ISSN 2413-2780

Jagannath University Journal of Law

Volume 3 **2015-2021**

Faculty of Law
Jagannath University, Dhaka

Jagannath University Journal of Law
Volume 3 2015-2021

A fully refereed journal

This journal is an official publication of the Faculty of Law, Jagannath University. Opinions expressed in the articles, however, are those of the authors and do not necessarily reflect the views of the Editorial Board.

Printed by : Mukta Offset Printing Press, 16/1 Shirishdas Lane, Banglabazar, Dhaka-1100

Price : 400.44 (BDT)
5.00 (USD)

Jagannath University Journal of Law
Volume 3 2015-2021

Contents

Md. Tarik Morshed and Tania Sultana 1
Arrest and Detention of Refugees and Asylum Seekers in Bangladesh: A Critique from Human Rights Perspective

Md. Shahidul Islam 18
Complete Justice and Preponderance of Probabilities in the Babri Masjid Verdict: A Critique

Khadiza Nasrin and Nurunnahar Mazumder 54
History of Human Rights and Recent Violation of the Right not to be Subjected to Torture

SM Masum Billah 73
How is Human Rights Law Reflected in Law of the Sea?

Khair Mahmud 101
In Quest for a Regional Human Rights Mechanism in South Asia

Md. Asaduzzaman Saadi and Md. Shahidul Islam 124
Labour Rights of Domestic Workers in Bangladesh: An Empirical Study

Sharmin Aktar 144
Legal Awareness and Raising of Agricultural Income Tax: Root Level Evidence from a Northern Village of Bangladesh

Ahmed Ehsanul Kabir and Shuvra Chowdhury 168
Naval Blockade: Theories and Practices

Nirmal Kumar Saha and M Jashim Ali Chowdhury 183
The Efficacy of Parliamentary Question: A Comparative Investigation into the House of Commons and the *Jatiya Sangsad* Practices

KMS Tareq 205
The Irrelevance of the Dichotomy between International Armed Conflicts and Non-International Armed Conflicts

Noor Israth Jahan and Mohammad Moin Uddin 219
The Triple Divorce Judgement and the Unprecedented Penal Legislation on Muslim Divorce in India: A Critical Review

ARREST AND DETENTION OF REFUGEES AND ASYLUM SEEKERS IN BANGLADESH: A CRITIQUE FROM HUMAN RIGHTS PERSPECTIVE

Md. Tarik Morshed[*] and Tania Sultana[**]

Abstract

Human rights are the inherent entitlements that a person enjoys simply for being a human, regardless of nationality or any other status. However, once a victim of forced migration crosses an international border, he becomes more susceptible to deprivation of those rights. In particular, refugees or asylum seekers face arbitrary arrest and detention more frequently in the receiving state. The immigration regime of Bangladesh under the Foreigners Act (FA) 1946 treats illegal migrants and refugees in the same manner and may put them in preventive detention. Eventually, this administrative detention may continue for an indefinite period. Moreover, the state is prone to not complying with the procedural safeguards regarding arrest and detention in general. In this context, this article explores the normative framework of human rights protection of refugees and asylum seekers facing arrest and detention. Then it finds that the laws and practices of Bangladesh relating to the arrest and detention of refugees and asylum seekers violate some of the basic principles of human rights.

1. Introduction

Refugees migrate from the country of their nationality or habitual residence owing to a severe violation of human rights. However, with the fresh memory of persecution, they face foreign immigration policies, often without documentation and minimum resources in fundamental

[*] Assistant Professor, Law Discipline, Khulna University.
[**] Lecturer, Law Discipline, Khulna University.

necessities. In this situation, if a person is arrested and detained, it can only compound his physical and psychological trauma. The human rights regime, which is based on the dignity and worth of a human person, protects refugees and asylum seekers of this situation from arbitrary arrest and detention. However, the immigration laws and policies of many states tend to flout these universal and inalienable rights. Bangladesh hosts one of the most significant numbers of refugees, with more than 8 million people.[1] Therefore, it is timely and necessary to evaluate Bangladesh's relevant laws and practices against its human rights obligations.

This article has two distinct but interconnected parts. The first part describes the existing human rights standards in international and constitutional law relating to the arrest and detention of refugees and asylum seekers. It has considered various sources of international law, including treaty law, customary international law and soft law instruments in doing so. The second part evaluates Bangladesh's ordinary laws and practices regarding the arrest and detention of refugees and asylum seekers on the standards described and analysed in the first part. The evaluation primarily rests on the non-recognition of refugees, the situation of refugee camps, the immigration detention scheme under the FA, and the procedural safeguards. Finally, the conclusion puts forward specific recommendations, including alternatives to detention, to address the issue more efficiently.

2. Definitional Scope of Refugees and Asylum Seekers

The definition of refugee takes a central stage in the discourse of their international and national protection. In common parlance, the word refugee means any victim of forced migration. Thus, Oxford Learner's Dictionary defines a refugee as "a person who has been forced to leave their country or home, because there is a war or for political, religious or social reasons'.[2] However, international law imposes some additional

---

1 UNHCR, 'Bangladesh: Key Figures' <https://reporting.unhcr.org/bangladesh> accessed on 25 September 2021.

2 'Refugee' <https://www.oxfordlearnersdictionaries.com/definition/english/refugee?q=refugee> accessed on 25 September 2021.

requirements for a person to be a refugee. According to Article 1 of the Convention Relating to the Status of Refugees 1951 (Refugee Convention), a person is a refugee who:

(a) Is outside the country of his nationality or his former habitual residence because of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion; and

(b) Is unable or, owing to such fear, is unwilling to avail himself of the protection of that country of his nationality or is unwilling to return to his habitual residence.

The definition only covers the persons crossing an international border and thus excludes internally displaced persons. Furthermore, the persecution must be caused by five discriminatory grounds mentioned above. For example, the people persecuted indiscriminately in civil wars or terrorist activities cannot avail refugee status. Again, the persons persecuted due to their gender or non-Convention grounds will also fail to qualify as refugees. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[3], and Cartagena Declaration on Refugees[4] have expanded the meaning of refugee to cover the situations. In this article, the author will follow the definition given by the Refugee Convention.

An asylum-seeker is a person who has made an application for refugee status in the host state. In this regard, a pertinent question arises whether a person becomes a refugee after the grant of refugee status by the host state or at any other time. The settled principle is that the determination of refugees is only declaratory.[5] Once a person fulfils all the criteria of Article 1, he becomes a refugee. Granting refugee status does not make

3 Art 1(2) of the Convention.

4 Conclusion and Recommendation III(3) of the Declaration.

5 UNHCR, 'Note on Determination of Refugee Status under International Instruments' <https://www.unhcr.org/excom/scip/3ae68cc04/note-determination-refugee-status-under-international-instruments.html > accessed on 25 September 2021.

him a refugee; instead, he is recognised because he is a refugee.[6] Pending the determination of his status, an asylum seeker will enjoy the protection of the principles of *non-refoulement* and non-penalisation for illegal entry.[7]

3. Human Rights Standards for Arrest and Detention of Refugees and Asylum Seekers

The two terms 'arrest' and 'detention' have varying definitions by domestic and international authorities. *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*[8] defines 'arrest' as "the act of apprehending a person for the alleged commission of an offence or by the action of an authority". Also, it defines 'detention' as 'the condition of any person deprived of personal liberty except as a result of the conviction for an offence'. However, the United Nations Working Group on Arbitrary Detention (WGAD) uses the term to include imprisonments after the conviction of an offence also.[9]

As the concept of arrest in international law is expansive, it includes many acts of apprehension which are not considered arrests in domestic law. In the UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention, the definition of detention gets even broader. For the Guideline, detention refers to:

> [T]he deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will,

---

6 UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees <https://www.unhcr.org/4d93528a9.pdf>accessed on 25 September 2021.

7 ACNUR, 'Legislation Establishes the Declaratory Nature of Refugee Status'<https://acnur.org/fileadmin/Documentos/Proteccion/Buenas_Practicas/11348.pdf > accessed on 25 September 2021.

8 Adopted by General Assembly resolution 43/173 of 9 December 1988.

9 UNODC, 'Module 10: Arrest and Detention' in *E4J University Module Series: Counter-Terrorism* <https://www.unodc.org/e4j/en/terrorism/module-10/key-issues/international-human-rights-instruments.html> accessed on 25 September 2021.

> including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.[10]

Therefore nomenclature of the places as 'holding center', 'reception center' or 'refugee camp' is immaterial in determining whether the restriction of liberty is detention within the meaning of international law. Thus the ECtHR has rightly pointed out that "the difference between deprivation of liberty (i.e., detention) and restriction of freedom of movement is merely one of degree or intensity and not one of nature or substance".[11]

Refugees and asylum seekers facing arrest and detention get protected by an array of international instruments. Among the binding sources, treaties and customary international law are of utmost importance. Moreover, in recent decades, various soft law instruments have complemented the mainstream sources. Along with these international sources, the Constitution of Bangladesh provides a minimal set of human rights protection. Thus, careful consideration of all the sources is necessary to have a holistic picture.

3.1. Protection under International Treaties

Though Bangladesh has not ratified the Refugee Convention Relating to the Status of Refugees 1951, it is relevant because some of its principles have become customary international law. Two provisions of the Covenant deal with the arrest and detention of refugees. Firstly, Article 26 grants the refugees 'the right to choose their place of residence to move freely within its territory'. In this respect, they will be subject to the same regulations as aliens in the same circumstances. Secondly, Article 31(1) requires no penalty be imposed on refugees for their 'illegal entry or presence'. However, they must show good cause for such entry or presence without delay to avail this right. Finally, article 31(2)

---

10 UNHCR, 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (Geneva 2012), para 5.

11 European Court of Human Rights, *Guzzardi v Italy* (1980) 3 EHRR 333 (Plenary), paras 92-93.

specifies that restricting the freedom of movement is permissible only when 'necessary' and 'temporary'.

A question arises whether the immigration detention is a penalty within the meaning of Article 31(1) of the Refugee Convention or not. Regarding the interpretation of treaties, the Vienna Convention on the Law of Treaties 1968 (VCLT) states, "atreaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[12] In the second paragraph of the Preamble to the Refugee Convention, it is evident that the object of the Convention is to "assure refugees the widest possible exercise of these fundamental rights and freedoms". The arbitrary detention of refugees or asylum seekers is beyond the spirit of the Refugee Convention. Thus, the author thinks that immigration detention is a penalty and is not permissible in the refugee context. For the same reason, the use of detention to deter prospective refugees is not acceptable. It is submitted that such detention will also amount to the violation of the overarching principle of *non-refoulement*.

The International Covenant on Civil and Political Rights (ICCPR) 1966 applies to all persons, including refugees. Article 9 of the Covenant, which is a non-derogable provision of the Covenant, runs as follows in its clause 1:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Therefore, the deprivation of personal liberty must not violate the principles of legality and non-arbitrariness. As per the Human Rights Committee, the principle of legality entails that the arrest or detention in question is established in domestic legislation.[13] The Committee has interpreted the Article to permit detention in specific circumstances and

---

12 *Vienna Convention on the Law of Treaties*, art 31.

13 *C. McLawrence v Jamaica* Communication No. 702/1996 (26 April 1996), CCPR/C/60/D/702/1996, p 230.

only for a limited time; otherwise, it will be arbitrary.[14] Besides, any limitation on a person's freedom must pass the test of necessity, reasonableness, and proportionality. Furthermore, any aggrieved person in this regard has the right to seek redress in a court that will review the lawfulness of the arrest or detention. Indefinite detention is, for its very nature, against the core principles of Article 9.

Apart from the previous treaties, some specialised and regional treaties protect the refugees. The International Convention on the Elimination of All Forms of Racial Discriminations 1965 (ICERD), in its Article 5, ensures 'security of person and protection' without discrimination. In its interpretation, the UN Committee on the Elimination of Racial Discrimination (CERD) observed that the states should "Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards".[15] The children among the refugees are the most marginalised. Article 37 of the Convention on the Rights of the Child 1989 (CRC) restricts arrest, detention, and imprisonment only as a final resort and for a short period. The Article also grants the following rights:

(a) to be treated with dignity;
(b) to maintain contact with family;
(c) to prompt legal and other appropriate assistance;
(d) to challenge the legality before a court or other authority; and
(e) to a prompt decision

.

Furthermore, Article 11 of the Convention against Torture 1984 (CAT) enjoins that states should systemically review procedural rules relating to the arrest, detention, or imprisonment so that they cannot be used as apparatus of torture.

---

14 *AV Australia* Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993, p 143.

15 CERD, General Recommendation No. 30: Discrimination against Non-Citizens (2004) para19.

3.2. Protection under Customary International Law

Customary international law is a potent tool for the refugees in a non-signatory state. A customary international rule comes into existence by the mutual interaction of widespread state practice and *opinion juris sive necessitatis*.[16] Going through this process, some provisions of international legal instruments, including the Universal Declaration of Human Rights (UDHR), have elevated to customary international law.[17] Most of the non-derogable rights in ICCPR also achieved the status.[18] For example, the Working Group on Arbitrary Detention claims in the General Assembly of Human Rights Council that the ban on arbitrary deprivation of liberty:

> [C] onstitute[s] a near universal State practice evidencing the customary nature of the arbitrary deprivation of liberty prohibition. Moreover, many United Nations resolutions confirm the *opinio juris* supporting the customary nature of these rules.[19]

The Group also maintained that the principle has also turned into *jus cogens* or peremptory norm of international law.[20] As per Article 53 of the VCLT, a treaty conflicting with a *jus cogens* norm is void. Apart from it, the principle of non-penalisation is in a grey stage towards customary status. Nevertheless, pending the refugee status determination, this principle is widely accepted as binding.[21]

3.3. Protection under Soft Law and UNHCR Instruments

In recent years, soft legal instruments have become the crucial regulator of international relations. While the instruments may not be binding, they

---

16 *North Sea Continental Shelf Cases (Germany v Denmark)* (1969) ICJ Rep 3.

17 Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', 3.2 *Health and Human Rights* 144.

18 UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (Geneva 1984) p 14

19 UNGA, 'Report of the Working Group on Arbitrary Detention' A/HRC/22/44, para 43.

20 Ibid, para 51.

21 ACNUR, n 7.

act as precursors to binding international treaties.[22] They also serve as evidence of customary international law.[23] Regarding the detention of a person, an authoritative soft law is the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.[24] The Body of Principles sets out 39 detailed principles equally applicable to refugees and asylum seekers. Especially, Principle 16 sets out:

> If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means … with the representative of the competent international organisation, if he is a refugee or is otherwise under the protection of an intergovernmental organisation.

UNHCR works as the 'guardian' of the Refugee Convention and its Protocol with the mandate to supervise their application.[25] As per the UNHCR Statute, Article 35 of the Convention, and Article II of the Protocol, this organisation issues some Guidelines on international protection.[26] Though they are not legally binding on the governments, they operate as an interpretive guide to the rights of refugees. *The Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* is a comprehensive document covering a diverse array of protection for refugees. The ten guidelines regulate arbitrary detention, indefinite detention, procedural safeguards of detention, non-discrimination, detention conditions, and review of the detention order, among others.

---

22 Michael P. Scharf, 'Accelerated Formation of Customary International Law' (2014) 20:2 ILSA Journal of International & Comparative Law 305.

23 Brian D Lepard, 'The Role of United Nations General Assembly Resolutions as Evidence of *Opinio Juris*' in *Customary International Law: A New Theory with Practical Applications* (CUP 2009).

24 UNGA Resolution, A/RES/43/173, 9 December 1988.

25 UNHCR, 'The 1951 Refugee Convention: 70 years of life-saving protection (28 July 2021) <https://www.unhcr.org/news/press/2021/7/6100199a4/1951-refugee-convention-70-years-life-saving-protection.html> accessed on 25 September 2021.

26 UNHCR, 'UNHCR Guidelines on International Protection – Consultation process' (November 2019) <https://www.unhcr.org/protection/globalconsult/544f59896/unhcr-guidelines-international-protection-consultation-process.html> accessed on 25 September 2021.

3.4. Protections under the Constitutional Scheme of Bangladesh

The Fundamental Rights incorporated in Part III of the Constitution can be divided into two categories depending on their applicability. Some of the articles apply only to the citizens of Bangladesh,[27] where others apply to citizens and non-citizens[28]. Thus, the refugees or asylum seekers in the territory or control[29] of Bangladesh can enjoy the rights of the second category. Among them, Arts 31, 32, 33 are of relevance to the issues relating to the arrest and detention of refugees and asylum seekers. Article 31 extends the protection of the law to the citizens and every person for the time being in Bangladesh alike. It includes a ban on any action detrimental to the life and liberty of the person in question. Again, Again, Article 32 guarantees expansive rights to life and personal liberty. However, these two articles do not state any specific safeguards favouring a person, including refugees facing arrest and detention. Finally, Article 33 grants them the following rights:[30]

(a) The arrested person in custody has the right to be informed of the grounds of his arrest. He also has the right to consult and be defended by a legal practitioner of his choice.

(b) He has the right to be produced before the nearest magistrate within twenty-four hours of his arrest.

(c) He has the right not to be detained in police custody beyond the preceding twenty-four hours.

The rights and freedoms in the Articles are not absolute, and the Government can reasonably restrict them in accordance with the law. As reasonableness is a relative term, it is interpreted contextually and

---

27 *Constitution of Bangladesh*, arts 27-30 and 36-43.

28 *Constitution of Bangladesh*, arts 31, 32, 33, 34, 35 and 44.

29 Scholarships regarding extraterritorial application of constitutional rights are emerging recently. For further inquiry see generally, Jane Rooney, "Extraterritorial Application of Constitutional Rights' (2017) <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e273> accessed on 25 September 2021.

30 The guarantees do not apply to the enemy aliens and persons under preventive detention. There is a separate standard for them in art 33(3-6).

keeping in mind various factors. However, *Abul A'la Moudoodi v West Pakistan*[31] remains an authoritative guide to the restriction regarding arrest and detention. The principles laid down in the case may be summarised in the following manner:

(a) The detention must be proportionate to the object sought.

(b) The restriction should be objective rather than subjective.

(c) The attribution of reasonableness should be clear and come with a full explanation.

Moreover, in *BLAST v Bangladesh,*[32] the Court has pronounced fifteen guidelines on the procedure of arrest and detention, which are equally applicable to refugees.

There is a procedure for the aggrieved person for the violation of his rights. If any law or administrative action infringes his rights, he may apply to the High Court Division under Article 44 of the Constitution. Then the High Court Division may 'give such directions or orders … as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.[33] Under the purview of this power read with Article 26, it can declare a law to be unconstitutional.

Bangladesh is a dualist state where international law is not enforceable directly.[34] However, during the last few decades, the Judges of the Supreme Court of Bangladesh are using international law to interpret fundamental rights. It is also indirectly mandated in the Constitution. Firstly, Article 11 of the Constitution declares the Republic as a democracy 'in which fundamental rights and freedoms and respect for the dignity and worth of human person shall be guaranteed'. Secondly, Article 25 of the Constitution affirms the 'respect for international law

---

31 (1965) 17 DLR (SC) 209.

32 (2003) 55 DLR (HCD) 363.

33 *Constitution of Bangladesh*, art 102(1).

34 *Hussain Muhammad Ershad v Bangladesh* (2001) 21 BLD (AD) 69 states "it is [true] that Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national Courts".

and the principles enunciated in the United Nations Charter'. As both of the Articles form part of the Fundamental Principles of State Policy (FPSPs), and Article 8(2) regards them as aids to interpretation, international laws can justifiably be used as an interpretive aid. In *Bangladesh v Sheikh Hasina,*[35] the Court confirms the position:

> The Courts would not enforce international human rights treaties, even if ratified by Bangladesh unless these were incorporated in municipal laws, but they would have looked into the ICCPR while interpreting the provisions of the Constitution to determine the right to life, liberty, and other rights.

The ingenuity of this method concerning arrest and detention is that the relevant treaties or documents can expand and refine domestic rights. Thus, General Comment 35 prepared by the Human Rights Committee relating to the liberty and security of persons can be used to interpret Article 33 of the Constitution.

One of the main challenges in protecting the rights of refugees in Bangladesh is that it has not ratified the Refugee Convention. As a result, the judges cannot authoritatively employ the treaty in interpreting the fundamental rights. However, some international human rights and refugee law principles have elevated to customary international law and *jus cogens* norm. Customary international laws which form part of the law of the land are directly enforceable in the Court.[36] In a recent case, *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*[37], the Supreme Court enforced the principle of *non-refoulement* as customary international law. It held that the principle has:

> [B]ecome a part of customary international law which is binding upon all the countries of the world, irrespective of whether a particular country has formally signed, acceded to or ratified the Convention or not.

---

35 (2008) 60 DLR (AD) 90, para 86.

36 *Bangladesh v Unimarine S A Panama* (1977) 29 DLR 252.

37 Writ Petition No. 10504 of 2016, pp 9-10.

4. Review of Laws and Practices in Bangladesh

The treatment of refugees in Bangladesh is primarily motivated by the fact that it has not ratified the Refugee Convention. Therefore, apart from the 35,519 recognised *Rohingya* refugees[38], more than 800,000 people fleeing persecution from Myanmar have been registered as 'forcibly displaced Myanmar nationals' rather than 'refugees' by the Government of Bangladesh.[39] Although the *Rohingya* refugees fulfil all the criteria of being a refugee, the designation 'forcibly displaced Myanmar nationals' denies their actual status and rights under the Refugee Convention. However, Bangladesh could not refuse their entry or refoul them because the principle of non-refoulment binds it.[40] As the *Rohingyas* are not given refugee status after their arrival, they fall into a perpetual streak of illegal presence in Bangladesh. For such a refugee, the choice of residence is binary, either in a so-called refugee camp or in a detention center by the operation of the Foreigner's Act 1946.

Most of the recognised and unrecognized 'refugees' reside in 34 refugee camps situated in Cox's Bazar District.[41] Recently, the Government has relocated around 20,000 Rohingyas to *Bhasan Char*, a remote and disaster-prone silt island on the Bay of Bengal.[42] Freedom of movement of the persons residing in the camps and the *char* is so restricted that any attempt to escape results in arrest and detention.[43] The restriction on

---

38 UNHCR, 'Refugee Response in Bangladesh' <https://data2.unhcr.org/en/situations/myanmar_refugees> accessed on 26 September 2021.

39 Bill Frelick, 'Bangladesh Is Not My Country' (*Human Rights Watch*, 5 August 2018) <https://www.hrw.org/sites/default/files/report_pdf/bangladesh0818_web2.pdf> accessed on 26 September 2021.

40 Article 3 of the Convention against Torture has a binding effect on Bangladesh. Moreover, the principle of non-refoulement is customary in nature.

41 UNHCR, 'Bangladesh Operational Update July 2021' <https://reliefweb.int/report/bangladesh/unhcr-bangladesh-operational-update-july-2021>accessed on 26 September 2021.

42 'An Island Jail in the Middle of the Sea' (*Human Rights Watch*, 7 June 2021) <https://www.hrw.org/sites/default/files/media_2021/06/bangladesh0621_web.pdf> accessed on 26 September 2021.

