the application of international human rights law.[1] The dominant narrative surrounding the international human rights law is that this branch of law contains norms designed to address violations committed by state actors. However, in response to the growing power and influence of the corporations, the international legal framework to address corporate or business responsibility as non-state actors to respect human rights is gradually emerging. However, the recent advances in this area in the form of soft law standards are not arguably compelling, and lack requisite leverage over the business actors, in particular the transnational corporations. Urgent call has therefore been made globally to strengthen the implementation of the existing regime on business and human rights or a move forward to a more compelling regime in the form of a legally binding treaty. This paper argues that the existing regime of international human rights law has much to offer to extend direct human rights obligations to non-state actors, in particular business enterprises. The paper also examines the existing provisions on business responsibility to respect human rights embedded in the United Nations Guiding Principles (UNGPs) on Business and Human Rights. The paper further assesses the impacts created by the UNGPs so far while negotiation for a legally binding treaty on business and human rights is underway.

Keywords: Business enterprise, corporate complicity, human rights due diligence, TNCs, and UNGPs.

1. Introduction

The classical discourse of international human rights law is predominantly state-centric, implying that states are the ultimate guarantor and guardian in the protection and promotion of human rights of individuals.[2] This approach is arguably rooted in the power and authority of states to enforce international law

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[2] Tom Obokata, 'Smuggling of human beings from a human rights perspective: obligations of non-state and state actors under international human rights law' (2005) International Journal of Refugee Law 17(2), p. 403

at the domestic levels.[3] However, the ever-increasing role and influence of non-state actors in this globalized world categorically call for a move away from the exclusive state-centric focus of international human rights law to addressing the conduct of non-state actors.[4] While human rights debate has expanded to address the accountability of non-state actors including business enterprises for human rights abuses, the responses to this debate vary widely depending on one's approach towards understanding and interpreting international law.[5] There is enough evidence to suggest that the unprecedented expansion of global business activities pervade the landscape of human rights in various ways. Whilst states derive economic benefits from the proliferation of business activities, what is worrying is the increasing power and influence of corporations that overwhelm the states to tackle threats to the enjoyment of human rights resulting from their activities.[6]

Global NGOs and human rights lawyers continue to criticize corporate behavior for transgressing the universally agreed human rights norms with relative impunity.[7] Advocacy efforts addressing the issue strongly stressed the need for ensuring human rights accountability of business enterprises including transnational corporations within the framework of international human rights law, ushering in a new era of relationship between business and human rights.[8] Such a demand clearly requires the application of international human rights law to private actors signifying directly enforceable obligations on business enterprises.[9] It is against this backdrop the article, in the first section, engages with the various strands of thoughts posited by the international lawyers addressing the human rights obligations of non-state actors within the broader framework of international law with particular emphasis on international human rights law. In the second section, the article claims that the existing body of international human rights law arguably offers ample scope to attribute direct human rights obligations to business enterprises as non-state actors. The analysis in this section is also supported by other relevant branches of international law which admittedly trigger a range of explicit and implicit obligations to non-state actors. The fourth section, highlighting the increasingly evolving intersection between human rights and business, examines the efficacy of the soft law standards including the United

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3 Chris Jochnick, 'Confronting the Impunity of Non-state Actors: New Fields for the Promotion of Human Rights' (1999) Human Rights Quarterly, Vol. 21, No. 1, p. 58

4 Beth Stephens, 'Corporate liability: enforcing human rights through domestic litigation' Hastings Int'l & Comp. L. Rev. 24 (2000) p. 408

5 Andrew Clapham, *Human rights obligations of non-state actors* (Frist published 2006, OUP) p. 7

6 Jan Arno Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 BUFF. HUM. RTS. L. REV. 21, p. 26

7 Steven Ratner, 'Corporations and human rights: a theory of legal responsibility' (2011) Yale Law Journal, p. 446

8 Denis G. Arnold, 'Corporations and Human Rights Obligations' (2016) 1 BHRJ 255, p. 257

9 Ibid

Nations Guiding Principles on Business and Human Rights (UNGPs) in holding business actors accountable for human rights abuse. The final section of the article sheds light on the debates concerning the potentially growing consensus over a legally binding instrument on business and human rights.

2. Position of Non-state Actors in International Human Rights Law

In international law, a broad range of entities[10] come under the banner of non-state actors.[11] Many international lawyers argue that international human rights law consigns no obligations to non-state actors.[12] They assert that it is the relevant government's responsibility to deal with the threats to the enjoyment of human rights resulting from the acts of non-state actors, and provide remedies for the victims of violation. However, the reality today is different. Non-state actors have come to exert their influence to an extent that has effectively eroded the state power and authority, thereby posing insurmountable challenges for states to tackle the increasing human rights violations committed by non-state actors.[13]

In debates surrounding the application of human rights law to private sphere, several strands of thoughts and responses have emerged. Andrew Clapham has effectively summarized the responses to this debate in two broad approaches.[14] One approach dismisses the idea of attributing human rights duties to non-state actors by arguing that any such attempt is likely to undermine the authority of states and would inadvertently accord non-state actors 'greater status'.[15] This approach seeks to reaffirm faith in the current state-focused system of international human rights law.[16] On the contrary, the other approach by acknowledging the growing decline in power and authority of states suggests that attention should also focus on non-state actors. Referring to the overwhelming reach of corporate activities spearheaded by globalization, Gunther Teubner aptly observed:

> Globalization has now become a fragmented process where politics has lost its leading role. It is now driven by invisible markets and branches that transcend

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[10] The list includes international organizations (IGOs), non-governmental organizations (NGOs), multinational corporations (MNCs), armed groups and individuals etc

[11] Math Noortmann., Reinish, a,m & Ryngaert, C., *Non-state actors in international law* (Oxford: Hart Publishing 2005) p. 2