43 '11 Rohingyas detained from *Panchagarh*' (*The Daily Star*, 2 September 2021) <https://www.thedailystar.net/news/bangladesh/crime-justice/news/11-rohingyas-

freedom of movement is of such degree or intensity that it is tantamount to 'detention' within the meaning of UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention. Here, the refugees are the victims of 'the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will'[44]. The nomenclature of the places as 'refugee camp' or '*Ashrayan Prokolpo* (Housing Project) is immaterial in determining the condition of detention.

The Foreigners Act 1946 is the core legislation regulating foreigners' entry, presence, and departure in Bangladesh. In addition to this statute, there are some other statutes and delegated legislation on the subject matter.[45] As per section 2 of the Act, any person is a foreigner who is not a citizen of Bangladesh. In its regulatory framework, the Act does not make any distinction between illegal entrants and persecuted refugees. The refugees are forced to enter into another state illegally due to persecution. A careful reading of the Act shows that it was framed to preclude the illegal entrants without compelling cause. Although there is an *intelligible differentia* between foreigners and citizens in the legislation, the distinction does not have any rational nexus with the object sought in the provision.[46] On that account, though Article 27 does not directly apply to non-citizens, the distinction may have violated the right to equality and non-discrimination because the undocumented migrants and refugees are not similarly situated.

---

detained-panchagarh-2167031> accessed on 26 September 2021, and '18 Rohingyas arrested after fleeing *Bhashan Char*' (*New Age Bangladesh*, 11 July 2021) <https://www.newagebd.net/article/143451/18-rohingyas-arrested-after-fleeing-bhashan-char > accessed on 26 September 2021.

44 UNHCR, n 10.

45 Other legislations include but are not limited to the Foreigners Order 1951, the Registration of Foreigners Act 1939, the Passports Act 1920, the Bangladesh Passport Order 1973,the Bangladesh Control of Entry Act 1952, the Extradition Act 1974, the Citizenship Act 1951, Bangladesh Citizenship (Temporary Provisions) Order, 1972.

46 The requirements have been reaffirmed by *Jibendra Kishore v Province of East* Pakistan (1957) 9 DLR SC 21, *Retired Government Employees Welfare Association v Bangladesh* (1994) 51 DLR (AD) 427.

Section 3 of the Act empowers the Government to make an order to arrest, detain or confine a foreigner on account of the security of Bangladesh. This restriction of liberty by the administrative order may continue to six months. However, a quasi-judicial Advisory Board may extend the period if, in its opinion, there is sufficient cause for such detention. According to Principle 4 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, any form of restriction of liberty shall be 'ordered by, or be subject to the effective control of, *a judicial or other authority*". Moreover, UNHCR Detention Guidelines prescribes that the person has a right to "be brought promptly before a judicial or other independent authority to have the detention decision reviewed". Unfortunately, none of the procedural safeguards in the Act is maintained adequately.

The detention can continue for an indefinite period because the Act prescribes no maximum limit of extension by the Advisory Board. While the respective arrest may not be arbitrary, the consequent detention may be so. When the detention becomes indefinite, it is undoubtedly arbitrary detention within the meaning of Article 9(1) of the ICCPR and the customary international principle against arbitrary detention. It also comes under the purview of 'cruel, inhuman or degrading treatment or punishment' under Article 7 of the ICCPR. The Detention Guideline also categorises indefinite detention as arbitrary and recommends a maximum limit for the detention period.

Moreover, constitutionality of the provision should also be considered. As legislation providing preventive detention, it does not violate Article 33. However, it violates the substantive and procedural due process standards set by Articles 31 and 32 of the Constitution. It has failed to meet the three requirements of *Abul A'la Moudoodi v West Pakistan* in cases of restriction on liberty. Firstly, the reasonableness of the detention (restriction on liberty) does not come with a full explanation. Secondly, the restriction is subjective rather than objective. Finally, the detention is not proportionate to the object sought (in this case, a subjective sense of national security).

The legislation's technicality also produces 'released prisoners' who are detained after serving their period of imprisonment. Section 14 of the Act

prescribes the punishment of a person with imprisonment for a maximum of five years. This provision conflicts with the principle of non-penalisation for illegal entry or presence of a refugee under Article 31 of the Refugee Convention. After serving the sentence, the refugee is kept in detention for an indefinite period because he cannot avail the protection of his home country, and a release will make him an illegal entrant again. This detention is a serious violation of personal liberty and falls within the first category of arbitrary detention categorised by the UN Working Group on Arbitrary Detention.[47] The violation of international and constitutional standards in the detention in the preceding paragraph is equally applicable in this case of released prisoners.

The procedural safeguards of arrest and detention in Bangladesh are maintained poorly with regard to citizens and non-citizens alike. The situation only worsens for a non-recognised refugee who is under the constant prospect of restriction of liberty. Apart from the deprivation of rights ranging from the right to be informed of the grounds of arrest to the right of legal assistance[48], they are allegedly tortured during the process.[49] This treatment towards them violates the obligation of Bangladesh under the CAT and Article 7 of the ICCPR.

5. Conclusion

The immigration detention scheme is not arbitrary *per se* because the Government can restrict freedom on account of national security. However, when the provisions are applied to the refugees and asylum seekers, putting them in the category of other types of undocumented migrants, the arrest may turn into an arbitrary measure. It becomes undoubtedly arbitrary when the detention continues for an indefinite period. The restriction of liberty imposed by the Foreigner's Act on those persecuted people is unreasonable and does not serve the object of the

---

47 Arpeeta Shams Mizan, *Analyzing the Legislative Gaps in the Detention Scheme of the Foreigners in Bangladesh: The Released Prisoners* (National Human Rights Commission, Bangladesh 2014) p 21.

48 Ibid.

49 'Bangladesh: Rohingya Refugees Allegedly Tortured' (*Human Rights Watch*, 27 April 2021)<https://www.hrw.org/news/2021/04/27/bangladesh-rohingya-refugees-allegedly-tortured> accessed on 25 September 2021.

Act. Thus, the Parliament should amend the Act to get rid of its unreasonableness and unconstitutionality. Firstly, after distinguishing between refugees and other undocumented migrants, the Parliament should grant the refugees a set of substantive and procedural safeguards. Secondly, it should fix a limit on the period of detention for all types of migrants, including refugees and asylum seekers. Finally, it should also replace the Advisory Board with a judicial authority for maintaining neutrality and objectivity.

When national security is concerned, detention should not be regarded as the only resort. However, multiple other measures can serve the interest without encroaching upon personal liberty. The Government may employ the following alternatives to detention as recommended by UNHCR:[50]

(a) Bail, bond or surety
(b) Reporting requirements
(c) Open centres, semi-open centres, directed residence, dispersal, and restrictions to a district
(d) Registration and documentation
(e) Release to non-governmental supervision
(f) Electronic monitoring and home curfew
(g) Alternatives for children
(h) Alternatives for other vulnerable persons

On a final note, Bangladesh should take appropriate measures to be a party to the Refugee Convention. It will protect the persecuted people from detention or penalisation for illegal entry and strengthen the position of Bangladesh in gaining international support. Moreover, a human rights-based approach will contribute to a humane and efficient solution to the refugee crisis Bangladesh is going through.

[50] UNHCR, n 10, p 41.

COMPLETE JUSTICE AND PREPONDERANCE OF PROBALITIES IN THE BABRI MASJID VERDICT: A CRITIQUE

Md. Shahidul Islam*

Abstract

Under the constitutional scheme, doing complete justice is a unique power of the Supreme Court of India. Meanwhile, the doctrine of preponderance of probability is a useful weapon to reach in a conclusion where the balance of justice vacillates in civil litigations. The Supreme Court of India has applied these principles in the historic Babri Masjid case and conferred ownership of the Babri Masjid compound to the Hindus. In quest for searching the justification of the application of these principles, this study makes a critical analysis of the conclusions the Supreme Court has drawn based on the evidence on record. In the result, the study finds that the decision of the Court mismatches with the premise it has constructed based on these principles. This is a constitutional mishap. Therefore, the study argues that the verdict should be reviewed by a larger constitution bench and the damage be cured.

1. Introduction

The legal battle surrounding the ownership of Babri Masjid is over. Now it is final and conclusive. The masjid compound that has been in existence for almost five centuries has been wiped out from the map of India, only to remain in the wounded hearts of the Muslims of Indian subcontinent in particular. It now belongs to the Hindus as if there were no mosque on it at any point of time. It is for the reason that the Supreme

* PhD, Associate Professor, Department of Law, Jagannath University.

Court of India overturns the verdict of the Allahabad High Court in the suit of *Siddiq v Mahant Suresh Das*[1] and confers ownership of the Babri Masjid including its premises upon the deity, Lord Ram being represented by the Hindus. At the same time, the Court orders the Government of India to the give an area admeasuring five acres of land to the Sunni Central Waqf Board for construction of a mosque in the city of Ayodhya. To this end, the Court adopts the principle of 'complete justice' as is enshrined in article 142 of the *Constitution of India*.[2] In the process, the Court traces the historical background of the Babri Masjid and relevance of the Hindu faith and belief in determining ownership of Babri Masjid. In this respect, the Court makes an extensive analysis of the findings of the report of the Archeological Survey of India (ASI). In order to come to this conclusion, the Court discusses the relevancy of various legal doctrines, travelogues, gazetteers, findings of the historians etc. Upon an assessment of the evidences, both oral and documentary, the Court yields to the principle of Preponderance of Probabilities in conferring ownership title of the Babri Masjid upon the Hindus. This paper aims to examine the justification for reliance on preponderance of probability principle as a ground for conferring ownership title to the Hindus. Simultaneously, it explores the rationale for applying the principle of 'complete justice' in a bid to allocate five acres of land elsewhere in the city of Ayodhya to the Muslims in recognition of their right to religion.

2. Principle of Complete Justice and Preponderance of Probabilities

The principle of complete justice and preponderance of probabilities bear significant importance in the civil justice system of India. An attempt is made to portray the statutory and judicial approach to the principle of complete justice and preponderance of probabilities below.

---

1 Civil Appeal Nos 10866-10867 of 2010 <https://main.sci.gov.in/supremecourt/2010/36350/36350_2010_1_1502_18205_Judgement_09-Nov-2019.pdf>accessed on 10 November 2019 (Hereinafter referred to as *Siddiq v Mahant Suresh Das (2019)*.

2 Article 142 of the *Constitution of India* empowers the Supreme Court to do complete justice in any suit or proceedings where it thinks appropriate.

2.1. Principle of Complete Justice

The principle of complete justice defies a 'precise definition'.[3] The 'scale and parameter of complete justice' varies from situation to situation.[4] The term complete justice implies, 'justice according to law', 'justice according to fairness, equity and good conscience'.[5] In view of Justice Mostafa Kamal:

> Sometimes [complete justice] may be according to fairness, equity and good conscience, sometimes it may be in the nature of arbitration, sometimes it may be justice tempered with mercy, sometimes it may be pure commonsense, sometimes it may be in the inference of an ordinary reasonable man and so on.[6]

Therefore, although the ambit of the power is wide, it should be confined to the defined area of the 'actual dispute' and should not extend to 'what might reasonably be connected with or related to such matter'.[7] However, article 142(1) of the Constitution of India does not prescribe any 'limitations' regarding the 'causes or the circumstance' under which such power can be exercised nor does it prescribed any condition to be satisfied before such power can be exercised.[8] The jurisdiction under this article is a 'plenary' one which is the 'residual source of power' that capacitates the Court to grant any remedy it considers 'just and equitable' in a given situation.[9] This power being an extraordinary one, 'extraordinary care and caution' is to be shown while exercising it.[10] Referring to article 142(1), the Supreme Court characterises its own role as follows:

> Indeed, the Supreme Court is not of restricted jurisdiction … in the nebulous areas. The plenary powers of the Supreme Court under article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on

---

3 *National Board of Revenue v Nasrin Banu*, (1996) 48 DLR (AD) 171, para 26.
4 *National Board of Revenue v Nasrin Banu*, (1996) 48 DLR (AD) 171, para 26.
5 *National Board of Revenue v Nasrin Banu*, (1996) 48 DLR (AD) 171, para 26.
6 *National Board of Revenue v Nasrin Banu*, (1996) 48 DLR (AD) 171, para 26.
7 *Zahira Habibullah Sheikh v State of Gujarat*, (2004) 5 SCC 353.
8 *Dayaram v Sudhir Batham*, (2012) 1 SCC 333, p 357.
9 *Supreme Court Association v Union of India*, 1998 AIR (SC) 1895.
10 *Hitesh Bhantnagar v Deepa Bhatnagar*, (2011) 5 SCC 234, p 242.

> the Court by various statutes though are not limited by those statutes.[11]

The power of doing complete justice is totally 'of a different level and of a different quality'.[12] Therefore, a provision of an ordinary law cannot put 'any prohibition or restriction'[13] on the constitutional power of doing complete justice by the Court in an effort 'to balance the equities'[14] between the litigants.

Taking a broad view of article 142, the Supreme Court of India, in *Union Carbide Corporation v Union of India*,[15] observes that an attempt to limit the powers is 'unsound and erroneous' irrespective of the importance attached with it.[16] Thus, a piece of ordinary legislation aiming to prohibit or limit this constitutional power cannot automatically be said to 'act as prohibitions or limitations on this power.[17] This power is left 'undefined and un-catalogued' to keep it 'elastic enough to be moulded to suit the given situation'.[18] It is a 'constituent power transcendental to statutory prohibition' and as such there is nothing to curb the power of the Court to mould relief or take appropriate decision to ensure 'justice or remove injustice'.[19] This power is given to the Court with wide amplitude to address 'myriad of situations' which gives no option to raise the question that the Supreme Court lacks jurisdiction or there is a 'nullity' in its order.[20] In the exercise of this power, the Supreme Court may issue appropriate directions and order 'to fill the vacuum' in the existing legal system.[21] Complete justice under article 142 means justice as per 'law and not sympathy'.[22]

---

11 *Supreme Court Association v Union of India*, 1998 AIR (SC) 1895.

12 *Delhi Judicial Service Association v State of Gujarat*, 1991 AIR (SC) 2176, p 2210.

13 *Delhi Judicial Service Association v State of Gujarat*, 1991 AIR (SC) 2176, 2210 and *State of Uttar Pradesh v Poosu*, 1976 AIR (SC) 1750.

14 *Supreme Court Association v Union of India*, 1998 AIR (SC) 1895.

15 (1991) 4 SCC 584.

16 *Union Carbide Corporation v Union of India*, (1991) 4 SCC 584.

17 *Union Carbide Corporation v Union of India*, (1991) 4 SCC 584, para 83.

18 *Delhi Development Authority v Skipper Construction Co.*, 1996 AIR (SC) 2005.

19 *Ashok Kumar Gupta v State of Uttar Pradesh*, (1997) 5 SCC 201.

20 *Ashok Kumar Gupta v State of Uttar Pradesh*, (1997) 5 SCC 201.

21 *Vineet Narain v Union of India*, 1998 AIR (SC) 889.

22 *Secretary,State of Karnataka v Umadevi*, (2006) 4 SCC 1.

However, article 142(1) entails with it some limitations. The flexibility in language of the article does not empower the Court to issue such direction which is 'inconsistent with, repugnant to, or in violation' of the existing law.[23] This power cannot be exercised to build 'a superstructure' having no legal basis.[24] Similarly, though the 'constitutional powers' under this article cannot be 'controlled by statutory provisions', its exercise should not come in direct 'conflict' with the expressed provisions of law.[25] True, the Supreme Court's power cannot be limited or curtailed by a legislative enactment but the Court 'must' consider legislative enactment regulating the matter in dispute.[26]

This power is 'supplementary in nature' which is to be exercised only for ensuring complete justice in 'any matter'.[27] Article 142(1) is 'curative in nature' and is meant to 'supplement' and not to 'supplant' the law to be applicable to a given case.[28] Substantive provisions of law cannot be entirely 'ignored' while dwelling upon complete justice under article 142.[29]

The power of the Supreme Court in doing complete justice implies 'a power of equity' in case 'strict application of the law' fails to produce 'a just outcome'.[30] It entails the power to identify the 'silences of positive law' to find within its interstices, a solution that is equitable and just.[31] Moreover, complexities of human history and activity inevitably lead to unique contests.[32] Thus the Supreme Court of India finds the law 'inadequate to deal with' in a case like the present one which involves

---

23 *AR Antulay v RS Nayak*, 1998 AIR (SC) 1531.

24 MP Jain, *Indian Constitutional Law* (6th Edition, LexisNexis, Haryana, India, 2013), p 371.

25 *Supreme Bar Association v Union of India*, 1998 AIR (SC) 1895.

26 *State of Uttar Pradesh v Poosu*, 1976 AIR (SC) 1750.

27 MP Jain, n 24, p 371.

28 Ibid, p 372.

29 Ibid, p 372.

30 *Siddiq v Mahant Suresh Das*, (2019), para 674.

31 *Siddiq v Mahant Suresh Das*, (2019), para 674.

32 *Siddiq v Mahant Suresh Das*, (2019), para 674.

'religion, history and the law'.[33] Describing the power of doing complete justice to be of wide amplitude, the Court notes:

> The equitable power under Article 142 of the Constitution brings to fore the intersection between the general and specific. Courts may find themselves in situations where the silences of the law need to be infused with meaning or the rigours of its rough edges need to be softened for law to retain its humane and compassionate face. Above all, the law needs to be determined, interpreted and applied in this case to ensure that India retains its character as a home and refuge for many religions and plural values … It is in seeking this ultimate balance for a just society that we must apply justice, equity and good conscience. It is in these situations, that courts are empowered to ensure a just outcome by passing an order necessary to ensure complete justice between the parties.[34]

This power being a plenary power can be adopted as an 'appeal of last resort' that equips the court to 'craft a relief' which accommodates 'reason and justice'.[35] On this argument, this power is 'curative in nature' which should not be construed to defy the 'substantive rights' of the litigants.[36] Under the contour of this article nothing can be accomplished 'indirectly' which cannot be done 'directly'.[37]

Therefore, the power of doing complete justice under article 142 of the Constitution encompasses the power to grant any relief to the parties to the suit. Even the rigidities in law can be lightened with the exercise of this legal tool. However, the fundamental limitation it carries with it is, it cannot create a new edifice unknown to the legal minds. The amplitude of this power is very wide but not so wide to transgress the permitted range defined by law.

---

33 *Siddiq v Mahant Suresh Das,* (2019), para 674.

34 *Siddiq v Mahant Suresh Das,* (2019), para 674.

35 *Siddiq v Mahant Suresh Das,* (2019), para 675.

36 *Supreme Court Bar Association v Union of India,* (1998) 4 SCC 409, para 47.

37 *Supreme Court Bar Association v Union of India,* (1998) 4 SCC 409, para 47.

2.2. Principle of Preponderance of Probabilities

Preponderance of probability as translated into preponderance of proof or balance of probability implies putting preference to one element which has 'greater weight of the evidence' compared to the other.[38] This doctrine arms the court to accept the evidence put forward by one party considering it as 'the most convincing force' with 'superior evidentiary weight' which appears 'sufficient to incline a fair and impartial mind to one side of the issue rather than the other'.[39] The court, in civil cases, leans towards that party whose evidence creates a preponderance of probability.[40] In another sense, preponderance of probability means an outweighing in the process of balancing however slight may be the tilt of the balance or the preponderance.[41] It presupposes the existence of evidence which claims 'superiority in importance' and possesses 'weight or influence' over the other.[42] Thus under this doctrine, the court inclines to that evidence which 'satisfies the conscience and carries conviction to an intelligent mind'.[43] It denotes the existence of a fact which conveys 'the idea of certainty beyond doubt'.[44] However, the fundamental question that requires to be answered is what constitutes preponderance of probability. Lord Hoffman attempts to answer the question with the help of a mathematical analogy:

> If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.[45]

---

38 *Black's Law Dictionary*, 9th edition, p 1329.
39 Ibid, p 1329.
40 Ibid, p 1329.
41 Shakil Ahmad Khan, *Advanced Law Lexicon* (Fifth Edition, LexisNexis, Haryana, India, 2017), p 4019.
42 Ibid, p 4019.
43 Ibid.
44 Ibid.
45 *Re B* [2008] UKHL 35.

Thus it appears that the court has to dissolve the question as to whether the alleged fact has actually happened. There is no option for the court to act upon a supposition that the alleged fact 'might have happened'.[46] In means that if a party to the suit claims it to have happened, that party must prove that fact has happened. It shall not be allowed to oscillate in uncertainty. Further, a party gets nothing in case he fails to prove an alleged fact upon which he asserts his right. A party's evidence attains preponderance only when on the basis of it the court finds the occurrence of the incident 'more likely than not'.[47] It should be established on 'stronger' evidence.[48]

3. Babri Masjid: Facts, Legal Battles and Evidences

The Babri Masjid case is surrounded by a bundle of facts, legal battles and volume of evidences projecting from numerous sources. This section makes a vivisection of all the facts, legal battles and evidences surrounding Babri Masjid case.

3.1. Historical Background of Babri Masjid

The name 'Babri Masjid' refers to some events of historical significance. These events include its construction of the mosque, compound bifurcation and riots surrounding it. The events also bring to it compass the desecration and closure of the mosque following idol installation and finally its demolition in 1992.

3.1.1. Construction of Babri Masjid

The Babri Masjid is built by Mir Baqi under the order of Emperor Babur during period of 1528-29 AD.[49] However, as per the oral testimony recorded by both the Hindu and Muslim witnesses, Babri Masjid is built by Mir Baqi at the behest of Emperor Babur in 1528.[50]

---

46 *Re B* [2008] UKHL 35.

47 *In re H (Minors)* [1996] AC 563, p 586.

48 *In re H (Minors)* [1996] AC 563, p 586.

49 ZA Desai Eds, *Epigraphia Indica, Arabic and Persian Supplement (in continuation of Epigraphia Indo-Moslemica*) (ZA Desai Eds), *Archaeology Survey of India* (1987)] cited in [*Siddiq v Mahant Suresh Das*, (2019), paras 58, 65 & 68].

50 *Siddiq v Mahant Suresh Das,* (2019), para 272, 314, 484. Also see P Carnegy, Officiating Commissioner and Settlement Officer, *Historical Sketch of Faizabad*

3.1.2. Bifurcation of Babri Masjid Compound

The Babri Masjid compound has been a centre of conflict over some decades particularly in the second half of the nineteenth century.[51] In 1856-57, 'riots' take place between the Hindu and the Muslim communities in the 'vicinity' of the disputed structure.[52] To avoid further violence, the colonial government creates a 'buffer' between these communities to keep law and order in place by building up a 'grill-brick wall' with six or seven feet height.[53] In this way, the mosque compound gets divided into the inner and outer courtyard, the inner being exclusively used by the Muslims while the outer by the Hindus.[54]

3.1.3. Riots Surrounding Babri Masjid

There takes another riot between the Hindus and the Muslims in 1934 over the Babri Masjid. At this time, the Hindus cause damage to the mosque which has been repaired' with the financial aid of the colonial government'.[55] However, fine is imposed upon the Hindus for causing damage to the mosque.[56] A Muslim contractor carries out the repair work which is evident through the 'exchange of correspondence' over the unpaid bills payment and work verification.[57]

3.1.4. Desecration and Closure of Babri Masjid following Idol Installation

On 19 March 1949 the Nirmohi Akhara mentions, in its customs, the Babri Masjid as the main temple of Ayodhya to be remain at its management.[58] However, an analysis of the communication between the

---

With Old Capitals Ajodhia and Fyzabad, Oudh Government Press, 1870 [cited in *Siddiq v Mahant Suresh Das*, (2019), para 566].

51 *Siddiq v Mahant Suresh Das*, (2019), para 10.

52 *Siddiq v Mahant Suresh Das*, (2019), para 10.

53 *Siddiq v Mahant Suresh Das*, (2019), para 10.

54 *Siddiq v Mahant Suresh Das*, (2019), para 10.

55 *Siddiq v Mahant Suresh Das*, (2019), para 11.

56 *Siddiq v Mahant Suresh Das*, (2019), para 47.

57 *Siddiq v Mahant Suresh Das*, (2019), para 47.

58 *Siddiq v Mahant Suresh Das*, (2019), para 48.

Uttar Pradesh Government officials reveals that they have prior information of a 'carefully planned course of action of placing idols inside the mosque.[59] This led to the desecration of the mosques by placing idols inside it.[60] As is evident, the administration posts a 'police picket' in the disputed area on 12 November 1949. On 29 November 1949 Faizabad Superintendent of Police writes to the Deputy Commissioner and District Magistrate of the construction of several 'Hawan Kunds' 'all around the mosque'.[61] He also further informs of the rumour of surrounding the mosque on the occasion of 'puranmashi' in such a way that would create difficulty for the Muslims to have 'entry' and consequently they might be compelled 'to abandon the mosque'.[62] The rumour escalates to the extent that the Hindus will make a forceful entry to the mosque to install 'a deity'.[63] The report of the Waqf Inspector submitted to the mosque secretary informing him of the fact that the Muslims are being prevented and teased on their way to the mosque substantiates this rumour.[64] Moreover, the Waqf Inspector urges for the protection of the Babari Masjid being a 'Shahi monument'.[65] Despite all the apprehensions, the administration takes no step to save the mosque from Hindu encroachment.[66]

The controversy surrounding the ownership of the Babri Masjid compound enters a 'new phase' on the night between 22 and 23 December 1949.[67] At the dead of this night, a group consisting of 'fifty or sixty people' breaks open the locks of the mosque and places idols of Lord Ram under the central dome of the mosque.[68] This incident is followed by lodging of a First Information Report.[69] As a consequence, the Faizabad-cum-Aydhya Additional City Magistrate treats the situation

---

59 *Siddiq v Mahant Suresh Das*, (2019), para 49.
60 *Siddiq v Mahant Suresh Das*, (2019), para 49.
61 *Siddiq v Mahant Suresh Das*, (2019), para 49.
62 *Siddiq v Mahant Suresh Das*, (2019), para 49.
63 *Siddiq v Mahant Suresh Das*, (2019), para 49.
64 *Siddiq v Mahant Suresh Das*, (2019), para 49.
65 *Siddiq v Mahant Suresh Das*, (2019), para 49.
66 *Siddiq v Mahant Suresh Das*, (2019), para 49.
67 *Siddiq v Mahant Suresh Das*, (2019), para 12.
68 *Siddiq v Mahant Suresh Das*, (2019), para 12.
69 *Siddiq v Mahant Suresh Das*, (2019), para 12.

to be 'emergent' in nature as the competing claims over the right to 'worship and proprietorship' is about to 'breach of peace'.[70] Therefore, he issues a preliminary order under section 145 of the CrPC.[71] At the same time, the authority attaches the inner courtyard and appoints the Chairman of the Municipal Board of Faizabad as the receiver of it.[72] Under this order, 'two or three *pujaris*' are allowed to 'perform religious ceremonies like *bhog* and *puja*' while members of the general public are only allowed 'darshan' from outside the wall made of grill-brick.[73] In this way, sanctity of the mosque has been viciously desecrated by placing idols under the central dome of it.

3.1.5. Demolition of Babri Masjid

The Supreme Court issues order to maintain *status qou* of the premises of the Babri Masjid.[74] Yet, a large crowd of Hindu devotee, in a premeditated and calculated manner, destroys the Babri Masjid on 6 December, 1992.[75] The crowd also demolishes the boundary wall and Ramchabutra at this time.[76] Simultaneously, the crowd places the idols under a makeshift structure built under the central dome of the mosque.[77] The mosque destruction leading to its obliteration in breach of the order of *status qou* is termed as an 'egregious violation of the rule of law'.[78]

3.2. Legal Battle Surrounding Babri Masjid

The Babri Masjid case attains its finality at the hand of the Indian Supreme Court. But before it knocks the door of the Supreme Court, it has been entangled with several legal battles starting in 1885 and ending in 2019.

---

70 *Siddiq v Mahant Suresh Das*, (2019), para 12.
71 *Siddiq v Mahant Suresh Das*, (2019), para 12.
72 *Siddiq v Mahant Suresh Das*, (2019), para 12.
73 *Siddiq v Mahant Suresh Das*, (2019), para 12.
74 *Siddiq v Mahant Suresh Das*, (2019), para 782.
75 *Siddiq v Mahant Suresh Das*, (2019), para 782.
76 *Siddiq v Mahant Suresh Das*, (2019), paras 12 & 23.
77 *Siddiq v Mahant Suresh Das*, (2019), paras 12 & 23.
78 *Siddiq v Mahant Suresh Das*, (2019), para 788 (XVII).

3.2.1. The Suit of 1885

In 1885, one Mahant Raghubar Das, who claims himself as the Mahant of Ram Janmasthan, institutes a lawsuit before the Faizabad Sub-Judge.[79] In this suit, he applies for construction of a temple on 'Ramchabutra' measuring '17x21 feet'.[80] The trial judge dismisses the suit as he apprehends a 'possibility of riots' between the Hindus and the Muslims on the 'proposed construction' of temple.[81] However, the trial judge admits the right of the Hindus on the 'possession and ownership' over the Chabutra.[82] The District Judge dismisses the appeal and strikes down the observation on ownership of Hindus over the Chabutra.[83] The Judicial Commissioner of Oudh also dismisses the second appeal as this Court finds the Mahant failure to furnish 'evidence to establish ownership of the Chabutra'.[84]

3.2.2. The Suits of 1950

On 16 January 1950 (Suit 1), one Hindu devotee Gopal Singh Visharad, brings a suit before the Faizabad Civil Judge to permit him pray before the Janmabhumi Temple following the tenets of Hindu religion.[85] In this suit, he prays for the reliefs including 'permanent and perpetual injunction' against defendant Nos 1 to 10[86] restraining them from removing the idols of the deity from the place where they have been

---

79 OS No. 61/280 of 1885), [cited in *Siddiq v Mahant Suresh Das*, (2019), para 11].

80 *Siddiq v Mahant Suresh Das*, (2019), para 11.

81 *Siddiq v Mahant Suresh Das*, (2019), para 11.

82 *Siddiq v Mahant Suresh Das*, (2019), para 11.

83 Civil Appeal No. 27/1885 [cited in *Siddiq v Mahant Suresh Das*, (2019), para 11].

84 No 27 of 1886 cited in *Siddiq v Mahant Suresh Das*, (2019), para 11.

85 Regular Suit No 2 of 1950 which is subsequently renumbered as Other Original Suit (OOS) No 1 of 1989 [cited in *Siddiq v Mahant Suresh Das*, (2019), paras 13 and 34].

86 Defendant Nos 1 to 5 are Muslim residents of Ayodhya; defendant No 6 is the State of Uttar Pradesh; defendant No 7 is the Deputy Commissioner of Faizabad; defendant No 8 is the Additional City Magistrate, Faizabad; defendant no 9 is the Superintendent of Police, Faizabad; defendant No 10 is the Sunni Central Waqf Board and defendant No 11 is the Nirmohi Akhara; see *Siddiq v Mahant Suresh Das*, (2019), para 34.

installed.[87] This suit is followed by an 'ad-interim injunction' thereby modified to 'prevent idols from being removed' and 'from causing interference in the performance of *puja*'.[88] The Allahabad High Court dismisses an appeal preferred against this order in 1955.[89]

In the meantime, on 5 December 1950, one Paramhans Ramchandra Das initiates a suit (Suit 2) before the Faizabad Civil Judge seeking similar relief sought in the suit by Gopal Singh Visharad.[90] However, he withdraws this suit on 18 September 1990.[91] In pursuance of Suit 1, on 1 April 1950, 'to prepare a map of the disputed premises', the authority appoints a court commissioner who submits a report along with 'two site plans' of it on 25 June 1950.[92]

3.2.3. The Suit of 1959

The Nirmohi Akhara claims the disputed site a temple which has been under their 'charge and management' at 'all material times' until 29 December 1949.[93] This organisation through Mahant Jagat Das institutes a suit on 17 December 1959 and seeks a decree for 'removal of the receiver of the Janmabhumi temple and for the delivery thereof.[94] Thereafter, the Government of India attaches the disputed site under section 145 of the *Code of Criminal Procedure* 1898 (CrPC 1898).[95] Thus it brings a suit claiming the right of charge and management in 1959.[96]

3.2.4. The Suit of 1961

Being aggrieved with the order of attachment by the Government of India, on 18 December 1961, the Uttar Pradesh Sunni Central Waqf

---

87 *Siddiq v Mahant Suresh Das*, (2019), para 34.

88 *Siddiq v Mahant Suresh Das*, (2019), para 13.

89 FAFO No 154 of 1951 [cited in *Siddiq v Mahant Suresh Das*, (2019), para 13].

90 Regular Suit no 25 of 1950 which is subsequently renumbered as Other Original Suit (OOS) No 2 of 1989) [cited in *Siddiq v Mahant Suresh Das*, (2019), para 14.

91 *Siddiq v Mahant Suresh Das*, (2019), para 14.

92 *Siddiq v Mahant Suresh Das*, (2019), para 15.

93 *Siddiq v Mahant Suresh Das*, (2019), para 5.

94 *Siddiq v Mahant Suresh Das*, (2019), para 36.

95 *Siddiq v Mahant Suresh Das*, (2019), para 5.

96 *Siddiq v Mahant Suresh Das*, (2019), para 5.

Board (Sunni Central Waqf Board) with nine Muslims initiates a suit seeking a declaration of title to the disputed site.[97] Besides, they pray for delivery of possession of the mosque compound along with the graveyard in its vicinity by removing the idols placed inside the mosque.[98] The Sunni Central Waqf Board bases its claim on the argument that the disputed site is a mosque famously known as the Babri Masjid constructed on the instructions of emperor Babur by Mir Baqi, the commander of emperor Babur's forces.[99] This suit further pleads that the Muslims in general have been offering prayer in the said mosque since its construction in 1528 until it has been desecrated by the Hindus on 23 December 1949 by placing idols inside it.[100]

3.2.5. The Application of 1986

One Umesh Chandra, on 25 January 1986, files an application before the trial court to permit the general public to 'perform darshan within the inner courtyard'.[101] The District Judge issues directions to open the locks in order to provide access to devotees for darshan inside the structure.[102] In a writ petition, the Allahabad High Court orders for *status quo* of the property so attached on 3 February 1986.[103]

3.2.6. The Suit of 1989

In 1989, a suit is instituted by a next fried on behalf of the deity, Bhagwan Shri Ram Virajman and the birth place of Lord Ram, Asthan Shri Ram Janmabhumi.[104] Three plaintiffs, namely the Bhagwan Sri Ram Lala Virajman, Asthan Sri Ram Janma Bhumi, Ayodhya and Sri Deoki

---

97 In this Suit, defendant no 1 in Suit 4 is Gopal Singh Visharad; defendant no 2 is Ram Chander Dass Param Hans; defendant no 3 is Nirmohi Akhara; defendant no 4 is Mahant Raghunath Das; defendant no 5 is the State of UP; defendant no 6 is the Collector, Faizabad; defendant no 7 is the City Magistrate, Faizabad; defendant no 8 is the Superintendent of Police of Faizabad; defendant no 9 is Priyadutt Ram; defendant no 10 is the President, Akhil Bharat Hindu Mahasabha; defendant no 13 is Dharam Das; defendant no 17 is Ramesh Chandra Tripathi; and defendant no 20 is Madan Mohan Gupta [*Siddiq v Mahant Suresh Das*, (2019), paras 6, 599 & 602].

98 *Siddiq v Mahant Suresh Das*, (2019), para 38.

99 *Siddiq v Mahant Suresh Das*, (2019), para 6.

100 *Siddiq v Mahant Suresh Das*, (2019), paras 6 & 601.

101 *Siddiq v Mahant Suresh Das*, (2019), para 19.

102 *Siddiq v Mahant Suresh Das*, (2019), para 19.

103 Civil Misc. Writ No. 746 of 1986 [cited in *Siddiq v Mahant Suresh Das*, (2019), para 19].

104 *Siddiq v Mahant Suresh Das*, (2019), para 7.

Nandan Agarwala, a former Judge of the Allahabad High Court substituted by an order of the High Court as a result of his death, institute Suit 5.[105] This Suit has twenty-seven defendants.[106]

This suit seeks for a declaration of title to the disputed site.[107] This suit claims the idol and the birth-place as juridical entities.[108] It further asserts the birth place of Lord Ram as the 'object of worship' since it personifies the divine spirit of Lord Ram'.[109] Therefore, the plaintiff prays for 'a perpetual injunction' to prohibit the defendants from interfering with construction of the new Temple building at the Sri Ram Janmbhumi.[110]

3.2.7. The Ayodhya Acquisition Act 1993 case

The Government of India acquires an area of admeasuring 68 acres and the premises of the Babri Masjid under the *Acquisition of Certain Area at*

---

105 *Siddiq v Mahant Suresh Das*, (2019), para 308.

106 The defendants in Suit 5 are: The first defendant is the legal representative of Gopal Singh Visharad (the plaintiff in Suit 1); the second defendant was the plaintiff in Suit 2 (which was subsequently withdrawn); the third defendant is Nirmohi Akhara (the plaintiff in Suit 3); the fourth defendant is the Sunni Central Waqf Board (the plaintiff in Suit 4); the fifth and sixth defendants are Muslim residents of Ayodhya and Faizabad; the seventh, eighth, ninth and tenth defendants are the State of Uttar Pradesh and its officers; the eleventh defendant is the President of the All India Hindu Mahasabha; the twelfth and thirteenth defendants represent the All India Arya Samaj and the All India Sanatan Dharma Sabha respectively; the fourteenth defendant was Sri Dharam Das, described as the Chela of Baba Abhiram Das, who was allegedly involved in the incident which took place on 22/23 December 1949; defendants fifteen and sixteen are Hindu residents of Ayodhya and Faizabad; defendant seventeen was a resident of District Faizabad (since deleted); defendants eighteen and nineteen are Mahant Ganga Das and Swami Govindacharya Manas Martand; defendant twenty was Umesh Chandra Pandey who opposed the claim of the Nirmohi Akhara in Suit 3 (but did not lead any evidence); defendant twenty-one is described as the 'Sri Ram Janma Bhumi Nyas', a trust which has been impleaded through its managing trustee Sri Ashok Singhal; defendants twenty-two to twenty-five are the Shia Central Board of Waqfs, individuals representing the Shias; defendant twenty-six is the General Secretary of the Jamaitul Ulema Hind UP and defendant twenty-seven is a Muslim resident of Faizabad. For details see *Siddiq v Mahant Suresh Das*, (2019), para 309.

107 *Siddiq v Mahant Suresh Das*, (2019), para 7.

108 *Siddiq v Mahant Suresh Das*, (2019), para 7.

109 *Siddiq v Mahant Suresh Das*, (2019), para 7.

110 *Siddiq v Mahant Suresh Das*, (2019), para 40.

Ayodhya Act 1993 (*Ayodhya Acquisition Act* 1993).[111] The *Ayodhya Acquisition Act* 1993 abates all pending suits before the Allahabad High Court.[112] In parallel, the President makes a reference to the Supreme Court of India under article 143 of the Constitution asking the Court to give opinion as to whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janam Bhoomi and Babari Masjid.[113]

The constitutionality of the *Ayodhya Acquisition Act* 1993 is challenged before the Allahabad High Court and also before the Supreme Court.[114] The Supreme Court of India hears all the writ petitions and the Presidential reference together. The decision of the Court in these proceedings comes out in the case of *Dr M Ismail Faruqui v Union of India*, which upholds the constitutionality of the *Ayodhya Acquisition Act* 1993 excepting section 4(3) as it abates all the pending proceedings.[115] The Court declares section 4(3) unconstitutional and invalid since it is found to be 'an extinction of the judicial remedy for resolution of the dispute amounting to negation of rule of law'.[116] Thus the pending suits and other proceedings in respect of the disputed area revive.[117]

3.3. Summary of Evidences

Besides the report of the ASI, the counsel of the contestants rely on hundreds of reference books written in different languages on the issues covering history, culture, archaeology and religion.[118]

3.3.1. Summary of Oral and Documentary Evidences

The Allahabad High Court examines a good number of witnesses from all the litigants, public documents, history books, travelogues and above all the findings of the ASI. On appeal, the Supreme Court of India re-examines the conclusions arrived at by the Allahabad High Court based on those evidences. The present section makes a brief presentation on it.

---

111 *Siddiq v Mahant Suresh Das*, (2019), para 24.
112 *Ayodhya Acquisition Act* 1993,ss 3 & 4.
113 *Siddiq v Mahant Suresh Das*, (2019), para 24.
114 *Siddiq v Mahant Suresh Das*, (2019), para 25.
115 *Dr M Ismail Faruqui v Union of India*, (1994) 6 SCC 360, para 96.
116 *Dr M Ismail Faruqui v Union of India*, (1994) 6 SCC 360, para 96.
117 *Dr M Ismail Faruqui v Union of India*, (1994) 6 SCC 360, para 96.
118 *Siddiq v Mahant Suresh Das*, (2019), para 27.

3.3.2. Nirmohi AKhara

Mahant Bhaskar Das of 75 years of age deposes as the witness of Nirmohi Akhara. The sum and substance of his deposition includes that the Nirmohi Akhara is the owner of the idols, the disputed temple and Ram Janmabhumi for several hundred years.[119] He states that there happens no incident of installing idols inside the disputed structure during the intervening night of 22 and 23 December 1949 as he has been asleep therein at that time.[120]

The gist of the deposition of another Nirmohi Akhara witness Raja Ram Pandey of 87 age is that he has seen the Nirmohi Akhara Aarti in the disputed structure before its attachment and as such no Muslim could enter the inner courtyard from outer gate between 1930-1949.[121] Satya Narain Tripathi who is 72 years old states that he has not seen any incidence of offering of namaz in the disputed structure.[122] Mahant Shiv Saran Das of 83 year deposes that he has had the opportunity to have a *darshan* of Shri Ram Janmabhumi since 1933 along with the *darshan* of Lord Ram in the sanctum sanctorum until 1949.[123]

Deposition of 73 years old Raghunath Prasad Pandey reveals that the Ram Janmabhumi temple situates about 16 to 17 kilometers from his village and he used to visit it since the age of 7.[124] In his examination-in-chief, Sri Sita Ram Yadav says that he is born in 1943 and has no personal knowledge of the disputed site in 1949.[125] The statement given by 90 years old Pt Shyam Sundar Mishra, a nearby resident of Ram Janmabhumi, suggests that he has no knowledge of worship at the litigated site before he attains 14 years of.[126] The examination-in-chief of Sri Ram Ashrey Yadav who is 72 years of age indicates that he is not aware of the history of Nirmohi Akhara' and knows nothing as to the attachment of the disputed shrine.[127]

---

119 *Siddiq v Mahant Suresh Das*, (2019), para 270.
120 *Siddiq v Mahant Suresh Das*, (2019), para 270.
121 *Siddiq v Mahant Suresh Das*, (2019), para 273.
122 *Siddiq v Mahant Suresh Das*, (2019), para 274.
123 *Siddiq v Mahant Suresh Das*, (2019), para 275.
124 *Siddiq v Mahant Suresh Das*, (2019), para 276.
125 *Siddiq v Mahant Suresh Das*, (2019), para 278.
126 *Siddiq v Mahant Suresh Das*, (2019), para 280.
127 *Siddiq v Mahant Suresh Das*, (2019), para 282.

Sri Pateshwari Dutt Pandey inserts mandir 'at the behest of certain other persons' while preparing a site survey in *Nirmohi Akhara v Ram Lakhan Sharan Das* (Suit 9 of 1973) case.[128] He admits that he has had no knowledge as to the actual character of disputed site has written what has been 'informed to him by others'.[129] The Court rejects his admissions as they 'cast serious doubt on his credibility'.[130] Sri Bhanu Pratap Singh, another witness of Nirmohi Akhara states that he is unable to remember anything on the disputed issue as his memory is 'weak'.[131]

The deposition of Sri Ram Akshaibar Pandey is constructed on hearsay evidence and therefore found to be unreliable.[132] Besides, he has never seen the three domed structure though he has performed *parikrama*.[133] However, the Supreme Court rejects the oral evidence of the witnesses of Nirmohi Akhara as these statements are 'replete with hearsay'. Remaining asleep inside by a witness in the disputed structure during the intervening night of 22/23 December of 1949 appears to be a 'feigned ignorance' on the part of the witness and thereby rendering it impossible for the Court to accept as 'credible or trustworthy'.[134] Regarding inadmissibility of the depositions given by the witnesses of the Nirmohi Akhara, the Supreme Court outlines:

> The statements of the witnesses are replete with inconsistencies and contradictions. The witnesses were unclear about the nature of the *parikrama* route and the number of idols. While furnishing a description of the idols inside the disputed structure, many witnesses acknowledged that they had not entered the disputed structure ... Many of the witnesses offered accounts with respect to the disputed structure which are at variance with the pleaded case of Nirmohi Akhara. Some of the witnesses in fact supported … that Babri Masjid existed ... Consequently, the witness accounts cannot be regarded as credible proof in support of the case of Nirmohi Akhara.[135]

---

128 *Siddiq v Mahant Suresh Das*, (2019), para 284.
129 *Siddiq v Mahant Suresh Das*, (2019), para 284.
130 *Siddiq v Mahant Suresh Das*, (2019), para 284
131 *Siddiq v Mahant Suresh Das*, (2019), para 285.
132 *Siddiq v Mahant Suresh Das*, (2019), para 286.
133 *Siddiq v Mahant Suresh Das*, (2019), para 286.
134 *Siddiq v Mahant Suresh Das*, (2019), para 295.
135 *Siddiq v Mahant Suresh Das*, (2019), para 295.