[12] Yael Ronen, 'Human Rights Obligations of Territorial Non-State Actors'(2013) 46 CORNELL INT'L L.J. 21, p.38

[13] Jan Arno Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 BUFF. HUM. RTS. L. REV. 21, p. 23

[14] Andrew Clapham, (n 5) p. 4

[15] Ibid, p. 9

[16] David Karp, *Responsibility for Human Rights, Transnational Corporations in Imperfect States* (Cambridge: Cambridge University Press, 2014) p.218

> territorial boundaries. Thus, a system based on the plurality of legal discourses rather than a hierarchy of legal orders is needed to respond to globalization.[17]

Indeed, the increased presence of non-state actors in the international affairs signals that they are gradually solidifying their position as potential rule-makers in the future systems. In line with this view, Arneld makes the point that 'in the new system general international law would come about through the many interactions of multiple international actors.[18]

To address the issue, Andrew Clapham advances a balanced proposition. He aims to develop an understanding that attaches obligations to non-state actors while not undermining the authority of states. Therefore, he proposes to locate human rights obligations for non-state actors in the prevailing system of international law. He, therefore, seeks to build on the current obligations imposed on states under international law. He argues that some of the obligations already existing in international law traditionally applied to states can also be applicable to non-state actors. He suggests that, to develop a normative framework addressing this issue, activities of the non-sate actors and their relationship with the state need to be examined by reference to the rules and standards of international human rights law. In this way obligations could be entrenched to address the behavior of the non-state actors that threatens human rights. His idea is to create a system founded on the prevailing construction of international law which would not allow non-state actors to claim primacy over states. It is based on this proposition subsequent analysis in this paper seeks to build an understanding of human rights obligations for non-state actors focusing on business enterprises.

3. Grounding Human Rights Obligations for Non-state Actors in the Existing Framework of International Law

Absolute reliance on states for the protection and promotion of human rights appears to be ineffective.[19] The horrendous experiences of Holocaust serve us a terrible illustration of how non-state actors in connivance with the states or independently of states can commit grave human rights violations.[20] The painful experiences of the two world wars accompanied by a series of instances causing great harm to human dignity resulted in the internationalization of human rights law and simultaneous development of international criminal law[21]. Admittedly, the emergence of these two branches of international law mark a unique

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17 G. Tuebner, 'Global Bukowina, Legal Pluarlism in the World Society', in G. Teubner(ed) *Global Law Without a State* (Aldershot: Dartmouth, 1997) 8

18 A. C. Arend, *Legal Rules and International Society* (New York: Oxford University Press, 1999) 179

19 Peter T Muchlinski, 'Human rights and multinationals: is there a problem?' (2001), International affairs 77.1 p. 35

20 J. E. Parkinson, *Corporate power and responsibility (Oxford: Clarendon Press, 1993);* J. Dine, The governance of corporate groups (Cambridge: Cambridge University Press, 2000)

21 Math Noortmann (n.11) p. 3

transformation in which private individuals were recognized as new subjects of international law in addition to states.[22] However, it has been argued that this recognition entitles individuals only with rights without assigning any corresponding duties and responsibilities.[23] Some international law scholars contend that trying to identify human rights obligations for non-state actors appears to be a search for needle in a haystack.[24] Nevertheless, attempts to innovate and develop a legal basis of responsibilities for non-state actors from within the existing framework of international human rights law is gradually gaining ground.

Those seeking to develop an understanding of horizontal application[25] of human rights argue that human rights duties applicable to private actors can be deduced from the current human rights regime. As observed by Chris Jochnick, human rights being rooted in human dignity should be able to transcend the boundaries of treaties and customary practice to exercise its authority over states and non-state actors alike.[26] Clearly, human rights came into existence not merely because states endorsed them, rather human rights derived their authority from the inherent dignity of human beings.[27] Viewed from this angle, the application of human rights to private sphere involving non-state actors enjoys broader appeal, at least theoretically. It is thus not an exaggeration to emphasize that protection of human rights should extend to all circumstances in which human rights are jeopardized regardless of who put them in jeopardy.[28] In fact, there are instances in which domestic legal systems have imposed human rights obligations on private individuals. Moreover, a nuanced analysis of the international bill of rights and some other emerging practices in the realm of customary international law in the following section would reveal that non-state actors have human rights obligations.[29]

International human rights law and non-state actors

An examination of the international bill of rights provides ample evidence to understand the assertion that human rights law envisages provisions implicating

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[22] Chris Jochnick, 'Confronting the Impunity of Non-state Actors: New Fields for the Promotion of Human Rights' (1999) Human Rights Quarterly, Vol. 21, No. 1, p. 58

[23] Ibid

[24] Ibid

[25] Gavin Phillipson, 'The Human Rights Act, horizontal effect and the common law: a bang or a whimper' (1999) Mod. L. Rev. 62 824

[26] Ibid

[27] Javaid Rehman, *International human rights law* (Pearson education, 2010) p. 49

[28] Dr. Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a fairer and more effective system of domestic law remedies' A report prepared for the Office of the UN High Commissioner for Human Rights, p. 60

[29] Jan Arno (n.13), p. 24

private duties in two different ways.[30] First, some provisions appear to explicitly or implicitly indicate that individuals owe duties. Second, there are rights without explicitly identifying as to who owes corresponding duty. Both ways can be interpreted to support the contention that human rights law does not prima facie exclude horizontal application of human rights.

The Universal Declaration of Human Rights (UDHR)[31] articulates human rights obligations for non-state actors in several provisions including the opening paragraph.[32] The UDHR commences with the expression that "every individual and every organ of the society shall strive by teaching and education to promote respect for these rights and freedoms and to secure their universal and effective recognition and observance". Similarly, article 29 of the UDHR refers to the human rights duties of individuals, although the nature and scope of such duties are not clearly outlined. More significantly, article 30 provides that "nothing in the Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." Article 30 makes it abundantly clear that private actors attract duties under the declaration.[33]

Some human rights lawyers assert that if UDHR creates human rights obligations for non-state actors, then the subsequent developments of international human rights law building on the UDHR may be interpreted to place obligations on non-state actors. This is what some human rights advocates have designated as derivative horizontal human rights obligations. However, the negotiation history of the UDHR does not provide strong evidence to support this contention. Nevertheless, it is perhaps commonly agreed that UDHR suggests individuals and organs to refrain from actions that either encourage states to violate human rights or hinder the state' adherence to human rights obligations. For instance, if a company works in partnership with a state initiative which is likely to violate human rights of citizens, the company may be held accountable for such act. Some international and domestic practices testify that the duty not to become complicit in human rights abuses is gradually gaining consensus, forming part of the customary international law. For example, the UN Economic and Social Council passed three resolutions[34] urging companies to divest from South Africa referring

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30 Jordan J Paust, 'The Other Side of Right: Private Duties under Human Rights Law' (1992) 5 HARV HUM RTS J 51

31 UDHR was adopted by the United Nations General Assembly at its third session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France

32 Elena Pariotti, 'International soft law, human rights and non-state actors: towards the accountability of transnational corporations?' (2009), Human Rights Review 10.2 139-155

33 Manfred Nowak, 'Introduction to the international human rights regime' (Brill Nijhoff, 2003) 85

34 <https://www.history.com/this-day-in-history/u-n-condemns-apartheid....military%20relations%20with%20the%20country> (last accessed on 01 Jugust 2019)

to the human rights abuses perpetrated by the Apartheid regime.[35] In the context of business enterprises, the adoption of the United Nations Guiding Principles on Business and Human Rights constitute an authoritative expression of the business responsibility to respect human rights. In addition to that, at the domestic levels, different models of constitutional protection against rights violations caused by private actors have emerged, triggering the growth of horizontal model of rights protection in contrast to the dominant and traditional vertical model of rights protection. Under the constitutions of Malawi, Argentina, South Africa and Ghana constitutional rights can be enforced both directly and indirectly against private actors in some circumstances.[36]

The Irish experience offers a classic example of judicial intervention activating the horizontal effect of the constitutional rights by means of developing the idea of constitutional tort. In the case of Meskell v. CIE, a private entity was held liable for the infringement of the constitutional right and had to pay compensation to the victim.[37] The case clearly established that "if a person has suffered damage by virtue of breach of constitutional right or the infringement of a constitutional rights, that person is entitled to seek redress against the person or persons who have infringed the right".[38] In a similar observation in Educational Company of Ireland Ltd v Fitzpatrick , Budd J. stated that " if one citizen has a right under the constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it".[39] These domestic examples are, however, riddled with jurisdictional challenges particularly when a transnational corporation (TNCs) is the perpetrator. There is a clear legal vaccum and absence of mechanisms to deal with such instances of right violation as TNCs operate in multiple legal jurisdictions and their share of liabilities is often difficult to determine.

While the UDHR is accorded a constitutional force in the realm of international human rights law, complete reliance on the UDHR as positive law is arguably problematic. Some human rights advocates assert that even if the UDHR addresses the obligations of non-state actors, those obligations may well be understood to demonstrate the aspirational premise of the UDHR.[40] Conversely, the growing body of jurisprudence surrounding the international human rights law appears to reflect a consensus that the UDHR has achieved the status of customary

35 *See* in *re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009)

36 Aoife Nolan, 'Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) *12 INT'L J CONST L 61,* p. 67

37 *Meskell v. CIE* [1973] IR 121 (Ir.)

38 Ibid

39 *Educational Company of Ireland Ltd. v. Fitzpatrick* (No. 2) [1961] IR 345, 368 (Ir.) (emphasis added).

40 William A Schabas, 'Punishment of non-state actors in non-international armed conflict' (2002) Fordham Int'l LJ 26: 907, p. 920

international law.[41] This view is deemed appropriate in so far as the jurisprudence developed under the present corpus of binding international human rights instruments is concerned, which is precisely built upon the spirit and content of the UDHR.

In parallel to the UDHR, similar provisions indicating private duties are embodied in both the ICCPR and ICESCR.[42] The preamble to the ICCPR[43] expressly recognizes that "the individual is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." It signifies that with respect to human rights, individuals have duties to other individuals and such a duty certainly gives rise to obligations not to deny or violate human rights of others. In addition to that, article 5, paragraph 1 of the ICCPR underscore that 'nothing contained therein can imply 'for any state, group or person any right to destroy or limit the rights of others to a greater extent than is provided.' Likewise, ICESCR[44] preamble and article 5(1) contain similar recognitions in regard to private obligations. As binding legal instruments, both the ICCPR and ICESCR provide convincing authority to make the case for the application of human rights responsibilities to private sphere.

UN Declarations and Resolutions on private duties to respect human rights

Several UN declarations contain human rights obligations of private actors. For instance, UN General Assembly Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[45] provides that:

> [e]veryone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms **....** and [i] ndividuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.

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41 Richard B Lillich, 'The growing importance of customary international human rights law'(1995) Ga. J. Int'l & Comp. L. 25 1

42 On private duties, see McDouGAL ET AL., *supra* note 5, at 807-08 (the Universal Declaration's equal emphasis on rights and duties is also seen in the Covenant on Civil and Political Rights)

43 The International Covenant on Civil and Political Rights is a multilateral treaty adopted by the United Nations General Assembly. Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976 in accordance with Article 49 of the covenant

44 International Covenant on Economic, Social, and Cultural Rights, Dec. *16,* 1966, 993 U.N.T.S. 3

45 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, Annex, at art. 11, U.N. GAOR, 53d Sess., U.N. Doc A/RES/53/144 (Mar. 8, 1999)

Also, in context of transnational corporations, the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy sets out several non-binding horizontal human rights obligations.[46] More so, the 1985 General Assembly Resolution on Measures to Prevent International Terrorism [47] "unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed."