Even in view of the witnesses of Nirmohi Akhara, it is no sin to tell lie in religious matter.[136] In furtherance, a witness of the Nirmohi Akhara believes that telling a lie is no harm if it is applied for the purpose of acquiring a 'religious place'.[137]

The Supreme Court concludes that the documentary evidence offered by the *Nirmohi Akhara* rather 'establishes the existence' of the mosque from 1934 to 1949.[138] This finding of the Court runs contrary to the claim of the *Nirmohi Akhara* that there exists no mosque at all at any time.[139] In addition, the documentary evidence proves the existence and use of the mosque until December 1949 as is evident from the letter of the Faizabad Superintendent of Police to the Deputy Commissioner and District Magistrate.[140] In fine, the Supreme Court terms the documentary evidence advanced by *Nirmohi Akhara* as 'stray acts' which do not sufficiently establish that it has been in possession of the disputed site continuously, exclusively and uninterruptedly.[141]

The plaintiffs of Suit 5 claim recovery of 'Ayodhya Vishnu Hari temple inscription' on 6/7 December 1992 from the debris of the demolished site.[142] The plaintiffs in Suit 5 claim this inscription to be recovered from their witness Ashok Chandra Chatterjee (OPW-8) who has collected it from the debris the temple on 6 December 1992.[143] As the deposition of the witness reveals that while the demolition of the Babri Masjid has been going on 6 December 1992, he has been standing behind it.[144] At this time, he has seen 'stones and bricks of uneven shape and size fitted in the wall' including 'a slab'.[145] In the mean time, 'a saint' informs him of the slab to be an 'inscription of an old temple' which is subsequently taken to the police custody.[146]

---

136 *Siddiq v Mahant Suresh Das*, (2019), para 391.
137 *Siddiq v Mahant Suresh Das*, (2019), para 391.
138 *Siddiq v Mahant Suresh Das*, (2019), para 306.
139 *Siddiq v Mahant Suresh Das*, (2019), para 306.
140 *Siddiq v Mahant Suresh Das*, (2019), para 306.
141 *Siddiq v Mahant Suresh Das*, (2019), para 399.
142 *Siddiq v Mahant Suresh Das*, (2019), para 539.
143 *Siddiq v Mahant Suresh Das*, (2019), para 545.
144 *Siddiq v Mahant Suresh Das*, (2019), para 546.
145 *Siddiq v Mahant Suresh Das*, (2019), para 546.
146 *Siddiq v Mahant Suresh Das*, (2019), para 546.

However, at cross-examination, he states that he has no knowledge of the 'place' wherefrom the slab falls.[147] Thus the 'inconsistencies' in the deposition of the witness shakes his credibility.[148] Rejecting his testimony, the Supreme Court holds:

> Since the recovery of the rock inscription from the disputed structure is not borne out from the evidence, a crucial link in the case which has been sought to be made out on the basis of the inscription, by the plaintiffs in Suit 5 is found to be missing. The rock inscription would indicate the existence of a Vishnu Hari temple at Ayodhya, having been constructed in twelfth century AD. But once the recovery of the inscription from the site in question is disbelieved, the inscription cannot be the basis to conclude that the Vishnu Hari temple which is referred to in the inscription was a temple which existed at the very site of the demolished structure.[149]

It is the faith and belief of the Hindus that Lord Ram as the incarnation of Vishnu takes birth at the place where the Babri Masjid has been constructed.[150] Their faith is basically founded on the significance attached to Ayodhya in the different religious books like in *Valmiki's Ramayan*, *Skand Puran*and *Sri Ramacharitmanas* on the one hand and travelogues, gazetteers and books on the other. Both *Jagadguru Ramanandacharya* and *Swami Avimuketshwaran and Saraswati* make no reference of any place where Lord Ram has taken birth in the *Purans* except in the *Ayodhya Mahatmya* and *Vaibhav Khand* in the *Skand Puran*.[151] Satya Narain Tripathi states that the *Ramacharitmanas* mentions Ayodhya as the place of birth place Ramachandraji and not any special place.[152]

3.3.3. Summary of the Gazetteers and Travelogues

The *Gazetteer of Oudh* (1877) and AF Millet's *'The Report of Settlement of Land Revenue, Faizabad District* (1880)' broadly embody the contents of Carnegy's account.[153] *The Imperial Gazetteer of India, Provincial*

---

147 *Siddiq v Mahant Suresh Das*, (2019), para 546.
148 *Siddiq v Mahant Suresh Das*, (2019), para 547.
149 *Siddiq v Mahant Suresh Das*, (2019), para 548.
150 *Siddiq v Mahant Suresh Das*, (2019), para 549.
151 *Siddiq v Mahant Suresh Das*, (2019), paras 550, 552 & 553.
152 *Siddiq v Mahant Suresh Das*, (2019), para 554.
153 *Siddiq v Mahant Suresh Das*, (2019), paras 567 & 568.

series, United provinces of Agra and Oudh – Vol. II (Allahabad, Banaras, Gorakhpur, Kumaon, Lucknow and Faizabad divisions and the native states) mentions that at Ramkot of Ayodhya, Lord is born and 'most of the enclosure' is used to build a mosque by Babar'.[154] It describes the 'outer portion' as the place of birth of Lord Ram.[155]

Hans Baker in his work *Ayodhya* notes that there prevails a local tradition in Ayodhya that ascribes rediscovery of the town to *Vikramaditya*.[156] William Foster in his edited work '*Early Travels in India (1583-1619)'* refers the 'ruins of *Ranichand'*s castle and Houses' to mean Ram Chandra, the hero of the Ramayana and the mound known as the *Ramkot* or fort of Rama.[157] Joseph Tieffenthaler, in his travel account titled *Description Historiqueet Geographique Del'inde,* makes a reference to the 'faith of the Hindu devotees' and the 'alleged demolition' of the temple by Aurangzeb who builds a mosque at a site believed as the place of birth of Lord Ram.[158] This account suggests the use of numerous 'black stone pillars' in constructing the mosque.[159]

Robert Montgomery Martin in his writing '*History, Antiquities, Topography and Statistics of Eastern India'* refers to the 'alleged destruction' many sites worship of the Hindus by Aurangzeb.[160] He notes that the mosque is built with the pillars made up of 'black stone'.[161] In his view, the entire story is founded on 'religious and mythological significance'.[162] Worship at these spots, as he mentions, bears religious significance to the Hindus.[163]

---

154 *The Imperial Gazetteer of India, Provincial series, United provinces of Agra and Oudh – Vol. II* (Allahabad, Banaras, Gorakhpur, Kumaon, Lucknow and Faizabad divisions and the native states) [cited in [*Siddiq v Mahant Suresh Das*, (2019), para 570].

155 Ibid.

156 Hans Bakker, *Ayodhya*, Egbert Forsten Publishers (1986) [cited in *Siddiq v Mahant Suresh Das*, (2019), para 571].

157 William Foster, Early Travels in India (1583-1619), (London, 1921), p 176 [cited in *Siddiq v Mahant Suresh Das*, (2019), para 560].

158 *Siddiq v Mahant Suresh Das*, (2019), para 561.

159 *Siddiq v Mahant Suresh Das*, (2019), para 561.

160 Robert Montgomery Martin (Biographical details) – British Museum [cited in *Siddiq v Mahant Suresh Das*, (2019), para 562.

161 *Siddiq v Mahant Suresh Das*, (2019), para 562.

162 *Siddiq v Mahant Suresh Das*, (2019), para 562.

163 *Siddiq v Mahant Suresh Das*, (2019), para 562.

Edward Thornton's Gazetteer titled *Gazetteer of the territories under the Government of East India Company and the Native States on the Continent of India* refers existence of an 'extensive establishment called *Hanumangurh*, or Fort of Hanuman'.[164] Relying on the opinion of Buchanan, this gazetteer notes that the mosque is built by Babur while the local tradition refers it to be built by Aurangzeb after destruction of the temple.[165]

Surgeon General Edward Balfour finds 'many Jain Temples and three mosques on the site of three Hindu shrines'.[166] Alexander Cunningham, gives a narrative of the Ayodhya where he finds some 'holy Brahmanical temples' with 'modern date' but with no 'architectural pretensions'; some of the 'ancient temples' have been 'destroyed by the Musulmans'.[167] In his description, Ramkot in Ayodhya has on its east side a 'small walled fort surrounding a modern temple', at its north-east corner situates '*Ram Ghat'* where Lord Ram is said to be have 'bathed' and on the north-west his body is believed to have been 'burned'.[168]

Cunningham's account states that close to the Banyan tree called the '*Asok Bat'* (Griefless Banyan), is the *Lakshman Ghat* where Lord Ram's brother Lakshman is said to have bathed and about one-quarter of a mile distant, in the very heart of the city, stands the 'Birth-place temple' of Lord Ram.[169] P Carnegy, as Officiating Commissioner and Settlement Officer, Faizabad writes the *Historical Sketch of Faizabad With Old Capitals Ajodhia and Fyzabad* (1870).[170] Referring to the local legend, he mentions that at the time of Muslim conquest of Ayodhya, there has been three temples known as the 'Janmasthan', the '*Sargadwar mandir'*, also known as '*Ram Darbar'*, and '*Tareta-Ke-Thakur*'.[171]

---

164 Edward Thornton, 1799-1875, *A Gazetteer of the Territories Under the Government of the East-India Company, And of the Native States On the Continent of India*, (London WH Allen, 1854) [cited in *Siddiq v Mahant Suresh Das*, (2019), para 563].

165 Ibid.

166 Ibid.

167 Alexander Cunningham, *Archaeological Survey of India - Four Reports Made During the Years 1862-63-64-65*, Volume 1 (Simla, Government Central Press, 1871) [cited in *Siddiq v Mahant Suresh Das*, (2019), para 565].

168 Ibid.

169 Ibid.

170 P Carnegy, Officiating Commissioner and Settlement Officer, *Historical Sketch of Faizabad With Old Capitals Ajodhia and Fyzabad*, Oudh Government Press, 1870 [cited in *Siddiq v Mahant Suresh Das*, (2019), para 566].

171 Ibid.

The local legend also says that Emperor Babur builds the Babri Masjid demolishing the Janmasthan temple in 1528 AD.[172] According to this account, the 'great rapture' occurred between the Hindus and Muslims in 1855.[173] The 'great rapture' of 1855 puts the Hindus in possession of the Hanuman Garhiand the Muslims to Janmasthan but it takes a toll of 75 lives of the Muslims who have been buried nearby.[174] Mentionable feature of Carnegy's account is that the construction of Babri Masjid on the Janmasthan temple is 'locally affirmed' and is not based on any authentic information.

According to the statements of travellers like *Tieffenthaler* and *Montgomery Martin,* the Hindus believe that the premises of the Babri Masjid is the birth place of Lord Ram.[175] On the question of admissibility of the accounts contained in travelogues and history books in determining the title of the in a conflicting claim, the Supreme Court observes:

> [T]he accounts of the travellers must be read with circumspection. Their personal observations must carefully be sifted from hearsay– matters of legend and lore. Consulting their accounts on matters of public history is distinct from evidence on a matter of title. An adjudication of title has to be deduced on the basis of evidence sustainable in a court of law, which has withstood the searching scrutiny of cross-examination. Similarly, the contents of gazetteers can at best provide corroborative material to evidence which emerges from the record … Title cannot be established on the basis of faith and belief above.[176]

3.3.4. Summary of the Study of the Historians

Under the title *Babri Mosque or Rama's Birth Place? Historians' Report to the Indian Nation* a report has been prepared and submitted to the Allahabad High Court on 13 May 1991.[177] The significant observations

---

172 Ibid.
173 Ibid.
174 Ibid.
175 *Siddiq v Mahant Suresh Das*, (2019), paras 788(IV).
176 *Siddiq v Mahant Suresh Das*, (2019), paras 788(IV).
177 The members are: (i) Professor RS Sharma, formerly a Professor at Delhi University and Chairperson of the Indian Council of Historical Research; (ii) Professor M Athar Ali, formerly a Professor of History at Aligarh Muslim University and a former President of the Indian History Congress; (iii) Professor DN Jha, Professor of History, Delhi University; and (iv) Professor Suraj Bhan, Professor of Archaeology

in the report, *inter alia*, are the *Skandpuran (Ayodhya Mahatmya)* does not refer the premises of Babri Masjid as the place of birth of Lord Ram and carvings on the pillars of the mosque do not indicate a '*Vaishnavite* association'.[178] According to the report, there is no discovery of 'stone pillars or architecture of roof material of a temple' in the debris of the trenches of the pillar-bases and there is no reference of Babri Masjid in *Ram Charitmanas* which is composed in 1675-76.[179] The report underpins that religious texts do not indicate any sign of 'veneration' to a spot in Ayodhya as being the place of birth Lord Ram before the eighteenth century.[180] In view of the report, there is nothing to believe that 'a temple of Lord Ram, or any temple' exists at the disputed site before its construction in 1528-29.[181] The concept of the construction of the Babri Masjid at the site of the birth place of Lord Ram does not arise until the late 18th century.[182] Moreover, it opines that the demolition of the temple is not asserted until the beginning of the 19th century and it receives the status of 'full-blown legend' from 1850 wherefrom there is a 'progressive reconstruction of imagined history, based on faith'.[183]

Justice Sudhir Agarwal of Allahabad High Court rejects the report on the grounds of its 'not been signed' by Professor DN Jha, non-availability of the 'material from the excavations of Professor BB Lal for inspection to the four historians'.[184] More importantly, the opinion of Suvira Jaiswal (PW18), a former Professor of Jawahar Lal Nehru University, is 'not based' on her own study and research but a reflection of the writings of others. Accordingly, he holds it inadmissible in evidence under section 45 of the *Evidence Act* 1872.[185] The Supreme Court rejects the findings of the four historians on a different ground. To this Court, it 'pre-dates' the material emerged in the form of the ASI report and prepared during the continuance of the suit and hence is inadmissible.[186] Therefore, the

---

and Dean, Faculty of Social Sciences, Kurukshetra University, Haryana. The report was submitted under a covering letter dated 13 May 1991 by Professor RS Sharma, Professor M Athar Ali, Professor DN Jha and Professor Suraj Bhan; [cited in *Siddiq v Mahant Suresh Das*, (2019), paras 595].

178 *Siddiq v Mahant Suresh Das*, (2019), paras 595.
179 *Siddiq v Mahant Suresh Das*, (2019), paras 595.
180 *Siddiq v Mahant Suresh Das*, (2019), paras 595.
181 *Siddiq v Mahant Suresh Das*, (2019), paras 595.
182 *Siddiq v Mahant Suresh Das*, (2019), paras 595.
183 *Siddiq v Mahant Suresh Das*, (2019), paras 595.
184 *Siddiq v Mahant Suresh Das*, (2019), paras 596.
185 *Siddiq v Mahant Suresh Das*, (2019), paras 597.
186 *Siddiq v Mahant Suresh Das*, (2019), paras 598.

findings of report does not 'carry any significant degree of weight' as they have failed to get the 'benefit of analysing the material' of the ASI report.[187]

3.3.5. Summary of the ASI Report

Both in Suit 4 and Suit 5, a common issue of contention has been whether the Babri mosque has been constructed after demolition of a temple.[188] To dissolve this issue, the ASI carries out a scientific investigation and survey on the disputed area consisting of the premises of the Babri Masjid by Ground Penetrating Technology or Geo-Radiology (GPR).[189] The GPR report finds some 'anomalies' associated with 'ancient and contemporaneous structures' in regard to the pillar, foundation, wall slab and floor which extend over a significant portion of disputed site.[190] For further analysis, the High Court directs the ASI to excavate the disputed site.[191] Thus a fourteen-member committee formed for the purpose, after preparing site plan, indicates the total 'number of trenches to be laid out and excavated'.[192] The ASI submits its final report in August 2003.[193] The High Court receives 533 pieces of exhibits and testimony of 87 witnesses comprising 13,990 pages in the course of hearing before it.[194] The ASI report contains ten chapters and four appendices.[195] The ASI prepares a 'still and video footage' of its

---

187 *Siddiq v Mahant Suresh Das*, (2019), paras 598.

188 *Siddiq v Mahant Suresh Das*, (2019), para 447.

189 *Siddiq v Mahant Suresh Das*, (2019), para 26.

190 *Siddiq v Mahant Suresh Das*, (2019), paras 26 & 448.

191 *Siddiq v Mahant Suresh Das*, (2019), paras 26 & 448.

192 *Siddiq v Mahant Suresh Das*, (2019), para 26.

193 *Siddiq v Mahant Suresh Das*, (2019), para 26.

194 *Siddiq v Mahant Suresh Das*, (2019), para 27.

195 The chapters consist of: Chapter I Introduction; Chapter II Cuttings; Chapter III Stratigraphy and Chronology; Chapter IV Structure; Chapter V Pottery; Chapter VI Architectural Fragments; Chapter VII Terracotta Figurines; Chapter VIII Inscriptions, Seals, Sealings and Coins; Chapter IX Miscellaneous Objects; Chapter X Summary of Results. Appendices I to IV to the report contain the following information: Appendix I C14 Dating of Charcoal Samples from Ayodhya excavation; Appendix IIA Report on the Chemical Analysis of Plaster Samples pertaining to different trenches collected from Ayodhya; Appendix IIB Report on the Chemical Analysis of Floor Samples pertaining to different trenches collected from Ayodhya; Appendix III On-Site Chemical Treatment and Preservation of Excavated Artefacts and Appendix IV Information on the Data-Form as per

findings.[196] The ASI makes 90 trenches in 5 months and submits the report within 15 days after completion of excavation.[197] Then the materials excavated along with the 'antiquities, objects of interest, glazed pottery, tiles and bones recovered from the trenches' have been sealed and preserved in room under the custody of the Commissioner of Faizabad Division.[198]

Chapter III of the ASI report contains its Stratigraphy and Chronology which can be divided into 9 cultural periods on the basis of evidences of 'pottery sequence, structural remains and other datable finds'.[199] In Chapter IV, the ASI report speaks of a 'massive structure below the disputed structure' and a circular shrine which can be an attribute of the circa tenth century AD.[200] In its concluding chapter, the ASI report records:

> Now, viewing in totality and taking into account the archaeological evidence of a massive structure just below the disputed structure and evidence of continuity in structural phases from the tenth century onwards upto the construction of the disputed structure along with the yield of stone and decorated bricks as well as mutilated sculpture of divine couple and carved architectural members including foliage patters, *amalaka, kapotapali* door jamb with semi-circular pilaster, broken octagonal shaft of black schist pillar, lotus motif, circular shrine having *pranala* (water chute) in the north, fifty pillar bases in association of the huge structure, are indicative of remains which are distinctive features found associated with the temples of north India.[201]

Upon an extensive analysis of the ASI findings, the Supreme Court cautiously records some caveats. In the first place, it underscores that the 'circular shrine' is conceivably a Shiva shrine which dates back to the 7th to 9th century AD but the underlying structure belongs to12th century

---

direction of Special Full Bench, Lucknow of the Hon'ble High Court, Allahabad. For details see, *Siddiq v Mahant Suresh Das*, (2019), para 495.

196 *Siddiq v Mahant Suresh Das*, (2019), para 448.

197 *Siddiq v Mahant Suresh Das*, (2019), para 448.

198 *Siddiq v Mahant Suresh Das*, (2019), para 448.

199 *Siddiq v Mahant Suresh Das*, (2019), para 453.

200 *Siddiq v Mahant Suresh Das*, (2019), para 454.

201 *Siddiq v Mahant Suresh Das*, (2019), para 455.

AD.[202] The circular shrine and the underlying structure with pillar bases belong to two different time periods between three to five centuries apart.[203] Secondly, the report mentions no specific and pointed finding that the underlying structure has been a temple dedicated to Lord Ram.[204] Finally, significantly the report avoids drawing a conclusive opinion that a temple has been demolished for building Babri mosque.[205]

Ms Meenakshi Arora, senior counsel terms the ASI to be suffering from 'glaring errors and internal inconsistencies'.[206] Archaeological finding being an 'inferential science' is basically an 'opinion' in view of section 45 of the *Evidence Act* 1872.[207] Moreover, unlike natural sciences, archaeology is not 'precise or exact'.[208] Archaeology stands on drawing inferences in respect of the findings discovered during excavation and does not yield verifiable conclusions.[209] More importantly, the ASI report does not contain any finding as to whether any pre-existing temple has been demolished for the construction of the Babri Masjid.[210]

Dr Rajeev Dhavan, another counsel though fairly accepts that the 'court may not have the expertise to sit in judgment over the experts' yet it can examine 'certain aspects' without sitting in the judgement over the expertise.[211] Accordingly, the Court may legitimately inquire of whether the commission provides an answer, whether the conditionalities and limitations have been observed, whether the conclusions are in conformity with the findings and whether the conclusions have drawn beyond probabilities.[212] Though ASI finds the existence of ruins of a preexisting structure, it does not mention the 'reason for the destruction of the pre-existing structure' and whether this structure has been demolished for the purpose of the construction of the mosque.[213]

---

202 *Siddiq v Mahant Suresh Das*, (2019), para 509.
203 *Siddiq v Mahant Suresh Das*, (2019), para 509.
204 *Siddiq v Mahant Suresh Das*, (2019), para 509.
205 *Siddiq v Mahant Suresh Das*, (2019), para 509.
206 *Siddiq v Mahant Suresh Das*, (2019), para 461.
207 *Siddiq v Mahant Suresh Das*, (2019), para 461.
208 *Siddiq v Mahant Suresh Das*, (2019), para 461.
209 *Siddiq v Mahant Suresh Das*, (2019), para 461.
210 *Siddiq v Mahant Suresh Das*, (2019), para 461.
211 *Siddiq v Mahant Suresh Das*, (2019), para 481.
212 *Siddiq v Mahant Suresh Das*, (2019), para 481.
213 *Siddiq v Mahant Suresh Das*, (2019), paras 788(II).

Moreover, there is time gap of four hundred years between date of construction of the pre-existing structure in 12 Century AD and the building of the mosque in 16th Century AD. Mysteriously, the ASI report makes no explanation as to what has 'transpired' in this 'intervening period'.[214] The ASI report does not mention that the 'remnants' of the preexisting structure have been used in constructing the mosque.[215] In addition, the ASI avoids mentioning that 'black Kasauti stone pillars' used in the construction of the mosque are 'relatable to the underlying pillar bases'.[216] The ASI does not record any finding on (i) the cause of destruction of the underlying structure; and (ii) whether the pre-existing structure was demolished for the construction of the mosque.[217]

3.4. Application of the Principles of Complete Justice and Preponderance of Probability: A Critique

The Supreme Court of India applies the principle of complete justice and preponderance of probability to arrive at a decision in the Babri Masjid case. As is held in the *Supreme Court Bar Association case,* the power of the Supreme Court in doing complete justice under article 142 of the Constitution is curative in nature and cannot be exercised to overlook the substantive rights of the litigant. At the same time, this power cannot be used to create a new edifice. Meanwhile, the principle of preponderance of probabilities, in a nutshell, implies accepting the evidence which outweighs the evidence of the counterpart. However, in present case, the Supreme Court appears to apply the principle of complete justice in total ignorance of its earlier reasoning. It is in the sense that since its inception in 1528, the Babri Masjid has been used by the Muslims of India consistently and peacefully up to 1856. There is no record at the hand of the Hindus that they have claimed ownership or right of any kind in the premises or in the vicinity of the Babri Masjid. It is, all on a sudden, in 1856 onward, the Hindus started claiming their right of ownership in the premises of Babri Masjid demanding it to be the birth place of Lord Ram. This claim of the Hindus is purely and utterly bases on their

214 *Siddiq v Mahant Suresh Das,* (2019), para 788(II).
215 *Siddiq v Mahant Suresh Das,* (2019), para 788(II).
216 *Siddiq v Mahant Suresh Das,* (2019), para 788(II).
217 *Siddiq v Mahant Suresh Das,* (2019), para 788(III).

religious faith and belief having no historical foundation of any kind. This led to the bifurcation of the Babri Masjid premises into inner court ward exclusively to be used for the Muslims while the outer court ward for the Hindus. This status continued until 1934 when another riot compelled the Muslims to offer namaz only on the Friday up to the fateful night of 22/23 December 1949 when the outrageous Hindus desecrated the Masjid by placing Hindu idols under the central dome of the Masjid. Thus it is clear that the Muslims have been in use of the Babri Masjid as their prayer house for a long period spanning over four centuries since its establishment in 1528 to 1949.