Non-state actors in International Criminal Law and IHL

Although via a different legal classification and in a narrowly circumscribed context, the growing corpus of international criminal law and international humanitarian law explicitly articulate human rights obligations for private actors [48] These two branches of international law have successfully developed the notion of individual criminal responsibility[49], providing a solid normative basis through which to build a robust legal justification to address the behavior of non-state actors in the larger context of human rights law.

The 1948 Genocide Convention[50] expands the obligations to private individuals for the crime of Genocide. Article 4 of the Convention unequivocally outlines that ''Persons committing genocide shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." One the other hand, international humanitarian law through common article 3 of the Geneva Conventions places obligations on all parties to a conflict irrespective of their status as state or non-state actors.[51] While this branch of law applies only in

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[46] Int'l Labour Org., *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,* Nov. 16, 1977, 17 I.L.M. 422 (1978) <www.ilo.org/public/ english/ standards/ norm/sources/mne.htm> (last accessed on 02.08.2019)

[47] G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. **53,** at **301,** U.N. Doc. A/RES/40/61

[48] Yael Ronen, 'Human Rights Obligations of Territorial Non-State Actors'(2013) 46 CORNELL INT'L L.J. 21 p. 23

[49] Ciara Damgaard, 'Individual criminal responsibility for core international crimes: selected pertinent issues'(2008) Springer Science & Business Media, p 88

[50] The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260. The Convention entered into force on 12 January 1951

[51] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), adopted 12 Aug. 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31, (entered into force 21 Oct. 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II), opened for signature 12 Aug. 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (entered into force 21 Oct. 1950); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), adopted 12 Aug. 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (entered into force 21 Oct. 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), adopted 12 Aug. 1948, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force 21 Oct. 1950). The legal obligations of "dissident armed forces or other organized armed forces" were later expanded through Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the

context of armed conflict and imposes criminal responsibility on individuals for certain specific category of proscribed acts[52] that constitute grave breaches of human rights, it nevertheless serves as an illustration based on which further developments can be made in areas of international human rights law.[53]

It is notable that the practice of holding private individuals liable for violations of the laws of war and prosecuting them on that basis dates back to the Nuremberg trial.[54] Nuremberg trial upheld the practice and it has evolved over time. The Nuremberg Judgment observed:

> That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized .... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[55]

It is thus submitted that these two branches of international law provide plenty of examples establishing horizontal obligations, which in turn complements the state's responsibility and facilitate in closing the existing accountability gap for non-state actors in international law.

The emerging intersection between human rights and business

It is a plain global fact that business enterprises, large or small, including MNCs in today's world wield more influence and power than most states in the global south.[56] As noted by Higgins, MNCs participate and at times decisively influence the making and unmaking of international law.[57] When found breaching human rights they should therefore not be considered immune from the discipline of

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Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, art. 1, ? 1, U.N. Doc. A/32/144, 1125 U.N.T.S. 513 (entered into force 7 Dec. 1978), reprinted in 16 I.L.M. 1442 (1977)

[52] Such as Genocide, Crimes against Humanity and War crimes

[53] Steven Ratner, 'Corporations and human rights: a theory of legal responsibility' (2011) Yale Law Journal, p. 446. 466

[54] *See, e.g.*, William W. Winthrop, Military Law and Precedents 776, 778, 783- 84, 796, 832-34 (2d ed. rev. 1920); Jordan J. Paust, *My Lai and Vietnam*, 57 MIL. L. REV. *99*, 113-16, 129-31 (1972) [hereinafter *My Lai]*; Jordan J. Paust, *After My Lai. The Case for War CrimeJurisdiction Over Civilians in Federal District Courts*, 50 TEx. L. Rv. 6, 12-16 (1971). *See also Expare* Quirin, 317 U.S. 1, 22-23, 27-29, 31, 33-36 (1942); 11 Op. Att'y Gen. 297, 300 (1865)

[55] *See, e.g.*, Opinion and Judgment of the International Military Tribunal (Nuremberg 1946), *supra* note 7; Frank Newman & David Weissbrodt, International Human Rights 714-17 (1990); U.S. Dep't of Army Pane. No. 27-161-2, II International Law 229-31 (1962); Paust, *My Lai, supra* note 40, at 133-35; Randall, *supra* note 5, at 386-87. *See also* Opinion of Advocate General Dontenwille, Judgment of Dec. 20, 1985 (Fidration Nationale des D~portis et Intern6s v. Barbie), Cass. crim., *translated in* 78 INT'L L. REP. 125, 147 (dictum re: private duties in connection with crimes against humanity); Adam Roberts & Richard Guelff, Documents on the Laws of War 10-12 (1982)

[56] Upendra Baxi, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus' (2016) 1 BHRJ 21, p. 23

[57] Rosalyn Higgins, *Problems and process: international law and how we use it* (Oxford University Press 1995) 49

international human rights law.[58] Corporate activities may infringe human rights in many ways. Broadly speaking, they may directly threaten the enjoyment of human rights as primary perpetrators or may indirectly contribute to human rights violations committed by others.[59] Indirect participation in human rights abuse is referred to as corporate complicity[60] to human rights abuse. Corporate involvement in any government initiative which is likely to infringe on people's rights may amount to corporate complicity to human rights violation.[61]

Most studies indicate that businesses often target the vulnerable people and areas in pursuit of achieving maximum profit.[62] Among others, extractive industries are at the forefront in creating adverse impacts on population, environment and agricultural lands in many countries.[63] For instance, many MNCs run uranium mining operations in Namibia, Tanzania, Niger and Malawai. The impact of their activities on the economy, environment and health in these countries has proven to be highly destructive. The high presence of MNCs extracting natural resources in Haiti and the ensuing disasters portray the dogged quest for profit by the MNCs with no regard for human rights, natural environment and future generations.[64] The operation of Texaco, later owned by Chevron, in Ecuadorian Amazon, a US based private Oil Development Company, is a notorious illustration of adverse human rights impacts through business activities. The company possessed annual global income four times larger than that of Ecuador's Gross National Product (GNP). The communities in the region suffered the terrible impacts of Texaco's abuses on their environment.[65] While several lawsuits were filed against the company, victims were denied effective remedy.

Several NGO reports revealed the extensive involvement of corporate sector in human rights abuse in the last few decades. A study conducted by the South African Truth and Reconciliation Commission found the involvement of business enterprises in the practices of Apartheid in South Africa.[66] A special unit of the Human Rights Watch on Corporations and Human Rights published two reports

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58 Ibid

59 Ramona Elisabeta Cirlig, 'Business and Human Rights: From Soft Law to Hard Law' (2016) 6 Juridical Tribune, p. 228

60 Farzana Aslam, 'Business and Human Rights in Southeast Asia: Risk and the Regulatory Turn' (2016) 1 BHRJ 371, p. 389

61 Anna Grear et al, 'The betrayal of human rights and the urgency of universal corporate accountability: Reflections on a post-Kiobel lawscape' Human Rights Law Review 15.1 (2015): 21-44

62 Jeanne M Woods. 'A Humtesan Rights Framework for Corporate Accountability'(2010) ILSA J. Int'l & Comp. L. 17, p. 328

63 Ibid

64 John R. Wilke & Brody Mullins, 'After Katrina, Republicans Back a Sea of Conservative Ideas'(2005)

65 Chris Jochnick et al., "Rights violations in the Ecuadorian Amazon: the human consequences of oil development." (1994) Health and human rights journal, pp. 83-100

66 Steven (n. 53)

in 1999 implicating Texas-based Enron corporations for aiding and abetting Indian government in human rights violations. The reports also accused several international oil companies such as, Shell and Mobil for cooperating with Nigerian government to quell the political oppositions.[67]

Evolution of international standards to address business-related human rights abuse

Heightened NGO activities and civil society protests in the wake of the widespread human rights abuses by Multinational Corporations(MNCs) in the late twentieth century resulted in the adoption of a series of non-binding regulatory instruments aimed at curbing the adverse human rights impacts of corporate activities.[68] In 1983 the draft UN Code of Conduct was adopted to provide social and environmental guidelines for TNCs operating globally. While the project was well received by the global south, it however encountered considerable backlash from the global north where majority of the TNCs have their headquarters.[69] The initiative prompted OECD countries to formulate a series of non-binding guidelines commonly known as OECD Guidelines for Multinational Enterprises. However, these guidelines were criticized for their narrow focus on human rights issues.

To draw the attention of the global business community on business abuse of human rights, UN Secretary General Kofi Anan initiated the UN Global Compact as voluntary learning initiative in 2000. It aimed to educate the global business community to align their business operations with human rights. In 2003, adoption of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights[70] was a significant step forward in developing standards to regulate MNCs to respect human rights. The norms made the first attempt to place direct obligations on corporations under international law.[71] Albeit strongly endorsed by the civil society, business community reacted to the norms negatively and in a relatively hostile manner. It was alleged that the norms failed to draw a clear line of distinction between human rights obligations of states and corporations. While the Norms eventually failed to

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[67] Ibid

[68] Patricia Feeney, 'Business and human rights: the struggle for accountability in the UN and the future direction of the advocacy agenda.' (2009) Sur. Revista Internacional de Direitos Humanos 6, no. 11, 162

[69] L Gallegos& Uribe, D, 'The next step against corporate impunity: A world court on business and human rights?' (2016) Harvard Journal of International Law, p. 57

[70] David, Weissbrodt, and Muria Kruger, 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (2003): American journal of international law 97.4 901-922

[71] Elena Pariotti, 'International soft law, human rights and non-state actors: towards the accountability of transnational corporations?' (2009) Human Rights Review, 10.2, 139-155, p. 162

garner universal support, as claimed by the UN Secretary General, it did play a significant role in shaping the debate on business and human rights.

In order to move the agenda forward, UN Secretary General appointed Professor John Ruggie as his special representative on business and human rights in 2005. Ruggie was highly critical of the UN Norms and dismissed any scope to develop it any further. He came up with a groundbreaking three pillar framework[72] in his 2008 report entitled "Protect, Respect and Remedy.[73] This framework received high level of acceptance from business community, governments and civil society groups. Ruggie was thus requested to develop concrete guidelines to operationalize this framework. Ruggie[74] then drafted a set of principles called United Nations Guiding Principles on Business and Human Rights (UNGPs)[75] in 2011 to operationalize the three pillar framework, which the UN Human Rights Council had unanimously endorsed through resolution 17/4.[76] These guiding principles are the latest addition in a series of initiatives endorsed by the UN Human Rights Council. Although, UNGPs are soft law standards and are not without limitations in many respects, it nevertheless has attained widespread recognition. Currently, it constitutes the most authoritative set of global standards to regulate the behavior of corporations.[77]

Business responsibility to respect human rights in the UNGPs

Corporate responsibility to respect human rights is the second pillar Ruggie outlined in his three-pillar framework on business and human rights. Subsequently, it has been placed in part II of the UNGPs. This pillar, as elaborated in the UNGPs, demands that businesses should avoid infringing human rights and

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72 Barbara A Frey, 'The legal and ethical responsibilities of transnational corporations in the protection of international human rights'(1997): Minn. J. Global Trade 6 153

73 A Framework for Business and Human Rights". John Ruggie's three-pillar framework is outlined as; (i) States have the duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; (ii) companies have the responsibility to respect human rights, which the SRSG defined as in essence involving managing the risk of human rights harm with a view to avoiding it; and (iii) victims require greater access to effective remedies, including non-judicial grievance mechanisms