All through their arguments, the claim of the Hindus is based on their faith and belief though the court itself comes to the conclusion that mere religious faith and belief cannot constitute the edifice of legal right of a litigant. Yet the Supreme Court succumbs to the contention of the Hindus in regard to the existence of the right of ownership over the disputed structure based on their religious faith and belief. This seems to be a creation of new edifice in contravention of its earlier findings in the *Supreme Court Bar Association case*.

On the other hand, though there is no scope of 'might have happened' of a fact under the principle of preponderance of probability, the Supreme Court declines to accept the long standing use of the Masjid by the Muslims. On the contrary, the Court accepts the mythical prevalence of faith and belief of the Hindus to constitute the legal foundation of their claim to their right to worship on the alleged suit premises. This argument of faith and belief cannot stand *qua* the long standing use of the disputed premises by the Muslims for period spreading over four centuries. On this background, it can be argued that the Supreme Court of India makes a misapplication of the principle of complete justice and the principle of preponderance of probability in awarding ownership title to the Hindus to the total exclusion of the Muslims.

4. Findings and Conclusion

Based on the above analysis of the *Babri Masjid* verdict the following findings are recorded. Thereafter, the article draws its conclusion.

4.1. Findings

This section analyses the findings based on the foregoing discussion.

4.1.1. Ignoring the Period from 1528-1856

The Supreme Court accepts the construction of the Babri Masjid in 1528 by Mir Baqi at the behest of Emperor Babur but rejects its existence as a mosque until 1856-7.[218] In the opinion of the Court, the plaintiffs in Suit 4 fail to provide any 'account by them of possession, use or offer of namaz in the mosque between the date of construction and 1856-7'.[219] In view of the Court, the Muslims could not adduce evidence in their favour to establish the exercise of 'possessory control over the disputed site' for a period of 325 years since its inception in 1528 and until erection of the dividing wall in 1858 by the British government.[220]

On the contrary, the Supreme Court does not seek any evidence in support of the claim by the Hindus that the Babri Masjid premises has been used by them as the place where Lord Ram takes birth. The Court remains satisfied with the contention of faith and belief by the Hindus in support of their claim.

Here the status of the disputed structure, during this intervening period, should have been taken seriously by the Supreme Court. If the argument that the mosque has been constructed in 1528 is accepted, then what has been its status until the creation of the buffer zone between the inner courtyard and outer courtyard in 1858? Has it been left abandoned since its construction? Or has it been used by the Hindus as a place of worship believing it to be the place of birth of Lord Ram during this intervening period? In case it has been used by the Hindus during this period, when have they ceased possession of it? Or has it been anything else? In the event the Muslims have not used the mosque from its construction in 1528 until 1858, then which event(s) has/have occasioned for them to use it to offer namaz, all on a sudden, in 1858 and onward?

---

218 *Siddiq v Mahant Suresh Das*, (2019), para 786.
219 *Siddiq v Mahant Suresh Das*, (2019), para 786.
220 *Siddiq v Mahant Suresh Das*, (2019), para 786.

These areas of the dispute have not been explored and addressed by the Supreme Court in determining the title of the disputed structure. The combined result of the answers that ensue from all these questions, most possibly is that, from the time of its construction in 1528, the disputed structure has continuously been used as a mosque by the Muslims at large. However, with the progression of the concept that Lord Ram is born at the very place where the Babri Masjid stands, the Hindu movement starts gaining ground. This, perhaps, results in the communal conflict in 1856-7 which has culminated into dividing the mosque premises as inner and outer courtyard. The Court simply seeks documentary evidence of offering namaz in the Babri Masjid during the intervening period. During those days none could have foreseen that at some point of time such a legal dispute would arise necessitating production of documentary evidence as a proof of offering namaz by them. This is an absurd claim by the Supreme Court of India.

In the excuse of the inability of the Sunni Central Waqf Board to advance any proof in its favour, the Court draws negative inference of its possession. This position of the Supreme Court runs contrary to the concept of possessory title of the premises of the Babri Masjid since its construction. It is because, in the absence of any evidence to establish its claim by the Sunni Central Waqf Board, the Hindu plaintiffs in Suit 5 have not offered any piece of evidence excepting their faith and belief.

It is a natural corollary of the possessory title that one who is in possession has the best title until contrary is proved. Here offering of namaz has been started with the construction of the mosque back in 1528 when the constructor has not thought of this type of legal battle to be taken place in distant future-some five hundred years later. Generally a mosque is built for the purpose of offering namaz and performance of other religious activities. There emerges no necessity of making document excepting creation of a waqf. In this case, there is no express evidence of creation of a waqf, but the Supreme Court has accepted the contention of waqf by user. Therefore, in the absence of any documentary evidence as to the creation of a waqf, acceptance of the doctrine of waqf by user confers title by means of possession on the Sunni Central Waqf Board. This point of law has been overlooked by the

Supreme Court in assessing the evidentiary value of the proofs presented by the Sunni Central Waqf Board.

Another significant period of time, constituting 23 December 1949 to 16 January 1950 when the mosque premises have been attached and taken control of by the Government of India, has been ignored by the Supreme Court. The mosque has been desecrated on the night of 22/23 December, 1949. Since then the Muslims have been dispossessed of the mosque. However, the intervening period of 23 December 1949 to 15 January 1950 is very crucial period as the Hindus have been in possession of the mosque. During this period of time, not only the mosque has been in their control but also there is great likelihood that it has been violated by the Hindus.

Besides, the mosque has been demolished by an overwhelming number of Hindu devotees on 6 December 1992. However, the excavation work by the ASI has been carried out long after its demolition and the report has been submitted on 22 August 2003. The chance of further manipulation of evidences during this fateful event cannot be overlooked.

The Supreme Court admits the existence of the three domed structure as a mosque since its construction in 1528 with argument that 'Allah' remains inscribed on the structure.[221] More importantly, the Court finds 'no evidence' against the Muslims of their abandonment of the mosque or ceasing from offering namaz in the mosque despite 'contestation' over the possession of the inner part after 1858.[222] Oral evidence also solidifies the claim of 'continuation of namaz'.[223]

In view of the Court, regular namaz has been offered by the Muslims until the communal conflict of 1934, despite contesting claims over the inner courtyard possession.[224] However, following this incident, only Friday namaz has been offered until its desecration at the night of 22/23

---

221 *Siddiq v Mahant Suresh Das*, (201 9), para 788(XII).
222 *Siddiq v Mahant Suresh Das*, (2019), para 788(XIV).
223 *Siddiq v Mahant Suresh Das*, (2019), para 788(XIV).
224 *Siddiq v Mahant Suresh Das*, (2019), para 788(XV).

December 1949.[225] With the attachment of the disputed premises by the Government of India on 29 December 1949, the Muslims have been forced out of the possession of the mosque. All these incidents prove the continuous possession of the Muslims over the inner courtyard in the face of intermittent challenge tendered by the Hindus over the disputed premises.

However, during the period of communal violence in 1856-7, the entire premises of the mosque have been divided as inner courtyard and outer courtyard. The Court finds the genesis of communal contestation in this incident. But what has been actual position of the Hindus before this incident, spanning around four centuries, is not analysed by the Court. Actually this period forms the key time for the Muslims to have their right mature. It is clear from the judgment that the Muslims continue to offer namaz in the Babri Masjid until its desecration in 1949 since its inception in the beginning of the 16th century. On the contrary, the Hindus only hold actual possession to the outer courtyard from 1858 and onward. Before this, there is no evidence in their favour except their faith and belief which the Court itself declines to accept in settling the dispute. Inspite of this clear evidence, upon what evidence the Supreme Court confers title upon the Hindus over the entire premises is not clear and understandable.

The Court reaches in a conclusion that the Hindus have established their 'possessory title' over the 'outer courtyard' clearly for their long, continuous and unimpeded worship at the *Ramchabutra*.[226] But the Court ignores considering the actual time of their physical possession of the outer courtyard to begin from 1858. Before this time, their possession has been confined only to their faith and belief attached to the place of dispute as the birth place of Lord Ram. This faith and belief has not been manifested by actual possession for a long period of four centuries. By contrast, the Muslims have retained their continuous possession until they have been overwhelmingly ousted by the Hindus in 1949.

---

225 *Siddiq v Mahant Suresh Das*, (2019), para 788(XV).
226 *Siddiq v Mahant Suresh Das*, (2019), para 788(XVIII).

4.1.2. Ignoring the Findings of the Historians

Under the title *Babri Mosque or Rama's Birth Place? Historians' Report to the Indian Nation* prepares a report which is submitted to the Allahabad High Court on 13 May 1991.[227] The significant observations in the report, *inter alia*, are the *Skandpuran (Ayodhya Mahatmya)* does not refer the Babri Masjid compound as the birth place of Lord Ram and carvings on the mosque pillars are not indicative of a '*Vaishnavite* association'.[228] According to the report there has been no discovery either of 'stone pillars' or 'architecture of roof material' in the demolition debris and *Ram Charitmanas* composed in 1675-76 makes no mention of Babri Masjid.[229] The report underpins that religious texts do not indicate any sign of 'veneration' to a spot in Ayodhya as being the birth site of Lord Ram before the eighteenth century.[230]

As the report concludes, there is nothing to believe that Lord Ram temple, or temple any kind exists at the disputed site before its construction in 1528-29.[231] The concept of the construction of the Babri Masjid at the site of Lord Ram's birth place does not arise until the late 18thcentury.[232] Moreover, it opines that the demolition of the temple is not asserted until the 19th century begins and it receives the status of 'full-blown legend' in 1850 wherefrom there is a 'progressive reconstruction of imagined history, based on faith'.[233]

---

227 The members are: (i) Professor RS Sharma, formerly a Professor at Delhi University and Chairperson of the Indian Council of Historical Research; (ii) Professor M Athar Ali, formerly a Professor of History at Aligarh Muslim University and a former President of the Indian History Congress; (iii) Professor DN Jha, Professor of History, Delhi University; and (iv) Professor Suraj Bhan, Professor of Archaeology and Dean, Faculty of Social Sciences, Kurukshetra University, Haryana. The report was submitted under a covering letter dated 13 May 1991 by Professor RS Sharma, Professor M Athar Ali, Professor DN Jha and Professor Suraj Bhan. For details see *Siddiq v Mahant Suresh Das*, (2019), paras 595.

228 *Siddiq v Mahant Suresh Das*, (2019), para 595.

229 *Siddiq v Mahant Suresh Das*, (2019), para 595.

230 *Siddiq v Mahant Suresh Das*, (2019), para 595.

231 *Siddiq v Mahant Suresh Das*, (2019), para 595.

232 *Siddiq v Mahant Suresh Das*, (2019), para 595.

233 *Siddiq v Mahant Suresh Das*, (2019), para 595.

4.1.3. The Period from 1528-1856 *vis-à-vis* the Findings of the Historians

In view of the Supreme Court, the Muslims fail to tender any documentary evidence of their possession of the Babri Masjid from its start in 1528 up to 1856. It is only the communal riots of 1856-7 that brings the possession of the mosque on earth by the Muslims. This riot is followed by the bifurcation of the mosque premises as the inner courtyard exclusively under the possession, control and management of the Muslims while the outer courtyard with similar consequences under the Hindus. This position of the premises continues until its desecration on the night of 22/23 December 1949. Then the mosque is attached and taken under the control of the Government from 29 December 1949. But before this vandalism, at no point of time, during the long course of 330 years from its inception 1528 to 1858, the Hindus are shown to have the possession of the inner portion of the mosque premises. It is only in 1858 when they are put in possession at the bifurcated outer courtyard by the British regime. Since then they have continued their possession only at the outer courtyard until its attachment in 1949.

4.2. Conclusion

Under the principle of complete justice, the Supreme Court is armed with the power of doing equitable justice to a litigant who is otherwise entitled to a remedy but is unable to get it under the coverage of ordinary law. However, this power does not empower the Court to do anything in vacuum. The Supreme Court declares the Muslims with no right to ownership on the Babri Masjid on one hand and orders the Government of India to give five acres of land to the Muslims for construction of a mosque as recognition of their constitutional right to religion. If in view of the Court, the Muslims are not owner of the disputed structure, then upon what legal basis it awards five acres of land to them for guaranteeing their right to religion? If it is a civil suit, then one party will lose the case entirely to the other. But here the Court takes a reverse course: it disentitles the Muslims to their ownership to the Babri Masjid which has been used by them spreading over four centuries by conferring it to the Hindus based on their sheer religious faith and belief and at the

same time it tries allay the woo of the Muslims by awarding them five acres of land for offering their prayer. This is simply ridiculous.

On the other hand, the principle of preponderance of probability, a guiding principle in civil justice system, leads the court to incline to a party whose evidence outweighs the evidence of the other party. To search for this position of the evidence in the case in hand, the Supreme Court meticulously examines the government gazetteers, personal accounts of the travellers, observation of historians and more importantly the report by the ASI presented as evidence presented before it. The survey conducted by ASI following the order of the Allahabad High Court fails to reach in a conclusion that the structure of the Babri Masjid has been constructed upon demolition of the alleged Ram Mandir. This view is also subscribed by the Supreme Court itself. In parallel, in view of the Supreme Court gazetteers, reports of the historians, travelogues etc have been held to be unacceptable to determine legal rights of the contestants. Still the Supreme Court confers right of ownership on the suit land including the historical Babri Masjid upon the Hindus relying on the principle of preponderance of probability. The Court rests its decision exclusively on the religious faith and belief of the Hindus that the disputed structure including the land upon which it situates is the place where Lord Ram is born. In reaching its decision, the Court disregards the existence and use of the disputed structure as a mosque by the Muslims exceeding a period of four centuries. While the claim of the Muslim is based on actual and real existence of the structure as a mosque for centuries, that of the Hindus rests simply on their religious faith and belief which is held not to be a determinant of legal right. Then where and how the Supreme Court finds the balance to titling in favour of the Hindus that paves the way for resorting to the principle of preponderance of probability? The search for answer under this study fails to discover it. Perhaps here lies the riddle of this judgment. At the same time, here lies the weakness of this judgment. Thus this paper attempts to conclude putting emphasis on the remarks of former Chief Justice of India YK Sabharwal that the Supreme Court is 'final not necessarily because [it is] always right'.[234] Therefore, to remove this riddle and weakness, it is submitted that the Supreme Court would constitute a larger bench in future and cure the error it has committed through this verdict.

[234] Available at< https://www.hindustantimes.com/india/we-are-not-infallible-but-we-are-final-sc/story-u8wqsrYnn9MerodLNTm7JL.html> accessed on 02 June 2020.

HISTORY OF HUMAN RIGHTS AND RECENT VIOLATION OF THE RIGHT NOT TO BE SUBJECTED TO TORTURE

Khadiza Nasrin[*] and Nurunnahar Mazumder[**]

Abstract

Human Rights are regarded as the foundational part of domestic and international law in the modern world. However, in the wake of so called "War on Terrorism", human rights regime is facing multifarious challenges and threats. The powerful civilized states are trading-off freedom from fear and torture for the sake of security concern. This paper presents an assessment on the development of the concept of human rights at international level. The study evaluates whether the development of human rights regime could be termed as 'success story' to reduce atrocities of pre –World War II or a 'story of sorry tale' taking into consideration increasing threats and challenges towards protection of the absolute right not to be subjected to torture after the 9/11 terrorist attack in USA.

1. Introduction

The movement of modern human rights regime virtually started at the end of the Second World War[1] for the actual prevention to repetition of atrocities and enforcement of human rights. Since 1945 onwards, the human rights regime has contributed remarkably in institutionalising 'standard-setting norm' and forming universal agreed point about promotion and protection of human rights. But the implementation of

[*] Research Officer, Law Commission, Bangladesh.

[**] Assistant Professor, Department of Law, Jagannath University.

1 Andreas Follesdal Johan Karlsson Schaffer Geir Ulfestin, *The legitimacy of International Human Rights Regimes Legal, Political and philosophical Perspective* (CUP 2013) p 1.

human rights norms is facing huge evolving challenges in the wake of severe terrorist attacks and threats which portrays growing concern about the uncertainty of its future in the effective protection of basic human rights. The objective of this writing is to assess the development of the concept of human rights at international level and evaluate whether the development of human rights regime could be termed as 'all out successful regime' to reduce atrocities and mass violation of fundamental human rights of pre –World War II era or there is still grey area for protection and enforcement of human rights. The study highlights the escalating crisis towards implementation of the absolute human right not to be subjected to torture or inhuman or degrading forms of treatment after the severe 9/11 terrorists attack in USA. It also provides recommendations about how to respond the challenges towards protection and promotion of *jus cogens* human rights "freedom from fear and torture".

2. Historical Background of Human Rights

The history of origin and development of human rights regime is significant to understand the contemporary concept of human rights. There is no unanimous view about the history of human rights. Some argue that the history of the concept of human right is western and some argue that the principle of modern human rights can be found in ancient times in many cultures and religions. Again, there is disagreement about the validity of human rights as 'universal'. Non-western societies claim that the history of human rights is western and its validity cannot be universal. MacIntyre, the leading proponent about the invalidity of universal human rights, has argued that there was no concept of 'rights' before 1400 AD and that the concept of universal human rights is invalid.[2] The Greek philosopher, Aristotle had the idea of 'just claim' derived from constitution. However that did not purely address the concept of human rights. In medieval age, the Magna Carta (1215) recognised the core value of rule of law that everyone including the king was subject to law and established the principle of prohibition of arbitrary detention as mentioned in article 39 of Magna Carta.[3]

The beginning of seventeenth century witnessed the notable recognition towards the 'theory of natural rights' propounded by prominent

---

2 Michael Freeman, *Human Rights* (PP 2011) pp 15-16.

3 Ibid p 19.

philosophers and jurists. The classical theory of natural rights found in 'Two Treaties of Government' by John Lock was actually an attack to the political absolutism and a response to the 'theory of natural hierarchy'. As opposed to divine right of king, John Lock suggested that initial equality had been associated with freedom of human individual[4].

'The American Declaration of independence (1776), the Bill of Rights (1791), the Virginia Declaration of Rights was justified by appeal to natural rights grounded in the laws of God'[5]. The French Declaration of the Rights of Man and the Citizen in 1789 was also a paradigm of protection of natural rights. It emphasises the rights of human person as being natural and inalienable.[6] At the end of eighteenth century the concept of natural rights was severely criticised by the conservatives like Edmund Burke and Jeremy Bentham. Bentham argued that natural rights are 'nonsense' and the only rights are legal rights. Indeed, in the nineteenth century, the theory of Utilitarianism superseded the concept of natural rights as the theoretical basis of reform in both England and France.[7] The social theorists like Karl Marx rejected rights of Man as bourgeois conception of rights which neglected the fundamental importance of labour, production and wealth to human well-being. In "On the Jewish Question," Marx argued that human emancipation and freedom could only be achieved in terms of socio-economic relations through politics.

3. International Regime of Human Rights

3.1. Protection of Individual Right

The term 'human rights' is relatively new in its origin and it did not connote the same meaning until the Second World War as it does today.[8] There were some limited steps to address rights like issue of slavery and national minorities, colonialism, workers' right, humanitarian laws of

4 Waldron, n 1, pp 7-9.

5 Freeman pp 26-27.

6 Christian Tomuschat, *Human Rights : Between Idealism and Realism* (OUP 2003) p 13.

7 Freeman, pp 32-33.

8 Hegarty, n 2, p 2.

war, the emancipation of women were addressed in terms of rights. The International Labour Organization (ILO) addressed workers' rights and the League of Nations after the First World War attempted to solve problems of refugees and minorities but those attempts were largely unsuccessful.[9] There was nothing in the charter of League of Nations for the protection of human rights and it was only concerned with the peaceful relations between states rather than protecting the interests of the citizens of those states.[10]

The Universal Declaration of Human Rights (UDHR) proclaimed by the United Nations on 10th December, 1948 is the foundation pillar for the national and international movement of protection of human rights and institution building for the enforcement of human rights. It was for the first time that a grand initiative was taken to establish individual human rights as 'subject' in the international level which was a fundamental shift from traditional understanding of sovereignty. In this regard, an analysis of 'subject of international law' and examinations of 'norm setting level of human rights regime' are significant to address in the context of following two eras:

3.1.1. Subject of International Law Prior to Second World War

In the 19th century, the 'notion of sovereignty' was unimpeachable in international law. Prior to 1945, international law was only concerned with the relation between states. The states alone were the absolute subject matter of traditional international law. 'The way in which citizens were treated by their respective governments was an internal affair and not the business of other governments or international community'[11]. The States could bind themselves by treaty or conventional law to protect the rights of individuals, for example, the Treaty of Amity, Commerce and Navigation (1794) adopted by United States and Great Britain.[12]Therefore, a national or colonial government did not face any scrutiny or monitoring mechanism by the international community for

---

9 Freeman, n 4, pp 36-37.

10 Waldron, n 1, p 154.

11 Richard Ashby Wilson, *Human Rights in the "War on Terror"* (CUP 2005) p 158.

12 M Van Alstine, " The Universal Declaration and Developments in the Enforcement of International Human Rights in Domestic Law"(2009) 24 Md. J Int'l L 63, p 65.

the way of treatment to its citizen within its territorial boundary. Francesca Klug rightly notes that before adoption of UDHR, any kind of criticism let alone interference by one Government with the treatment of citizens of another was regarded as a breach of principle of national sovereignty.[13] Indeed, human rights left undefined and was not legitimate concern of international community prior to 1945 except some minor efforts to address minority system, workers' rights etc.