74 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework, 2 March 2011, A/HRC/17/31. See Ruggie, *Just Business. Multinational Corporations and Human Rights* (New York: WW Norton, 2013); and Buhmann, 'The Development of the "UN Framework": A Pragmatic Process Towards a Pragmatic Output', in Mares (ed.), *The UN Guiding Principles on Business and Human Rights* (Leiden: Martinus Nijhoff, 2012) 85

75 Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 2 March 2011, A/HRC/17/31 Annex

76 UNHRC, 6 July 2011, A/HRC/RES/17/4

77 Daniel Augenstein et al., 'Implementing the UNGPs in the European Union: Towards an open method of coordination for business and human rights'(2017). EUI Department of Law Research Paper 2017/01

address adverse human rights impacts with which they are directly or indirectly involved.[78] UNGPs articulate that responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate.[79] UNGPs recommend that companies should undertake a broad range of measures to ensure that human rights issues are properly taken into consideration in their operations.[80] This responsibility is independent of state's abilities and/or willingness to fulfill their own human rights obligations and does not diminish it anyway.[81] Here, the central focus lies in the prevention and mitigation of impacts business enterprises cause or contribute to as well as those that are directly linked to their operations, products or services.[82] In efforts to prevent and mitigate adverse human rights impacts, corporations are required to recognize the full array of internationally recognized human rights.[83]

In quest of advancing business respect for human rights, UNGPs suggest three different but interrelated duties for companies.[84] First, they must formulate a policy demonstrating their commitment and willingness to meet the responsibility to respect human rights. Second, they should undertake a Human Rights Due Diligence (HRDD) Process to identify, prevent, mitigate and account for how they would address impacts on human rights. Third, they are required to develop a system to enable the remediation of any adverse human rights impacts they cause or to which they contribute. Among these three operational principles, UNGPs attach central importance to HRDD process. As observed by Ruggie, HRDD is the main vehicle for a company to discharge the responsibility to respect human rights within the framework of the UNGPs.[85]

Global uptake of the UNGPs

The fact that the UNGPs have been well received is reflected in its incorporation in several leading international standards and initiatives. Various regional intergovernmental organizations, states, human rights institutions, business organizations, and civil society have shown their increasing support for the

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[78] United Nations Guiding Principles on Business and Human Rights(UNGPs), 2011,Part-II, Foundational Principle 11, p.10

[79] Ibid

[80] Claire Methven O'Brien et al., 'The corporate responsibility to respect human rights: a status review' (2016) Accounting, Auditing & Accountability Journal 29.4, p. 544

[81] UNGPs, pillar II, principle 11, p. 1

[82] UNGPs, pillar II, principle 13, p. 14

[83] UNGPs, pillar II , principle 12, p. 14

[84] UNGPs, pillar II , principle 16, p. 17

[85] Jonathan Bonnitcha, Robert McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) European Journal of International Law, Volume 28, Issue 3, p.910

UNGPs.[86] The establishment of a Working Group on the Issue of Human Rights and Transnational Corporation was an effective addition to the UNGPs.[87] The group was formed to intensify efforts towards comprehensive dissemination and implementation of the UNGPs. Prompt response was received from the Organization for Economic Development and Cooperation (OECD). The organization revised its Guidelines for Multinational Enterprises in 2011 by clearly aligning the principles set out in the UNGPs.[88] It is equally significant to note that the national contact points established under the OECD who deal with disputes concerning the violation of the guidelines reaffirmed their desire to link OECD with the UNGPs.[89] Moreover, important aspects of the UNGPs have been highlighted in the International Finance Corporations Sustainability Framework.[90]European Commission undertook a landmark initiative to develop globally-applicable guidance based on the UNGPs targeting three industrial sectors which include oil and gas, information and communication technology, and employment and recruitment as well as for small and medium size enterprises.[91] The commission also decided to publish periodic reports on the implementation of the UNGPs. It also urged its member states to develop plans to implement the UNGPs.[92]

Compared to the initiatives undertaken, some studies recorded slow progress in reality.[93] In 2013, a survey conducted by the Working Group on 153 companies of

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86 Report of the Working Group on the issue of human rights and transnational co porations and other business enterprises, 10 April 2012,HRC Twentieth Session, A/HRC/20/29, p. 6, para 22

87 The Working Group on the issue of human rights and transnational corporations and other business enterprises (also referred to as the Working Group on Business and Human Rights) was established by the Human Rights Council in 2011 (resolution 17/4). The Working Group is composed of five independent experts, of balanced geographical representation. The Council renewed the Working Group's mandate in 2014 (resolution 26/22) and 2017 (resolution 35/7) <https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last accessed on 31 August 2019)

88 <www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html> (last accessed on 20 September 2019)

89 See OECD National Contact Point Norway, "Report: Mining company does not act in accordance with the OECD Guidelines" available from <www.regjeringen.no/en/sub/styrer-rad-utvalg/ncp_norway/news/report_intex.html?id=664912>; and Netherlands National Contact Point for the OECD Guidelines, Final report of the National Contact Point for the OECD Guidelines in the Netherlands on the Specific Instance notified by CEDHA, INCASUR Foundation, SOMO and Oxfam Novib concerning Nidera Holding B.V., 3 February 2012, <www.oesorichtlijnen.nl/wp-content/uploads/final_statement_nidera.pdf> (last accessed on 22 October 2019)

90 <www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/ifc+sustainability/sustainability+framework/> (last accessed on 29 December 2019)

91 European Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels, 25 October 2011, COM(2011) 681

92 Remarks by Rafendi Djamin, representative of Indonesia to the ASEAN Intergovernmental Commission on Human Rights, at the Asia Pacific Forum of National Human Rights Institutions Regional Conference on Business and Human Rights, 11-13 October 2011, Seoul

93 United Nations General Assembly Report, 2013

different sizes and forms concluded that only 58 percent of the companies adopted a policy document indicating their commitment to respect human rights.[94] Up to 2016, Business and Human Rights Centre documented that less than 350 companies out of approximately 80,000 transnational firms worldwide had policies on human rights.[95] Compared to the number of TNCs, compliance rate appears to be overwhelmingly poor. It was expected that companies which participated in the UN Global Compact as well as those expressed their support for the OECD Guidelines on MNCs would ensure compliance with the UNGPs and OECD Guidelines. However, a 2013 study on 200 large European companies revealed that only 33 percent made explicit reference to UNGPs and OECD Guidelines for MNCs.[96] Among them, only three percent referred to the UNGPs, while 2 percent referred to the ILO's Tripartite Declaration of Principles concerning MNCs and Social Policy.[97] Majority of the studies highlighted that large companies are more likely to adhere to the international human rights standards than small companies.[98] Domestic experiences suggest that regarding the adoption of human rights policy, motivations from the governments and strong business ethics play a vital role.[99] Therefore, states are expected to take necessary measures to motivate companies to adopt human rights policies. Certainly, it will facilitate in the creation of a level playing field among the companies with respect to their human rights obligations.

Domestic implications of the UNGPs

It is undoubtedly encouraging to see a wide array of domestic level initiatives. However, their impact on company's performance appears to be dissatisfactory.[100] In the absence of state driven regulatory frameworks, many companies have developed voluntary practices to ensure respect for human rights, which is indeed a positive sign.[101] However, the practice being a voluntary one in most jurisdictions raised doubts and skepticism about its efficacy.

Some countries in fact have advanced to the extent of enacting legislation requiring respect for human rights by companies. China made a draft legislation in 2015 envisaging a requirement of due diligence for the companies to ensure that their supply chains do not commit human rights abuses. The UK passed the

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94 Ibid

95 Business and Human Rights Resource Centre, 2016, Accessed on <https://www.business-humanrights.org/> (last accessed on 20 November 2019)

96 Claire Methven O'Brien et al., 'The corporate responsibility to respect human rights: a status review' (2016) Accounting, Auditing & Accountability Journal 29.4, p. 546

97 Ibid

98 Ibid, 548

99 Ibid, 549

100 Christine M Chinkin, 'The challenge of soft law: development and change in international law." (1989): International & Comparative Law Quarterly 38.4, 870

101 Ibid, p. 875

landmark Modern Slavery Act[102] in 2015 which requires certain businesses to disclose what activity they are undertaking to eliminate slavery and trafficking from their supply chains and their own businesses.[103] The Act provides that companies with a turnover threshold of (Y36 million), must prepare a slavery and human trafficking statement for each financial year. It is however a pity to note that, a recent report released by Sancroft and Tussell on 20 May 2019 on modern slavery reporting performance of UK's top suppliers revealed that about 29 of the nation's 100 biggest suppliers in 2019 did not meet a legal requirement to outline the steps they had taken to combat the risk of forced labour within their supply chains.[104] Highlighting the narrow scope of the law, Britain's new independent anti-slavery commissioner Sara Thornton recently stressed that the law should be expanded to include the public sector [105]

In 2013, following *Erika* oil spill case[106], a group of French parliamentarians introduced the French bill on corporate due diligence. Although the bill in its first two draft versions provided for company's obligations to prevent damages, it ended up adding nothing related to corporate liability for human rights violations except requiring a non-financial reporting in accordance with the EU Directive.[107]

The United States also passed a bill on the Business Supply Chain Transparency on Trafficking and Slavery Act (2015)[108]. The law made amendment to the Securities Exchange Act of 1934, empowering the Securities and Exchange Commission to issue regulations requiring listed companies that had annual worldwide global turnover in excess of $100 million to publish a mandatory annual report.[109] The report must disclose detailed measures it had taken in a financial year to identify and address conditions of slavery, human trafficking, child labor within its supply chains. The law also requires the company to make such information available on its website "through a conspicuous and easily understandable link to the relevant information labeled Global Supply Chain Transparency". The Securities and Exchange Commission is entrusted with the

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[102] The official UK legislation portal, Accessed on <http://www.legislation.gov.uk/ukpga/2015/30/contents> (last accessed on 29 April 2019)

[103] Ramona Elisabeta Cirlig, (n. 59), p. 234

[104] Kieran Guilbert, Thomson Reuters Foundation, Modern slavery reporting performance of UK govt.'s top suppliers still low according to updated research.<https://www.business-humanrights.org/en/uk-one-third-of-govts-top-100-suppliers-fail-to-meet-modern-slavery-act-requirements-report-says> (last accessed on 14 October 2019)

[105] Ibid

[106] In September 2012, France's Cour de Cassation upheld a 2008 ruling against Total SA over a 1999 oil spill of 22,046 tons of crude oil, when the24-year-old tanker Erika split apart in a storm off the northwest coast of France.

[107] Ramona Elisabeta Cirlig, (n. 59)p. 236

[108] Summary of the Business Supply Chain Transparency on Trafficking and Slavery Act (2015). <https ://www.congress.gov/bill/114 th-congress/house-bil/3226/text> (last accessed on 02 January 2020)

[109] <https://www.congress.gov/bill/115th-congress/house-bill/7089/text> (accessed on 20 Feb 2020)

duty to publish the list of companies which failed to make such information available. The objective is to enable the customers to learn information about companies and products which are likely to be held liable for child labor, slavery and human trafficking in their supply chain operations.[110]