3.1.2. Subject of International Law Post Second World War

The historical context of Second World War is considered as breakthrough to the commencement of new understanding of modern history of human rights, i.e. the protection of individual right at international level. The Nazi atrocities shocked the conscience of whole international community and it portrayed that no previous theory of rights was appropriate to explain the evil nature of criminal Nazi dictatorship.[14]

The severe brutality of this war shifted attention of the international community from the notion of national sovereignty to the fact that the state could be the principal violator of its own citizens' right and could be the worst tyrant invoking sovereign legal right. In the words of Christian Tomuschat:

> It had been learned during the horrendous years from 1933 to 1945 that a state apparatus can turn into a killing machine, disregarding its basic function to uphold the dignity of every member of the community under its power.[15]

Following the horrific atrocities of Nazi tyranny all over the Europe, people started to recognize the severe flaws of extremely focusing on the solidity and supremacy of state sovereignty. In the immediate post-war period, a new urge was felt on many levels to set up a new world order emphasizing the idea that protection of humanity from the ravages of war

---

13 Rob Dickinson(ed), *Examining critical perspectives on human rights* (CUP 2012) p 3.

14 Freeman, n 4, p 33.

15 Tomuschat, n 8, p 22.

was essentially linked to ensuring respect for individuals and groups at all levels irrespective of political and geographic boundaries.[16] The concept of 'human rights' got a remarkable revival to the Allied discourse during Second World War. In 1941, President Roosevelt tailored his vision of a world declaring 'four essential human freedoms'. The Nuremberg Trials of Nazi leaders created a favourable context of thinking that international law could protect individual human rights but they were limited to war crimes. The United Nations Organization was set up as new international system which replaced League of Nations and the United Nations Charter declared its aim in the preamble to be "to reaffirm faith in fundamental human rights" and describes one of its purposes as "to achieve international co-operation ….in promoting and encouraging respect for human rights and fundamental freedoms for all".[17] Immediately afterwards, the Universal Declaration of Human Rights enumerating basic human rights adopted by the General Assembly on 10th December 1948, with 48 states voting for and no vote against, with eight abstaining.[18] The salient motive of UDHR was to prevent the repetition of overwhelming horror and atrocities of Nazism and the concept of 'human rights' substituted the Lockean concept of 'natural rights' despite sufficient similarities portraying no interest to philosophical foundation. The main strategy of UDHR was to act as manifesto of commitment to seek agreement to the norms that protection and enforcement of human rights is to be safeguarded above everything.[19]

The grand success of UDHR is that it changed the traditional understanding of relationship between states and its citizens. It is now generally accepted that states have international obligation to their citizens to observe human rights. The sacrosanct notion of 'sovereignty' has compromised to make individual as the 'subject' of international law. As Beth Simmons comments:" it is no longer acceptable for the government to make sovereignty claims in defense of egregious rights abuses" and "the Westphalian defense appears to be severely compromised".[20] States have voluntarily agreed to this interference into

---

16 Hegarty, n 2, pp 15-16.

17 Freeman, n 4, pp 38-39.

18 Ibid p 40.

19 Ibid p 41.

20 James R Hollyer and B Peter Rosendorff, 'Do Human Rights Agreements Prolong the Tenure of Autocratic Ratifiers' (2011) 44 NYUJ Int'l L & Pol 791.

their sovereignty and have set up different international monitoring institutions to report on and even to file cases to redress individual grievances for violation of human rights.[21] It is to be noted that the notion of 'national sovereignty' remains the central theme of international law reckoning states as the principal grantor of human rights and 'international protection of human rights' comes into operation only if the states use its sovereign power as shield to commit violation of human rights.

3.2. Legal Context of Human Rights Norms-setting Regime

The concept of 'human rights' proclaimed by the UDHR had not abruptly entered into its norm-setting level overnight. It is important to analyze the historical context of modern human rights movement and the evolution of normative international human rights regime. The United Nations Charter and the Universal Declaration of Human Rights regarded as 'hallmarks' for the protection and promotion of the concept of 'human rights' at international level. Jack Donnelly defines 'international regime' as normative and procedural constraints accepted by states and other relevant actors for replacing original 'national sovereignty' with 'international authority' in an issue area of international protection of human rights and dignity to minimize the costs of international anarchy. He reasonably holds that international human rights regime is the 'UN-centered regime' because there was not even a weak declaratory human rights regime prior to UN era.[22]

It is interesting to see that in the aftermath of the Second World War, the UDHR was adopted by the General Assembly of UN in the form of resolution only as "a common standard of achievement for all peoples and all nations" which had no immediate legal force. At that time, the United Nations itself had no mentionable enforcement mechanism or institutions for individuals with specific complaints.[23] Moreover, the UDHR had allegedly 'birth defect' on account of the fact that the states who played vital role for the adoption of UDHR were the colonial empires and most of the states of Asia and Africa being colonies were

---

21 Ibid.

22 Jack Donnelly, 'International human rights: a regime analysis' (1986) 40 International Organization 599, 602, 605, 614 <http:// journals. Cambridge.org/abstract S0020818300027296> accessed on 15 April 2018.

23 Alstine, n 14, p 64.

not represented in the elaboration of UDHR.[24] Basically, the drafters being well aware of the difficulties of declaring immediately applicable international human rights without sufficient enforcement mechanism intended to set out long term visionary goals for which states were expected to strive.[25] At this backdrop, Oscar Schachter has rightly mentioned that- "[i]n 1948 the Universal Declaration of Human Rights….was cautiously declared to express aspirations, but not binding law".[26] The European Convention on Human Rights for the effective 'protection of Human Rights and fundamental Freedoms' by mechanisms of collective enforcement was adopted by the Council of Europe two years after the UDHR. Despite the chronological priority, the sequence of events in the field of human rights regime evidenced that the draft International Covenant on Civil and Political Rights (ICCPR) had already been finalized by the fifth session of Human Rights Commission.[27]

The legal dimension of international human rights regime basically came into effect at universal level by two fundamental human rights treaties – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the General Assembly on 16th December, 1966 and came into force in 1976. The UDHR along with two covenants with its optional protocols setting out the civil, political, cultural, economic and social rights as birth rights of all human beings which are known as "International Bill of Human Rights". These two treaties got broad acceptance as the most important expressions of international human rights regime's norms and both of which are legally binding on the state parties who ratified for implementation.

In the 1970s the human rights regime had begun to gain agreed political acknowledgement within policy making circles and enforcement mechanisms for individual grievances envisaged under the main human rights treaties. The Helsinki Final Act of 1975 is considered as landmark moment in the progressive development of human rights regime since it reaffirmed promises towards principles in conformity with UN charter

24 Tomuschat, n 8, p 63.
25 Freeman, n 4, p 42.
26 Alstine, n 14, p 64.
27 Tomuschat, n 8, p 30.

and UDHR. Most notably, the Act was signed by 35 states including the US and USSR recognizing 'universal significance of human rights and fundamental freedom'.[28] The USSR changed its previous position in Final Act and it gave first formal affirmation towards the principle and aspiration of UDHR. The Final Act started a milestone step as political instrument for continuous dialogue between East and West and eventually developed a declaration on human rights minimizing the ideological differences between USA and Soviet spheres.[29]

Despite a lot of disagreement over many issues, the Vienna World Conference on Human Rights, 1993 reaffirmed cross culture consensus on the universality, indivisibility and interdependence of human rights[30] and emphasized that the UDHR "is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments".[31] The agreed text of Vienna Declaration also highlighted a wide range of issues such as vulnerability of women, children, migrant workers and refugees, disabled person, minority rights and also paved the way for the appointment of a High Commissioner for Human Rights.[32]

Therefore, the UDHR along with its two covenants have served as role model and primary sources which directly and indirectly influenced to build up norm setting level of global human rights regime with enforcement mechanism. The international human rights regime being both political and legal institution has made distinctive contribution toward the balance of power in the world and minimized the dominion of western human rights agenda by promoting and emphasizing the 'interdependence' of all human rights.

4. Role of Human Rights in National and International Law

The direct and indirect influence of international human rights regime at national and international level is incredibly significant. The UDHR once

---

28 Hegarty, n 2, pp 341-343.

29 Victor Y Johnson, 'International Human Rights-Helsinki Accords-Conference on Security and Cooperation in Europe Adopts Copenhagen Document on Human Rights' (1990) 20 Ga J Int'l & Comp L 645, p 651.

30 Freeman, n 4, p 55.

31 Hurst Hannum, 'Status of the Universal Declaration of Human Rights in National and International Law, The' (1995) 25 Ga J Int'l & Comp L 287, p 290.

32 Hegarty, n 2, p 9.

adopted as solemnly declared 'aspiration' and 'common standard of achievement', however, "propelled quite remarkable changes in perspectives and even law itself".[33] The striking influence of principles set forth in UDHR is very vividly reflected at domestic level. Hurts Hannum states that –

> The Universal Declaration has served directly and indirectly as a model for many constitutions, laws, regulations, and policies that protect fundamental human rights. These domestic manifestations include direct constitutional reference to the Universal Declaration or incorporation of its provision; reflection of the substantive articles of the Universal Declaration in national legislation; and judicial interpretation of domestic laws (and applicable international law) with reference to the Universal Declaration.[34]

The contributions of human rights as a source of general and customary international law are now widely accepted by the states practices over the years. Justice R Lallah rightly observed that –

> [T]he Universal declaration is now widely acclaimed as Magna Carta of humankind, to be complied with by all actors in the world arena. What began as mere common aspirations is now hailed both as an authoritative interpretation of human rights provisions of UN charter and as established customary law, having the attributes of *jus cogens* and constituting the heart of global bill of rights.[35]

The impact of Universal Declaration is rapidly growing in general international law and has already evidenced itself as a catalyst towards progressive changes and developments of international law. Most notably, it has inspired for the creation of 200 international legal human-rights instrument out of which 65 reckon the Universal Declaration as authoritative source and is working as a source of inspiration for national and international movement against oppression, injustice and exploitation.[36] Indeed, human rights proclaimed by the Universal Declaration are now indispensable components of national and

---

33 Alstine, n 14, p 64.

34 Hannum, n 34, p 289.

35 Ibid, p 326.

36 Freeman, n 4, p 42.

international law and regarded as the 'touchtone' to assess the validity of every action taken at national, regional and international level.

5. Human Rights Violation, Torture and Responses of the State

The very purpose of UDHR was to prevent repetition of horrific atrocities and mass violation of fundamental human rights that the Nazi committed throughout Europe during World War II. Accordingly, a milestone initiative was taken to make individual as 'subject' of international law to seek redress against grievances which is hailed as turning point in the history of human rights regime. Undoubtedly, the impressive advances have been made in the area of protection and enforcement of human rights after the adoption of UDHR. However, it is also worthy to consider the other side of the coin, that is the considerable gap between promises and practices about human rights standards which arguably articulate the failures of human rights era. Human Rights Council, the main human rights body of UN, is facing severe criticism on the ground that some of its members are represented by governments with very bad human rights records and being highly politicized it tends to protect human rights violators[37]. The large scale genocide in Rwanda, ethnic cleansing in former Yogoslavia, the frequent massacre in Algeria, the persecution of Kurds in Iraq are some of the examples of large scale atrocities and human rights disasters which address the grey area of failure of human rights regime,[38] but "overall, the idea of human rights moved from the margins to the center of international politics".[39] However, after the 9/11 terrorist attacks on USA and the subsequent 'war on terror' has brought unprecedented multifarious challenges and crisis towards the human rights regime since "the dominant terms of political discourse became 'terrorism', 'security' and 'war'".[40]

Undoubtedly, the international human rights system is in a state of crisis since, somewhat surprisingly, the powerful civilized states like USA for

---

37 Ibid, pp 57-58.

38 Hegarty, n 2, p 2.

39 Michael Freeman, 'Order, rights and threats: Terrorism and Global Justice' in Richard Ashby Wilson(ed), "Human Rights in the 'War on Terror"(CUP 2005) 37.

40 Ibid.

the sake of security concern are so often resorting to torture and extraordinary rendition practices as illustrated by the case of Abu Omar[41] and by the story of prisoners in Guantanamo Bay and Abu Gharib. The world is now witnessing the glimpses of triumph of torture law over the long cherished norms and common values set out by the era of human rights. The Binyam Mohamed case is also illustrative to the various forms of complicity of UK government in torture, violating positive obligation not to participate in or solicit torture by action or inaction.[42]

The case of Osama Mustafa Hassan Nasr (Abu Omar) represents a better understanding of the violation of human rights, torture and responses by the state. On February 2003 Abu Omar on the way from the local mosque in Milan, Italy was stopped by a plain-clothes *carabiniere* (Italian military police officer) and asked for his legal documents. The time he was searching for his refugee passport, he was put in the van with the help of more plain-clothes officers, some of whom were US agents. He was missing and was hidden unknown somewhere for a long time and was allegedly tortured. The incidents of Abu Omar were disclosed as abduction in June 2007 by the criminal trial in Milan against the US and Italian

The Italian Constitutional Court was called on to decide whether the trial could lawfully continue despite the issues of 'state secrecy' which had arisen therein.[43] The case of abduction Abu Omar by US government indicates as the case of 'extraordinary rendition' which involves the capture of suspected terrorists outside the United States or a recognized battle field such as Afghanistan or Iraq and their forcible transfer to another country for interrogation and detention and often torture which US carried out as a matter of US government policy. In the name of interrogation and detention, in many cases such as case of Abu Omar the torture also take different forms of inhuman treatment. But the victim

---

41 Francesco Messineo, "Extraordinary renditions' and state obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy', (2009) 7 *Journal of International Criminal Justice* 1023, p 1025.

42 K D Ewing, 'What is the point of human rights law?'Dickinson, n 15, p 37.

43 Francesco Messineo, "Extraordinary renditions' and state obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy', (2009) 7 *Journal of International Criminal Justice* 1023, p 1025.

like Abu Omar does not face any criminal charge or a trial by an independent judicial body. But this type of allegation firstly forced repatriation to the country of nationality secondly, it may take forcible transfer to a detention facility under US jurisdiction but located outside its mainland territory, such as Guantánamo Bay and finally the forcible transfer of a person to a detention facility outside US jurisdiction located in a third country such as Egypt, Syria, Jordan, Libya or Morocco. Of course, Mr Abu Omar is only one among the many victims of 'renditions' who have allegedly been tortured while in detention. Torture or ill-treatment was reported in relation to virtually all places of detention where 'rendition' victims were held, whether run by the US government or by other countries.

However by way of response, in June 2007, the Public Prosecutor's Office initiated proceedings before the Constitutional Court and argued that a 'state secret' should not have been established on facts of a 'subversive nature' such as 'extraordinary renditions' and mentioned that the case of abduction of Abu Omar was such a grave human rights violation that it posed a threat to the very interests 'state secrets' were deemed to protect.[44] Moreover, Italian obligations under the Torture Convention were never considered, or even mentioned, by the Constitutional court when deciding how 'state secrets' would impact upon the trial for the abduction of Abu Omar. There is definitely a need for a more incisive implementation of Convention obligations in the Italian legal system.

Therefore, the most patent challenge towards human rights issues arising from the “war on terrorism” is the violation of very basic “right not to be subjected to torture or inhuman or degrading forms of treatment” which is also causing severe threat to the “Rule of Law”. Regrettably, the prominent activists of human rights are examining “hitherto sacrosanct protections such as the prohibition of torture by debating how to ‘manage’ torture in the context of counter – terrorism”.[45]

---

44 Francesco Messineo, "Extraordinary renditions' and state obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy' (2009) 7 *Journal of International Criminal Justice* 1023, p 1025.

45 Dickinson, n 15, p 7.

It is important to emphasise the legal position on the condemnation of torture. The prohibition of torture as stated by the UDHR in Article 5 has got the status of 'universal peremptory norm' as basic right in international law resulting from the consent and recognition of international community. Article 2.2 of Convention Against Torture[46] notes that right not to be subjected of torture is 'unqualified' right and no derogation is permitted in any exigencies of circumstances which is also reiterated in many case laws. In the case of *Prosecutor v Furundzija*, the ICTY held that –

> Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.[47]

Despite the recognition and acceptance as *jus cogens* norm, after the event of 9/11 while asserting 'life- saving' motive and security as possible justifications, the states are resorting to various forms of torture techniques in shaping national policies, laws and international affairs causing massive violation of human rights and rule of law. The most surprising scenario is that USA who takes pride as the leader of promoting human rights and democracy is increasingly adopting torture policies contending that to give security to its citizens, all the steps are necessary as immediate response in the wake of increased threat of terrorism. The allies of USA are allegedly giving assistance in the commission of torture or outsourcing torture to another state where torture is very common directly violating Article 4 of UNCAT which states that:

> [E]ach state party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

---

[46] <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> accessed on 15 April 2018.

[47] Farrell M, *The prohibition of torture in exceptional circumstances* (CUP 2013) p 41.

In reality, the states are showing reluctance to practice the "*egra omnes* character of human rights obligation" since they are not willing to jeopardise the friendly relations with their allies. The harsh methods of torture and mistreatment for extracting information and confession as revealed from the allegations of the detainees held in Guantanamo and Abu Gharib have tarnished the track record of leadership of USA on human rights. The most frightening part is that the model set by the USA for extracting information from terror suspects by harsh method of interrogation become the hidden approach of ally states belonging to the same club. The states are playing "double game" regarding its obligation toward human rights law. On the one side, the states are practicing 'lip-services' to the firm stand against human rights violations and simultaneously engaging in practicing, soliciting torture technique and establishing secret cells to evade and bypass the scrutiny and monitoring mechanism of human rights institutions.

It is also worthy to look at the complex judicial response for holding states accountable for observing international obligation not to participate or be complicit in torture. In Greek Case,[48] the European Commission of Human Rights used the term 'unjustifiable' while giving interpretation of torture, inhuman and degrading treatment or punishment under Article 3 of the European Convention which invited lots of criticisms. Subsequently, in the case of *Ireland V. United Kingdom,*[49] "the Court took the opportunity to address the 'misunderstanding' and referring back to the Greek case held that "it did not have in mind the possibility that there could be a justification for any treatment in breach of Art. 3". The Court reaffirmed the absolute and non-derogable nature of prohibition of torture in international law concluded that there can never be a justification for acts in breach of the provision of Article 3 irrespective of 'victim's conduct' under the Convention or under International law. The European Court of Human Rights remained robust in its view on the principle that no justification or exception is permitted against the prohibition of torture in the subsequent cases such as *Tomasi v France, Chahal v United Kingdom* and *Saddi v Italy.*[50]

Despite judicial activism in asserting the absolute nature of rights not to be subjected to torture of any kind, the human rights regime also

---

48 < https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-73020>.
49 *Ireland v United Kingdom* (1979-80) 2 EHRR 25.
50 Ibid, pp 55-59.

regrettably witnessed sorry tale of UK domestic courts' willingness to allow "foreign torture evidence justifying the ground that the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens".[51] In *Abbasi*[52] case, the Court showed its reluctance to scrutinise the prerogative power of Crown in the field of international relations and particularly its reluctance to examine nature of representation holding that it would be inappropriate to order any specific representation to United States causing impact on the conduct of foreign policy at a particularly delicate time. The Court "rejected the argument that it has a duty to protect British citizens who are being abused by the government of another state".[53] The decision clearly showed the unwillingness of the Court to use its power to intervene which is actually portrays the timid response of the Court, 'extraordinary timid responses of the Court'.

The above mentioned discussion reasonably bring out the quite sceptical questions about how sufficient the success of development of human rights since it becomes unable to stop the basic right infringement and consequently, whether "human rights irretrievably lost their status in international affairs and national policy-making"[54] since it is facing systematic failure to deal with something as fundamental as torture. It is undeniable that human rights regime is facing new and evolving nature of challenges in the effort to combat terrorisms across the world which indicate that despite progressive changes and development of human rights law discourse, there are much more still needed to address and navigate for the effective enforcement and recognition of common values which the drafters of UDHR intended to protect and develop.

6. Recommendations

It is the high time to navigate the challenges that are facing international human rights regime and find the ways out about how to ensure the effective implementation of human rights standards. The states are pledge bound to strive for the continuous progress of human rights regime.

---

51 Ewing, n 45, p 49.
52 *Regina (Abbasi) v Secretary of State for Foreign Affairs*, CA 6 Nov 2002.
53 Ibid.
54 Richard Ashby Wilson, "*Human Rights in the 'War on Terror*"(CUP 2005) p 1.

(i) The first and foremost positive stands to deal with the mounting challenges towards promotion and protection of human rights are to ensure effective participation by the states in legally binding international instruments with the purpose to reinforce the universality of human rights. All the states should stand firmly against torture and cruel, inhumane and degrading treatment or punishment and strive to identify the ways to reconcile the promotion of human rights and at the same time, being safe from increased threat of terrorism. Human rights should not be stigmatized as 'obstacle to security' since it would be a self-defeating approach putting the terrorists (right violators) and the human right protectors on the same boat. In 2003, U.N Secretary General Kofi Annan addressed this issue stating that-"Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms, and the rule of law are essential tools in the effort to combat terrorism- not privileges to be sacrificed at the time of tension".[55]

(ii) The active and robust role of judicial, quasi-judicial body and media for the protection and promotion of human rights are significantly important to rule out the challenges towards the human rights regime. The enforcement mechanisms i.e., domestic and international court must take stern and robust view regarding any sort of violation or complicity to violation of absolute human rights and freedom. It is the duty of the domestic Court to make state accountable to its international *egraomnes* character of human rights obligation and commitment towards *Jus cogens* norms. There should not be any amnesty regarding violation of fundamental human rights and freedom. The judicial mechanisms must take resolute stand to provide appropriate and courageous response in examining state responsibility for complicity in torture.

(iii) The last but not the least, It is very much important to promote and raise awareness about rights and available redress for violation of rights among the people. Due to lack of awareness, most of the victims could not avail the proper redress or claim

[55] Ibid, p 221.

> reparations for violations of their rights. Indeed, promoting knowledge and awareness about rights and available redress are the effective means to make state accountable to perform its obligation towards human rights at national, regional and international level.

7. Conclusion

In evaluating the history human rights protections, we find that the journey of international human rights regime toward achieving its lofty ideals and common values are not squarely successful without slippery slope. Despite the progressive development and codification of human rights law, the fundamental reason for the gross human rights violations causing mass atrocities is international power politics and lack of political will towards ratification of basic legal human rights instrument. Paradoxically, the relevant international actors almost universally endorse their acceptance to the normative framework of international human rights, while they increasingly complain and criticise the enforcement of those norms highlighting the notion of sovereignty and the principle of non - interference of domestic democratic affairs.[56] Indeed, over reliance of these two principles are still creating obstacles to the proper implementation of human rights standards. Nevertheless, it would be sheer mistake to draw conclusion that the ideas and principles of human rights are only impressive in paper or "the era of human rights has come and gone"[57] disregarding the already achieved success. Now-a-days**,** the treatment by states of their citizens is potentially open to question when it comes to the international human rights norms.[58] There are many evidences for optimism about future prosperity of UN based human rights regime. Michael Freeman states that-

> Since 1945 the UN has done a lot of 'standard-setting', institution- building and human rights promotion. The concept of human rights is one of the most influential of our time, and many poor and oppressed people appeal to it in their quest for justice.[59]

---

56 Follesdal, n 3, pp 1-3.
57 Wilson, n 51.
58 Evans T, *Human Rights Fifty Years On: A Reappraisal* (MUP 1998) p 195.
59 Freeman, n 4, p 59.

However, the domestic and international Court, NGO, the civil society and the media should play the vibrant and effective role to minimise the challenges associated with the implementation of human rights norms and to make all the states worldwide accountable to the international human rights obligations in order to keep their promises for the continuous progress and extension of human rights at every level.

HOW IS HUMAN RIGHTS LAW REFLECTED IN LAW OF THE SEA?

SM Masum Billah*

Abstract

This paper looks at the less-explored relationship between the law of the sea and human rights with a focus on investigating the potential role of UNCLOS III in developing human rights discourse and vice versa (i.e. rights-based take on UNCLOS III). The law of the sea is one of the vibrant branches of international law. Unlike other disciplines, however, its interactions with human rights law are a less explored discipline. The 1982 United Nations Convention for Law of the Sea (UNCLOS) comprehensively deals with sea affairs covering almost all the conceivable matters affecting human lives, except the issues developed in the post-1982 episode. The UNCLOS mainly speaks in the state's voice, making the concept of sovereignty and sovereign rights over the sea zones and access to its resources a championing idea of the Convention. The theory of human rights entails an inherent conflict with the idea of state sovereignty because human rights under international law somewhat limit the exercise of sovereign power. This paper investigates the human rights dimension of the law of the sea. It explains the relationship in two ways: firstly, it looks at the state-centric obligation under the UNCLOS and interprets them through the prism of collective human rights; secondly, it analyses the UNCLOS provisions directly applicable to a human being at sea and examines how the adjudicating bodies have applied and interpreted them to fashion the human rights jurisprudence.

* PhD, Associate Professor, Department of Law, Jagannath University.

1. Introduction

The UN Convention on the Law of the Sea 1982 (UNCLOS)[1] has been characterized as a 'living treaty' for its capacity to support new realities.[2] The treaty broadly addresses almost every aspect of the uses of the seas.[3] Many scholars have qualified the UNCLOS as a 'constitution for oceans'.[4] As opposed to many international treaties, the 1982 Convention stands unique in the sense that it was the result of nine years-long negotiations among the nations. Although the UNCLOS is a non-human rights treaty, it has recently been examined for its probable role in fashioning the human rights law. The attempt holds merit as the preamble of the UNCLOS while spelling out its objectives, uses the terms 'people' and 'mankind' which lie at the heart of human rights notion. The ideas of 'people' and 'mankind' mainly owe their origin to natural law theory, although they may entail different meanings in different socio-cultural contexts. Introduction of the concept of 'sovereign rights' of the states in exploiting the marine resources adds fresh blood to this discourse. The UNCLOS, thus, can be seen from a human rights lens in terms of the developmental needs of states and individual rights protection.

In this paper, I will revisit the relationship between the law of the sea and human rights firstly by looking at the sovereign rights provisions of the UNCLOS as an indirect indicator for human rights and secondly by considering the provisions dedicated to the treatments of individuals at sea having a direct bearing on human rights jurisprudence. The arguments advanced revolve around two questions:

---

1 *United Nations Convention on Law of the Sea* 1982, Montego Bay, 10 December 1982, 21 ILM 1261.

2 Jill Barret, 'UNCLOS: A "Living Treaty"?' in Jill Barret and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, London, 2016) p 5.

3 Natalie Klein, *Dispute Settlement in the United Nations Conventions on Law of the Sea* (Cambridge University Press, London, 2005) p 349.

4 Tommy Koh, 'A Constitutions for the Oceans' in UN, *The Law of the Sea—Official Text of the United Nations Convention on Law of the Sea with Annexes and Index* (United Nations, New York, 1983) xxiii. See also Vaughan Lowe, 'Was it Worth the Effort' in David Freestone (ed), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Martinus Nijhoff, Leiden, 2013) 201.

(i) To what extent is the human rights law influenced by developments in the law of the sea?

(ii) How is the human rights law reflected in the law of the sea?

By adopting a theoretical and functional approach, I will look at the relevant primary and secondary literature to answer the questions. This paper is organised as follows. After this introduction in part 1, part 2 gives a brief account of the sea resources and their importance for human development. Part 3 sets the scene for the human rights appreciation of the law of the sea. Part 4 focuses on state-centric positive rights by furnishing the contents of the rights and duties of the states in the sea zones. Part 5 extracts some area of collective human rights from the state-centric duties and part 6 traces the meaning of sovereignty and sovereign rights for human rights and identifies some challenges for the states to attain the human rights objectives. Part7 discusses the provision of UNCLOS having direct relevance to individual human rights. Part8 is the conclusion.

2. Marine Resources: Key to the Development

A rights-based study of the UNCLOS demands a prelude to the sea resources. For at the heart of the legal premises of marine resources and seafood sustainability lies the states' obligation to realise people's right to development. Scholars consider access to marine resources as a significant tool to attain the socio-economic rights.[5] A remarkable variety of living organisms constitute the resources of the sea. This has the potential of becoming one of the major sources of food security. Further, it is estimated that the seabed contains close to 300 non-living resources, many among those ultimately benefit the human kind.[6]

---

5 Abdullah Al Faruque, 'From Basic Need to Basic Right: Right to Food in Context' (A Study Report Prepared for National Human Rights Commission, Dhaka June 2014); Hilal Elver and Nilüfer Oral, 'Food Security, Fisheries and Ocean Acidification: A Human Rights-based Approach' in David Vander Zwaag, Nilüfer Oral and Tim Stephens (eds), *Research Handbook on Ocean Acidification Law and Policy* (Elgar Online, 19 Oct 2021)<https://doi.org/10.4337/9781789900149> accessed on 28 December 2021.

6 Iftekhar Chowdhury, 'Statement by Bangladesh Ambassador' (United Nations General Assembly, New York, 28 November 2005).

The world production of marine resources—biological, chemical and geological –amounted to billions of dollars.[7] All the marine, chemical and geological resources and about 70-90 per cent of the biological resources come from the near seashore areas of the ocean.[8] Economists claim that this century's economy will largely be marine-centric.[9] Furthermore, rights activists predict that a 'huge demand for freshwater may be the cause of World War III'.[10]

Of late, states are focusing on the sea resources to attain food security and economic welfare of their people. The importance of stable maritime boundaries cannot be overlooked when the exploration and exploitation of sea resources are at stake. In *Bay of Bengal (Bangladesh/India),*[11] Bangladesh underscored the importance of access to sea resources by a country having inadequate natural resources. Endorsing the submission, the Arbitral Tribunal noted that to make the sovereign rights of the Coastal or Littoral States (LS) meaningful, the sea boundaries must be demarcated with precision to allow for 'development and investment'– a significant aspect of the modern human rights discourse.[12]

In the aftermath of winning two sea boundary cases, against Myanmar and India, Bangladesh is now a known maritime country. Possessing an expansive Territorial Sea (TS) and an extended Continental Shelf (CS), with a maritime zone equivalent to its land borders, a window of opportunity calls the country to realise its developmental goals.[13] Some of the sea potentials for Bangladesh are: marine fisheries and aqua culture, marine tourism and marine bio-technology, exploration of gas,

---

7 Khurshed Alam, *Bangladesh's Maritime Challenges in the 21st Century* (Pathak Shomabesh, Dhaka, 2004) p 143.

8 Ibid, p 143.

9 Ibid.

10 SL Bahuguna, 'Water Shortage Would be the Cause of Third World War' (*Indian Express*, September 2009)<http://archive.indianexpress.com/news/water-shortage-would-be-the-cause-of-third-world-war-sunder-lal-bahuguna/523180>accessed on 1 September 2020.

11 *Bay of Bengal Maritime Boundary Arbitration* (*Bangladesh v India*) [2014] 167 ILR 1.

12 Ibid, p 62.

13 Abul Kalam, *Bangladesh's Maritime Policy: Entwining Challenges* (Routledge, 1st edn, London, 2018) p 1.

oil and mineral resources, trade and communication and maritime research and education. The Bangladesh case reminds one of how a developing country needs to receive the principles of sustainable development vis-à-vis the utilisation of sea resources.[14] A recent study reveals that the award will bring a positive change in the public order of the seas in South Asia.[15]

Thus, sea and ocean resources entail a development potential in the form of modern ideas including the 'blue economy' concept that presupposes the access by the states to these resources and exploit them in attaining the collective needs of its people.

3. Law of the Sea through the Human Rights Prism

The interdisciplinary study of the international law of the sea and human rights is comparatively a recent trend. Both the disciplines engulf fine-shades of differences about their origin, applicability, forum and mode of execution. Besides, the role of the law of the sea in advancing human rights is allegedly not obvious, as the UNCLOS is a non-human rights treaty. Therefore, tagging them together may sound to be a futile exercise in the first instance. However, considering law as a unified field of knowledge, it can be said that the subject of every law is human beings. Terming international law as a legal system, Judge Greenwood in *Diallo* suggests a convergence between different areas of international law.[16] Moreover, as Louis Henkin puts it: "A scholar of uncommon ability can transcend the differences between the law of the sea and human rights".[17] Bernard Oxman, one of the leading commentators of this discipline, cites

---

14 The blue economy, as an alternative development paradigm, is the *perceptions* about the oceans and future –which greatly depends on sustainability and good governance of oceans through international and regional cooperation. See VN Attri, 'Introduction' in VN Attri and N Bohler-Muller (eds), *The Blue Economy Handbook of the Indian Ocean Region* (Africa Institute of South Africa, Pretoria, 2018) 15.

15 Mark Rosen and Douglas Jackson, 'Bangladesh v. India: A Positive Step Forward in Public Order of the Seas' (CAN Report, September 2017).

16 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* (2012) ICJ Rep 324.

17 Louis Henkin, Oscar Schachter and Hans Smit, *International Law: Cases and Materials* (West Publishing, 3rd edn, Minnesota, 1993) XXX.

three characteristics of UNCLOS that offer an opportunity to study the law of the sea through the lens of human rights: i) it is a global Convention that addresses almost all the activities regarding the sea—the significant part of the earth; ii) most nations of the world have acceded to the Convention[18] and iii) the parties accept a binding adjudicating mechanism set by the Convention.[19] Considering these aspects of the Convention, it transpires that the sea disputes between the states may affect individuals in many adverse ways the way it does for land territory.

The UNCLOS pledges to strengthen international 'peace, security and co-operation'[20] and urges to foster friendly relations among all the nations in conformity with the principles of justice and equal rights. The Convention, thus, reflects a commitment to promote the economic and social advancement of all the international community.[21]The performance of the UNCLOS thus far, therefore, can be studied from a rights angle.

The roots of modern international law as it stands today trace back to Grotius' *Mare Liberum*[22] which defined the law of the sea as one of the 'original' fields of international law. Oxman shows that the natural law environment during Grotius' time became conducive to determining states' obligation to individuals than focusing on the state-centred positivism developed later.[23] Although the concept of human rights had

---

18 So far, 167 states have ratified the Convention. See 'United Nations Treaty Collection' (*UN Treaties*, Oct 2020)<https://treaties.un.org/>accessed on 22 September 2020.

19 BH Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1997) 36 *Columbia Journal of Transnational Law* 399.

20 *UNCLOS*, preamble.

21 Ibid.

22 Hugo Grotius, *The Free Sea*(Liberty Fund 2012)<muse.jhu.edu/book/17941> accessed on 28 October 2020. Grotius wrote, "The Sea in no way can become the private property of anyone because nature not only allows but also enjoins its common use." See also Hugo Grotius, *The Freedom of the Seas, Or, The Right which Belongs to the Dutch to Take Part in the East Indian Trade* (Law Book Exchange, New Jersey, 2001) 30.

23 Bernard Oxman, n 19, p 399.

its origin in natural law, yet glorious national practices and revolutions of varied nature over time along with multilateral human rights treaty-making in the modern era constitute its formal sources. Thus, it appears that modern human rights law based on human rights instruments is relatively younger than the law of the sea. From that point of view, the law of the sea has contributions in promoting the idea of the universality of human rights.

In line with Oxman, Tullio Treves and Budislav Vukas compellingly assert that several provisions of the UNCLOS articulate human rights principles in essence and accommodate the principles of international equity and peace.[24] The preambular pledge of the Convention envisages that one of its main purposes is to uphold the universal rule of law and provide effective governance at sea. It creates mechanisms to govern sea affairs and imposes qualifications on that mechanism. It envisages the rights and duties of states in a precise form to be complied with. Sophie Cacciaguidi-Fahy, thus, echoes the preambular words of the UNCLOS:

> [T]he Convention as a whole seeks to advance the interests of humanity by establishing a legal order for the seas and oceans which … will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their resources and the study, protection and preservation of the marine environment and by contributing to the realization of a just and equitable international economic order.[25]

The Convention seeks to 'advance certain specific community interests.'[26] The interests mostly concern the relationship between human rights and community interests in general or common cultural or environmental rights. These rights are not generally enforceable by or against individuals or groups under the Convention, however, are articulated as duties to be respected and enforced by the parties to the Convention. Article 61 of the UNCLOS asks the states to take into

---

24 Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 (1) *Berkeley Journal of International Law* 1. See also Budislav Vukas, *The Law of the Sea: Selected Writings* (Martinus Nijhoff, Leiden, 2004).

25 Sophie Cacciaguidi-Fahy, 'The Law of the Sea and the Human Rights' (*Pan Optica*, 20 June 2020)<http://www.panoptica.org>accessed on 10 October 2020.

26 *UNCLOS*, preamble.

account relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing states, while taking measures to explore and exploit the living resources of the Exclusive Economic Zone (EEZ).

In this way, the elements of international equity –the move to redress the North-South disparity, suppression of crimes, ensuring human development and food security etc. resonate with the call for the third generational right to development. As far as the individual-focused human rights are concerned, the provisions of the UNCLOS are more expressive in human rights terms i.e., the right to prompt release, the right to a fair trial and the right to due process of law.

The human rights discussion of the UNCLOS, thus, has two dimensions. One isstate-centred positivism that focuses on the rights and duties of the states manifested in the form of sovereignty or sovereign rights (depending on the zone). The other one is the individual human rights directly expressed in the language of rule of law, liberties and due process.

4. Sea Legal Regime: State-focused Positivism

As a discipline, international law offers the most rigorous criteria for delimiting the field of human rights.[27] The notion of human rights lends itself to broad philosophical conjecture on man and society, to the more specialised image of law and human justice. In the following part of this paper, I give an overview of the nature of rights and duties of states on sea zones within and beyond the limits of national jurisdiction to form a basis of understanding the content of human rights as far as the law of the sea is concerned.

4.1. Extension of Sovereignty: Territorial Sea and Contiguous Zone

Territorial Sea (TS) is the closest maritime area adjacent to the main territory of a state which extends to 12 nautical miles (n.m.) from the

[27] Stephen Marks, 'Emerging Human Rights: A New Generation for the 1980s', (1981) 33 *Rutgers Law Review* 435.

baseline. The sovereignty of a coastal state extends up to this distance (art 2). Earlier, Judge McNair in *Anglo-Norwegian Fisheries* endorsed this idea of expanding sovereignty towards territorial waters'.[28] From a close reading of art 2, it appears that a state enjoys four-dimensional sovereignty on the surface waters, sea-bed, sub-soil and airspace.[29] The sovereignty of the coastal state is subject to the provisions of 'innocent passage'.[30]

Naturally, a state's legal system recognizes people's sovereignty over its territory and ownership over its property. As such, the TS provisions strengthen the idea of popular sovereignty, where the state agencies work on people's behalf. The implications of fundamental rights and freedoms guaranteed to the people, therefore, subject to innocent passage rights, should also apply to the sea zones. In a Bangladeshi case,[31] wherein a question arose as to whether a fundamental human right is land-territory specific, the Appellate Division of Bangladesh Supreme Court held, "The fundamental rights of the citizens extend even up to the CS."[32] The decision is an assertion of human rights protection even beyond the land territory of a country.

Next to the TS, the 1982 Convention contemplates a further12 n.m. supportive area called the Contiguous Zone (CZ)[33] in which the LS enjoys jurisdiction on four loosely defined topics called customs, fiscal, immigration and sanitary. The CZ initially was concerned with the control necessary to prevent smuggling,[34] however, by now it has been extended to the four areas just mentioned.

---

28 (1957) ICJ Report 160.

29 For example, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain),* Merits, Judgment (2001) ICJ Report 93.

30 A passage is regarded as 'innocent' if it is not against the peace, safety, good order of the LS. See *UNCLOS,* arts 17-32.

31 *Kazi Mukhlesur Rahman v Bangladesh* (1974) 26 DLR (AD) 144.

32 Ibid (ASM Sayem CJ, stating, "Evidently, these rights attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching upto the Continental Shelf").

33 *UNCLOS,* art 33. See also Monograph Series 5, Carnegie Endowment for International Peace, Division of International Law, University of Michigan 1942) 105; JG Strake, *Introduction to International Law* (Butterworths, Oxford, 1989) 192.

34 Aristotelis Alexopoulos, 'Some Thoughts on the Concept of Contiguous Zone and Its Potential Application to the Greek Seas' in Anastasia Strati, Maria Gavouneli and

Scholars favour the CZ for a state's self-preservation. Among others, Judge Oda advocates for the CZ, as he believes that such a zone better serves the needs and exigencies of the current world. For Oda, the advantage of such extension in preventing smuggling or insanitation is 'incomparably greater' than any expected disadvantage caused to others.[35] Although the rationality of the CZ is well accepted, the 1982 Convention invented the regime of 200 nm EEZ granting exclusive economic rights to states making the existence of CZ redundant. Nonetheless, the potential utility of the CZ may effectively assist the LS to address human rights violations at sea including environmental threats.

4.2. EEZ: Access to Economic Rights

UNCLOS makes a different place in the history of international law for the invention of the concept of the EEZ.[36] The establishment of a suitable regime for the EEZ occupied much of the time of UNCLOS negotiation.[37] RW Smith suggests that the EEZ has brought a transformation in the corpus of the law of the sea.[38] The International Court of Justice (ICJ) in *Continental Shelf (Tunisia-Libya)*[39] treated the EEZ as a settled part of international law even at a time when the 1982 Convention had been still at a nascent stage. The EEZ is a multi-purpose zone having *sui-generis* status subject to *the specific legal regime* established by the Convention.

Apart from exploring and exploiting the natural marine resources of this zone, the LS can exercise jurisdictional sovereign rights to construct, authorize and regulate the making and use of artificial islands and other

---

Nikolaos Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Seas: Time Before And Time After* (Martinus Nijhoff, Leiden, 2006) 260.

35 Shigeru Oda, *Fifty Years of the Law of the Sea: With a Special Section on International Court of Justice* (Kluwer Law International, Dordrecht, 2003) 170.

36 The EEZ is an area beyond and adjacent to the Territorial Sea, subject to the specific legal regime established by the Convention. See *UNCLOS*, art 55.

37 JG Starke, *Introduction to International Law* (Aditya Books, New Delhi, 1994) 216.

38 Ibid.

39 [1982] ICJ Report 18.

installations so that it can determine the allowable catch and settle its economic objectives.

Importantly, the EEZ enjoys a greater significance to the states in respect of resource rights without prejudice to the traditional rights of other states i.e., overflight, navigation, marine research, laying of submarine cables and pipelines and other installations approved by international law.[40] Although the UNCLOS grants a qualified privilege to other developing states over the fishing resources, the privilege is somewhat uncertain. As such, the regime of EEZ by itself is not sufficient to assure the rights of other states in the exploitation of living resources. Other states cannot be sure of overcoming the LS's unscrupulous attempt at economic activities unless a portion of the 'allowable catch' is reserved for them.

4.3. Continental Shelf: The Inherence Metaphor

The nature of the LS's rights over the CS is to be understood in light of the economic importance associated with it. The right of a state over the CS is a much-talked issue and demands careful perusal. A state's right over its CS has three aspects: *sovereign, exclusive, inherent.*

4.3.1. Sovereign

Article 77 of the 1982 Convention postulates, "The coastal state exercises over the CS sovereign rights to explore it and exploit its natural resources (mineral and non-living)."[41] A careful perusal of the provision reveals the following points for consideration:

(i) The use of the term 'sovereign rights' is significant. It 'engulfs' a probability of confusion and vagueness for its resemblance to the concept of sovereignty itself. It seems that the Convention deliberately uses the term to make a compromise with the views of control and jurisdiction on the one hand and rights of sovereignty on the other. In fact, in the 1958

40 *UNCLOS*, art 58.

41 *UNCLOS*, art 77.

Law of the Sea Conference, the use of the term 'sovereignty' attracted serious criticism because the dividing line between *sovereign rights* and *sovereignty* was viewed as uncertain and vague.[42] As a result, certain other terms, for example, 'exclusive' was considered, however, the term 'sovereign right' received greater support.[43]

It is argued that the debate over the distinction between 'sovereignty' and 'sovereign rights' proves to be mechanical given the historical and customary development of the concept of CS.[44] It is understandable that the concept of 'sovereign rights' is a functional aspect of the notion of 'sovereignty itself. The issue drew the attention of the ICJ in the *North Sea Continental Shelf,* wherein the world court noted:

> [C]oastal state exercises rights over the CS by its sovereignty over the land, of which the shelf is the natural prolongation and as an extension of it in an exercise of sovereign rights to explore the sea bed and exploit its natural resources.[45]

In the same vein, in the *Aegean Sea Continental Shelf*,[46] the ICJ found, 'CS rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the LS.'[47]

(ii) The difference between 'sovereign rights' and 'sovereignty' becomes more difficult when we get the EEZ concurrently at the scene. Because, the 1982 Convention states that the LS exercises its sovereign rights not merely on the CS-resources but also on the shelf itself, whereas, it exercises sovereign rights over the EEZ's resources, not on the zone itself. René-Jean Dupuy, thus, argues:

---

42 Robert Beckman and Tara Davenport, 'The EEZ Regime: Reflections after 30 Years' (Annual International Conference, Seoul, May 2012).

43 The phrase 'sovereign rights' suggests the rights are exclusive, not preferential. The terminology is used both with EEZ and CS to make it clear that the LS did not have sovereignty over the zones but had all other rights necessary for and connected with the exploration and exploitation of their natural resources.

44 RJ Dupuy and Daniel Vignes, *A Handbook on the New Law of the Sea* (Martinus Nijhoff, Leiden, 1991) 369.

45 (1969) ICJ Report 22.

46 (1979) ICJ Report 36.

47 (1979) ICJ Report 36, p 36.

> If an account is also taken of its character, as reaffirmed by the Court and confirmed by the Convention, as the "natural prolongation of the land territory" of the LS, it is conceivable that the somewhat subtle distinction between the "submerged land territory" ie. the bed and subsoil of the territorial sea, and its natural prolongation i.e., the CS, is bound to gradually disappear as we progressively move towards widespread recognition of genuine territorial sovereignty.[48]

Dupuy's argument has substance when he submits, "This development was expected; the rights over the CS are rights over territory, and this is not altered by the fact that it is submarine territory. And territory, even if it is submerged, requires sovereignty."[49] This can be viewed as a manifestation of states in establishing control over the sea resources.

4.3.2. Exclusive

The expression 'sovereign rights' is further by the word 'exclusive' in the sense that if the LS does not explore the CS or exploit its natural resources, no one may undertake these activities without the express consent of the LS.

This 'exclusive' nature of LS's rights is a necessary and logical corollary of their nature as sovereign rights. The ICJ in *North Sea Continental Shelf* observes, "If the LS does not choose to explore or exploit the areas of the shelf appertaining to it, which is its affair, but no one also may do so without its express consent."[50]

The issue also invites the subtle distinction between the state's rights over the EEZ and the CS. In the case of the former, although the LS enjoys sovereign rights over living resources, the LS is obliged to promote the objective of optimum utilization of these resources under art 62 of the UNCLOS. On the other hand, in the case of its shelf and resources, there is no similar obligation to the LS. The only qualification to the exclusive nature of the rights is that a state must make

---

48 Dupuy and Vignes, n 44, p 369.
49 Ibid.
50 (1969) ICJ Report 22.

contributions in kind in respect of the exploitation of the non-living resources of the CS beyond 200 nautical miles. The point to be noted is that the LS is not obliged to take advantage of these resources and although the revenue generated from exploitation is shared out, the other states are not involved in actual exploitation.