The US Alien Tort Claims Act, 1789 is famously cited for its implications on business and human rights discourse. The law empowers the Federal Courts to try in first instances any civil action taken by a foreigner regarding a tort liability for an act committed in violation of the laws of nations or of a treaty in which the US are a party. Despite being an old legislation, it attracted renewed attention in recent years due to its potential to hold US based MNCs liable for human rights abuses abroad.[111] The 9th US Circuit Court in 2002 handed down a seminal ruling that non-state actors can be held accountable for human rights violations, where they have acted in concert with state officials or with significant state aid. However, the seminal Kiobel v Royal Dutch Petroleum case[112] represents an example where the US Supreme Court missed an opportunity to use the Alien Tort Claims Act to hold MNCs responsible for human rights abuses in their supply chains. The case concerns corporate complicity in human rights violation committed by Nigerian government. In 2013, the US Supreme Court ruled that "the presumption against extra-territoriality also applies to claims under the Alien Tort Claims Act, and therefore the Act does not apply to serious human rights violations committed on foreign territory if they lack sufficient connection with the USA. The mere presence of a corporation on the US territory is not sufficient to create such a link." The ruling points to the fact that resolving a case of corporate liability for human rights within a domestic boundary appears to be constrained by the jurisdictional limits of claims under International Law. However, the judgment was criticized by many on ground that it is inconsistent with the previous interpretations of the law, while others welcomed the judgment stating that "it is not the duty of the US to play the role of world police".[113] Under the same Act, another judgment delivered by the federal Court of Appeal in the case of Doe I v. Nestle[114] ruled that MNCs can be held liable under the Alien Tort Claims Act.

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110 Summary of the Business Supply Chain Transparency on Trafficking and Slavery Act (2015).<https://www.congress.Gov/bih/ll4th-congress/house-bil/3226> (accessed on 26 Sep. 2019)

111 Felipe Gomez Isa; Koen de Feyter (Eds.), *International Human Rights Law in a Global Context.* University of Deusto (Bilbao, 20090) p. 21

112 *Kiobel v. Royal Dutch Petroleum Co.,* No. 10-1491 (U.S. 2012)

113 Vivian G. Curran, *Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v. Royal Dutch Petroleum Co.,* "Maryland Journal of International Law", 28 (2013), pp. 77-89. <http:// digitalcommons.law.umaryland.edu/mjil/vo28/iss 1/6> last accessed on 14 November 2019; Charles Kotuby, *New Alien Tort Statute Case at the United States S preme Court Kiobel, et al., v Royal Dutch PetroleumPetition Filed,* 8 June 2011. <http://conflictoflaws.net/201 1/new-alien-tort-statute-case-at--the-united-states-sup reme-court - kiobel-et-al-v--royal-dutch-petroleum-petition--filed/> (last accessed on 30 June 2019)

114 *Doe v. Nestle, S.A.*, No. 17-55435 (9th Cir. 2018)

In this case companies such as Nestle, Cargill, and Archer Daniels Midland were held responsible for forced child labour in their supply chain operations in Cocoa Plantations in the Ivory Coast.

Move towards a binding treaty on business and human rights

It has been argued by many business and human rights practitioners that the progress achieved via soft law standards is slow, thereby making it difficult to bring about the desired change in the global corporate culture to respect human rights.[115] Evidently, corporations operating mostly in developing countries routinely defy rules which are rather loosely framed under the UNGPs.[116] In response to the increasing rate of abuses triggered by business activity, state actions are far too slow and ineffective. Moreover, corporations draw advantage from a widely prevalent climate of corrupt and weak governance structures in many developing countries.[117] A study conducted by the European Parliament in 2017 concluded that despite relative success of the UNGPs, human rights abuse by corporations continue unabated.[118] To make space for a legally binding treaty on business and human rights, the UN Human Rights Council has established an Open-ended Inter-governmental Working Group on TNCs and other business enterprises.[119] After a series of consultations, the working group came up with a zero draft legally binding treaty on business and human rights in 2018, and a revised draft in 2019. It is, however, a reality that a binding treaty is hard to come about in the face of strong resistance from many quarters representing the interest of the business community. In addition to that, a complex web of challenges in relation to the scope, content and enforcement of the potential obligations assigned to business entities appear in this debate. It is, however, expected that the treaty would soon come into force by overcoming all the hurdles it is encountering in the ongoing process of negotiations.

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115 Towards a binding international treaty on business and human rights, European Parliament, Briefing, 2017, p. 4. <http://www.europarl.europa.eu/RegData/etudes ...EPRS_BRI (2018) 620229 _EN.pdf> (last accessed on 15 July 2019)

116 Ibid

117 Ibid

118 A Ramasatry, 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement' in S Deva and D Bilchitz (eds), Human Rights Obligations of Businesses: Beyond the Corporate Responsibility to Protect (CUP 2013) 162–89; T Kirkebø, 'Closing the Gap. A Human Rights Approach to Regulating Corporations' (2015) PluriCourts Research Paper No 15–16. Accessed on <http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2642254> (last accessed on 17 December 2019)

119 The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established by the Human Rights Council in its resolution 26/9 of 26 June 2014 and mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights

4. Conclusion

The paper has argued that the existing regime of international human rights law may well be interpreted to stretch human rights obligations to business enterprises as non-state/private actors. Such an interpretation shall not mean undermining the authority of states or cover up their failure to meet the responsibility to protect, respect and fulfill human rights of citizens. That said, it must not be overlooked that the existing corpus of non-binding international standards including the UNGPs created huge prospects for positive change. The dominant discourse of corporate responsibility to respect human rights reached a point of global consensus following the adoption of the UNGPs. The trends and patterns of global uptake of the UNGPs certainly indicate that positive developments in the realm of business and human rights are gradually taking place. Corporate behaviour showing respect for human rights by way of undertaking human rights due diligence has increased to a great extent. But the gap remains and expected progress is not yet achieved. It is deemed realistically difficult to close this gap without creating a compelling legal regime in this area. Arguably, the task of moving towards a legally binding framework is quite challenging, but not impossible. The recently released draft treaty on business and human rights evidences the growing aspiration of the international community to establish a robust legal regime to combat business-related human rights harms. While the possibility of securing universal support to successfully conclude a legally binding treaty is faced with complex challenges, it is however hoped that with extensive jurisprudential support from the existing regime of international human rights law the UNGPs can be well enforced.