4.3.3. Inherent

Article 77 (3) of the UNCLOS gives the idea of inherent right over the CS. It states that the rights of the LS over the CS do not depend on occupation, effective or notional or any express proclamation.[51] The International Law Commission (ILC) in 1951 also advocated the existence of an inherent right. The proposition has also received juridical recognition in *North Sea Continental Shelf:*

> … [T]he rights of the coastal state in respect of the area of the continental shelf…exist ipso facto and *ab initio*…In short, there is here an inherent right. To exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the rights do not depend on their being exercised.[52]

CS is rich in natural resources. The 'inherence' principle gives the impression that it automatically belongs to an LS. The principle metaphorizes the idea of inherence used in human rights scholarship, which says that human rights are inalienable, universal and inherent.[53] The developing states' incapability to explore the CS puts a serious challenge for making this regime meaningful for those states. As a result, CS arguably remains the name of an unfulfilled dream.

4.4. Dealing with Deep-seabed Resources

The national jurisdiction i.e., the domain of sovereign rights usually ends with 200 n.m. EEZ and CS.[54] The residual part of the sea is called the

---

51 *UNCLOS*, art 77 (3).

52 (1969) ICJ Report 22.

53 See Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press. Pennsylvania, 2009).

54 In exceptional cases, a state can claim up to 350 n.m. CS with the acquiescence of the UN Commission on the Limits of Continental Shelf. See UNCLOS, art 76 (5).

High Sea (HS) where every state can exercise their freedoms subject to the observance of certain fundamentals, peaceful use, non-claim of sovereignty, and suppression of the *hostis humanis generis* i.e., pirates among them are the most important.[55] The seabed, ocean floor and the subsoil under the HS water have been termed as 'area' under art 1(1) of the UNCLOS. Of particular relevance to this discussion is mankind's participatory right to property situated in the Deep-Sea Bed (DSB). The 'area' along with its resources, holding enormous commercial potentials, is called the Common Heritage of Mankind (CHM).[56] The idea of CHM represents people's sovereignty as opposed to state. Under the concept of the CHM, the property of the area belongs to the entire world.[57]

Separate emphasis on the terms 'common', 'heritage' and 'mankind' gives a collective-humanistic sense of international law.[58] The main objection to the CHM concept, however, seems to be based partly on the fear that some of the heirs to that heritage might curve out what they regard as their share. This is a misunderstanding of the idea. An essential feature of the concept of CHM is the indivisibility of heritage. It is indivisible in the sense that a rational equitable means of sharing the benefits would ensure equal rights for all states. The 'common*ness*' central to the CHM reflects the idea evocative to the doctrine of *jus cogens* under international law.[59] For, art 136 of UNCLOS treats the 'area' as well as 'its resources' as the CHM. Arguably, the objectives of CHM are to deal with DSB resources so that all states can be benefited from it to narrow the economic gap between states.

The exploitation of DSB resources requires sophisticated technology. To date, only a few countries own such advanced technology. This leads Peter Payoyo to criticise the regime of CHM as not being an 'innocuous

---

55 Six freedoms of HS: navigation, overflight, lay submarine cables, construct artificial islands and other valid installations, fishing and scientific research. For freedoms, see art 87 and for the fundamental rules at HS see arts 88 to 92, and for suppression of piracy *jure gentium* see arts 100 to 107 of the UNCLOS.

56 *UNCLOS*, art 133.

57 Carol Buxton, 'Property in Outer Space: The Common Heritage of Mankind Principle vs. the First in Time, First in Right, Rule of Property' (2004) 69 *Journal of Air Law and Commerce* 689.

58 Kemal Baslar, *The Concept of Common Heritage of Mankind* (Martinus Nijhoff, Leiden, 1998) p 10.

59 Thomas Weatherall, *International Law and Social Contract* (Cambridge University Press, London, 2015) p 254.

description of oceanography' but a 'highly explosive political hypothesis'.[60] In the presence of such perils and promises in the CHM regime, it will be interesting to see how it can bring significance to human rights understanding.

5. Collective Human Rights in the Law of the Sea

I have illustrated the states' entitlements and obligations in the respective sea zones thus far examined. Except for the CHM regime, they largely portray an array of state-centric positivism[61] as they speak about the state's rights to and obligation over the vast expanse of the ocean. They also become the central thesis to human rights ideas as will be argued in the successive parts of this paper. It transpires that the provisions in spirit contain collective human rights of people i.e., 'community rights' with a drive to establish an international economic order. The collective interests include suppression of piracy *jure gentium*, access to sea resources, research and fishing activities, protection of underwater cultural heritage,[62] right to the marine environment,[63] right not to be discriminated against as a developing and landlocked nation and so on. These imply a bunch of affirmative economic, social and cultural rights or solidarity rights or developmental rights, whatever term one selects, enforceable by the states, if not by the individuals.

The parties to the Convention owe an 'assessment duty' to not only for its people but also for others aimed at strengthening the concept of

---

60 PB Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity* (Martinus Nijhoff, Leiden, 1997) p 168.

61 From a positivist perspective, laws are valid not because they are rooted in moral or natural concepts, but because they are enacted by the legitimate authority. Positivism locates the state as the exclusive source of authority and views legal rules as the positive enactments of states. See Terrence Paupp, *Redefining Human Rights in the Struggle for Peace and Development* (Cambridge University Press, London, 2014) p 493.

62 *UNCLOS*, arts 303 and 149. The *UNCLOS* in these provisions reflect the idea that mankind has an undivided interest in the sea, however, viewing the sea as a culturally unifying force, the LS is granted a preference.

63 *UNCLOS*, arts 192 and 290 (1). In case of preventing harm to the marine environment, a state owes a compulsory obligation to arbitrate at a forum recognised by *UNCLOS*.

sustainable development.[64] This also contributes to creating an 'international value system' that may yield respect for human rights.[65] There is one obvious challenge to this hypothesis, as Bernard Oxman notes that "it is very hard to figure out the point at which the states owe a duty *erga omnes* to take action for enforcing these collective rights."[66] Below, nonetheless, I have picked up the fishing rights, solidarity rights, argument of distributive justice and rights of cultural heritage and scientific benefit, and environmental rights denoting the wider idea of the right to development to illustrate the collective human rights issues further.

5.1. Fishing Rights

Fishing rights occupies a significant place in international law, as fisheries is considered a common property natural resource since the old days. Under the UNCLOS regime, the right becomes a point of conflict given the customary and treaty law rights of fishing. The trend of recent law of the sea developments suggests the presence of an accommodative view among the competing claims of fishing rights. In *South China Sea,*[67] interpreting the phrase, 'other rules of international law' the tribunal held that it accommodates the traditional fishing rights.

In the *Bay of Bengal (Bangladesh/India)*,[68] the tribunal considered the meaning of 'relevant circumstance' in adjusting maritime boundaries. Bangladesh wanted the tribunal to consider the longstanding fishing rights of Bangladesh's coastal communities. Bangladesh argued that its people depend heavily on fish from the Bay of Bengal and a sea boundary based on the equidistance principle advocated by India would produce inequity. The tribunal endorsed fishing activities as a *relevant*

---

64 *UNCLOS*, art 206.

65 Erika de Wet, *The International Constitutional Order* (Amsterdam University Press, Amsterdam, 2005) 16.

66 Bernard Oxman, n 18, p 8.

67 *South China Sea Arbitration (Philippines v China)* Award (12 July 2016) PCA 2013-19, p 9.

68 *Bangladesh-India,* n 10, p 26.

circumstance, however, rejected Bangladesh's fishing rights plea not being corroborated by sufficient evidence.

Earlier in *Jan Mayen,*[69] the ICJ endorsed the view of *Gulf of Maine*[70] and held that the impact of a sea-delimitation on parties' respective fishing activities should be considered if the delimitation produces disastrous ramifications for the economic welfare of country.[71] The ICJ, then, adjusted the provisional equidistance line based on migration patterns, to give Denmark equitable access to the fish stocks. In *Barbados and Trinidad and Tobago,*[72] however, the International Tribunal for the Law of the Sea (ITLOS) declined to adjust the provisional equidistance line to accommodate the interests of the fishermen from Barbados, on the ground that the practice of fishing in the area was not longstanding.

5.2. Distributive Justice and Cultural Heritage

The distributive idea is instrumental to satisfying human needs and wants. The idea is driven by the dream to eradicate world poverty. Many scholars think that resource rights should surpass territoriality in terms of nature and scope, as such, world resources dividend should be used for the benefit of mankind equitably.[73] This argument of distributive justice may not be a convincing idea to explain UNCLOS. Because a state may not be competent to ensure distributive justice of wealth for varied reasons including its governmental form and function. Nevertheless, it may be argued that the establishment of extended LS's jurisdiction over the natural resources of the 200n.m. EEZ and CS seem to complement the claim of distributive values.[74]

---

69 *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v Norway*) (1993) ICJ Report 38.

70 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada v The United States of America*) (1984) ICJ Report 342.

71 *Jan Mayen,* n 69, p 71.

72 *Barbados/Trinidad and Tobago* (2006) RIAA221.

73 Margaret Moore, 'Natural Resources, Territorial Right and Distributive Justice' (2012) 40 (1) *Political Theory* 84.

74 *Barbados/Trinidad and Tobago,* n 72.

5.3. Environmental Rights

The case of the marine environment has received a holistic formulation from the UNCLOS in terms of human rights. All the features of the right to the environment can be found in arts 192 to 237 of the UNCLOS, i.e., elaboration of a specialised body of law stating the prevention, reduction and control measures relating to marine pollution; an easily discernible international law-making process; incorporation of the principles of international law as something related to life-cycle and notably attaching responsibility to the violators. In *Mox Plant*,[75] the ITLOS ordered the states to consult to exchange information and monitor risks to prevent environmental harm caused by a project.

5.4. Solidarity Rights

The CHM theory is the best example of collective rights, where the International Sea Bed Authority's (ISBA) duty is to mankind as a whole. The promise for sharing the economic benefit on a non-discriminatory basis is a testimony to the human rights values. Admittedly, the concept of the rights of people is a contested term. Nonetheless, the right to the CHM belongs to the law of solidarity, which is a new generation of human rights. In the case of the right to CHM, one may be tempted to believe that it only entails a collective dimension. Gros-Espiell is of the view that this right makes the 'international community' a subject of international law.[76] Espiell adds, however, that this right also implies the 'community-oriented rights'[77] which are to be shared in the like context of the CHM. He distinguishes between the 'ownership' over the common heritage, which can only be vested in 'mankind', and the right to 'benefit from' that common heritage, which is vested, through states and peoples, in the individual human being.[78]

The individual dimension of the right to the CHM implies the contemporary application of existing international human rights,

---

75 *Mox Plant (Ireland v the United Kingdom)* (2001) 14 ILM 405.

76 H Gros-Espiell, 'Introduction' in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff, Leiden, 1991) p 1167.

77 Ibid.

78 Stephen Marks, n 27, p 449.

particularly those expressed in art 27(1) of the Universal Declaration of Human Rights (UDHR): "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." This right implies not only the cultural and scientific life of the local and national community but that of the international community as well.[79] Thus, arguably, the notion of the common heritage gives new meaning to the rights of art 27 of the UDHR.[80] Given that, in its broad sweep, art 27 may be considered as an intrinsic part of the life of human beings to 'enjoy the benefit of scientific advancement and its benefit' both in a collective and individualistic sense.

Thus, seen so far, the regime of the law of the sea creates the basis for re-invigorating an international legal system from a perspective that allows for a substantive international law of human rights in respect of access to marine resources, fishing rights, solidarity rights and environmental justice.

6. The Space for Human Rights in State Sovereignty and Sovereign Rights

The nature of human rights law is paradoxical as it questions the omnipotence of the state, however, at the same time, is deeply embedded in public international law which has the principle of state sovereignty at its core.[81] The state-centric positivistic idea of 'sovereignty or 'sovereign rights' may not yield a good result for human rights. Because human rights and state sovereignty are traditionally believed to be two opposite ideas. The state is often held responsible for violations of human rights while exercising its supreme political power. While human rights are inherent in human beings, state rights are power-centric rights created by law, which may not work apparently for the advancement of human

---

79 Ibid.

80 Ibid.

81 RK Smith, 'Human Rights in International Law' in M Goodhart (ed), *Human Rights, Politics and Practice* (Oxford University Press, London,2009) 27.

rights.[82] Consequently, there is a danger of interpreting the state-centric provision of the UNCLOS through human rights prism.

The traditional idea of human rights stipulates to protect the inherent rights of the human being from the unreasonable exercise of sovereign power. However, the prerogatives of state sovereignty have changed significantly over time under the impact of the state's institutional settings, constitutionalism and human rights law. In a consent-based international system, international law functions as a medium of coordination among the actors to exhibit sovereignty in a compromised form. In *Chagos,*[83] the arbitral tribunal held that the exercise of territorial sovereignty by the LS is subject to "other rules of international law" (i.e., human rights law). Therefore, state sovereignty and human rights, in a given situation, may buttress one another.[84] Patrick Macklem argues that a legal theory of human rights in international law defines their nature and purpose in terms of their capacity to monitor the structure and operation of the international legal order.[85] Human rights, therefore, monitors the distribution and exercise of sovereign power validly accorded by international law.[86]

Putting Macklem's thesis in the sea-law context, it can be submitted that human rights generate international legal duty on the states to improve the social and economic conditions of impoverished people around the world.[87] If we see the whole thesis of the law of the sea as a right to 'social and international order' as recognised both in the UDHR and in the preamble of UNCLOS, a meeting point is traced. Article 28 of the UDHR states that "everyone is entitled to a social and international order for the realisation of human rights." Thus, the UNCLOS preamble

---

82 TM Ndiaye, 'Human Rights at Sea and the Law of the Sea' (2018) 10 *Beijing Law Review* 261.

83 *Chagos Marine Protection Area (Mauritius v UK)* Award (18 March 2015) PCA 514.

84 Daria Jarczewska, 'Do Human Rights Challenge State Sovereignty' (*E-IR*, May 2013)<https://www.e-ir.info/2013/03/15/do-human-rights-challenge-state-sovereignty/>accessed on 10 October 2020.

85 Patrick Macklem, The Sovereignty of Human Rights (Oxford University Press, London, 2015) p 1.

86 Ibid.

87 Ibid.

gleaned through art 28 of the UDHR takes a structural approach to the need of a national and international environment as a whole facilitating the economic take-off of the poor countries and a major redistribution of wealth in developed countries.[88] While one may argue that this effort may not only muddy the picture, but also discredit the whole thesis of human rights,[89] it may also be said that in certain historical conditions a new look in the form of social and international order may be an irreplaceable catalyst for the political, ideological, economic, social and legal process and the evolution of humanity.[90]

Thus, the state-centric provisions of the UNCLOS ultimately are geared to work for human rights for the people—the people of a state in particular or humanity as a whole. In future, human rights treaty obligations may be an interpretative curiosity for the adjudicating forum in reminding the states to dispose of sea disputes peacefully. As the sources of international law do not operate in a vacuum but rather in a broader context of convergence.[91] This is easier said than done. Factors like access to technology and the nature of dispute settlement forums may influence the role of the state in realising the human rights of the people, as the states are wrought with tensions about conflicting interests.

7. People-centric Human Rights and UNCLOS

The state-centric provisions of UNCLOS offer implications for the people of a country or the whole community of humanity. The challenges, in contrast, are not so obvious in the case of individual human rights. In this part of the paper, I will turn to the UNCLOS provisions that have a direct bearing on individual human rights. It needs to be reiterated that the 1982 Convention nowhere mentions the term human rights. The adjudicating body, the ITLOS for example, even being a non-human rights forum, may consider international human

---

88 Yoshufumi Tanaka, 'Protection of Community Interests in International Law: The Case of the Law of the Sea' (2011)*Max Plank Yearbook of United Nations Law* 329.

89 FG Isa and Koen Feyter (eds), *International Human Rights Law in a Global Context* (University of Deusto, Bilbao, 2009) p 207.

90 Espiell, n 76, p 1169.

91 *Fisheries Jurisdiction (Spain v Canada)* (1998) ICJ Rep 460.

rights law while deciding the UNCLOS claims. For, art 293 (1) of the Convention, permits the UNCLOS tribunals to apply not only the UNCLOS provisions but also the 'other rules of international law' compatible with them.[92] Two opposite views features the jurisprudence of 'other international law'—one view claims that art 293(1) does not empower the sea tribunals to expand its jurisdictions to enforce non-UNCLOS claims, the other view argues that the adjudicating bodies have no jurisdiction to declare whether states have violated certain non-UNCLOS rules of international law, such as the rules on the use of force and human rights law.[93] *M/V Saiga (No. 2)*, discussed later in this part, is the leading case that viewed the UNCLOS through the lens of human rights, while the tribunals in *Chagos, Arctic Sunrise* and *Duzgit Integrity* rejected to enforce the claims of human rights.[94]

Despite the above views, it can be noted that if a person or vessel remains at a sea zone within national jurisdiction, they are entitled to have human rights protection, as the national sea zones are within the realm of a state.[95] A ship or a person in distress deserves assistance from

---

92 Anna Petrig and Martin Bao argue that art 293 is a primary norm within the UNCLOS system which allows for systematic integration of external international law norms, including human rights while interpreting and applying the law of the sea. See Anna Petrig and Marta Bo, 'The International Tribunal for Law of the Sea and Human Rights' in Martin Scheinin (ed), *Human Rights Norms in Other International Courts* (Cambridge University Press, London, 2019) p 397.

93 Peter Tzeng, 'Jurisdiction and Applicable Law under UNCLOS' (2016) 142 *Yale Law Journal* 244.

94 In *Chagos* (*Mauritius v UK*) PCA 2011, Mauritius's claim of violation of the right to self-determination of an indigenous community by the UK was rejected. In *Arctic Sunrise* (*Netherland v Russia*) PCA 2014, the tribunal on Netherland's claim, refused to declare that Russia had violated the International Covenant on Civil and Political Rights (ICCPR) in its arrest and detention of its Greenpeace activists. In *Duzgit Integrity* (*Malta v Sao Tome & Principe*)PCA 2014, Malta challenged São Tomé's arrest of the Maltese vessel *Duzgit Integrity* in São Toméan archipelagic waters. Malta's allegation of violation of international human rights law by the arrest, imprisonment of the master and crew of the vessel was rejected by the tribunal.

95 Irini Papanicolopolu, *International Law and the Protection of People at Sea* (Oxford University Press, London, 2018) p 4.

the LS.[96] The demarcation of state powers to administer its laws and regulations applicable in the EEZ find their starting point in the need to protect the individuals.[97] Further, the UNCLOS prohibits imprisonment or other forms of corporal punishment for fisheries violations;[98] prescribe only monetary penalties as redress for certain pollution violations;[99] oblige a state to notify the flag state promptly about the arrest and detention of foreign fishing vessels;[100] and promptly release the captured crew or vessel for alleged infringements of fisheries and pollution laws upon furnishing reasonable bond or security.[101]

These provisions, in essence, safeguard the freedom of the crews and the rights of the ship and cargo owners in carrying out economic activities. An interesting feature of these provisions is that they leave an option to the flag state or to any interested parties to request an expeditious international proceeding before the ITLOS for the prompt release of the responsible ship or crews.

Over the last two decades, the prompt release jurisprudence has shown tremendous growth either in the hand of the ITLOS or in the hand of the European Court of Human Rights (ECtHR).[102] In *MV Saiga,*[103] the ITLOS in discussing whether the force used by Guinea in stopping and boarding the Saiga was disproportionate given the circumstances of the arrest in the context of the applicable rules of international law observed:

> [I]nternational law, which is applicable by art 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply to the Law of the Sea as they do in other areas of international law.[104]

---

96 *UNCLOS*, art 18(2).

97 Tullio Treves, n 23.

98 *UNCLOS*, art 73 (3).

99 *UNCLOS*, art 230.

100 *UNCLOS*, art 73 (4).

101 *UNCLOS*, art 293.

102 Prompt release cases brought under art 73(2) along with art 292 of the UNCLOS when considering human rights law of other courts are of particular interest as they involve the right to liberty of the crews and the right to property of the shipowner.

103 *M/V Saiga* (No2) (*St Vincent v Guinea*)(1999)ITLOS Report 10.

104 Ibid.

Hence, the Court for the first time appreciated the norms of human rights in the garb of 'considerations of humanity'. The ITLOS took note of this term from the ICJ's opinion in *Corfu Channel* (1949).[105] In *Comouco* (*Panama v France*)[106] and *Monte Confurco* (*Seychelles v France*)[107], the ITLOS offered a far-reaching interpretation of the notion of 'detention', as applied to the master and crew of the ship.[108] Later, in *Juno Trader* (*Saint Vincent and the Grenadines v Guinea Bissau*)[109] and *Hoshinmaru* (*Japan v Russian Federation*)[110], the ITLOS confirmed the freedom of the masters and crews and observed that they should be 'free to leave without condition'. Judge Tullio Treves in *Juno Trader* stated:

> [T]he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial guarantee must be reasonable indicates that a concern for fairness is one of the purposes of this provision.[111]

The ITLOS in *Tomimaru* (*Japan v Russia*)[112] observed in the same vein,"[T]he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law."[113] The ITLOS in prompt release proceedings effectively refrained itself from deciding potential violations of human rights claims, however, implicitly shares the idea that ordinary human rights are, nonetheless, relevant from the state's obligation to comply with the due process requirement.[114]One recent challenge is that it is unclear whether the ITLOS can entertain the recent floating refugee crisis from a human rights perspective.[115]

---

105 *Corfu Channel* (*Albania v the United Kingdom*) (1949) ICJ Report 1.

106 *Comouco* (*Panama v France*) (2000) ITLOS Report 10.

107 *Monte Confurco* (*Seychelles v France*) (2000)ITLOS Report 86.

108 France's step to place the master at a court's supervision and surrender of the passport was held to be a 'detention' and a compromise of the 'prompt release' clause stated in art 293.

109 *Juno Trader* (*Saint Vincent and the Grenadines v Guinea Bissau*) (2004) ITLOS Reports 17.

110 *Hoshinmaru* (*Japan v Russian Federation*) (2005) ITLOS Report 18.

111 *Juno Trader*, n 109, p 17.

112 *Tomimaru* (*Japan v Russian Federation*) (2007) ITLOS Report 74.

113 In this case, the Tribunal assessed whether confiscation of a vessel had been made in such a way to demand prompt release.

114 Anna Petrig and Marta Bo, n 92, p 397.

115 Ibid 411.

The ECtHR in *Rigopoulos*[116] and *Medvedyev*[117] recognized that detentions lasting for two weeks are incompatible with human rights law requiring detained persons to be 'brought promptly' to a judicial authority.[118] In *Women on Waves*,[119] the ECtHR used UNCLOS to interpret freedom of expression. Here, the Portuguese government sent a warship to deny the access of a ship called *Borndiep* which was being used for a campaign of legalizing abortion prohibited then in Portugal. Two rights organisations alleged violations of freedom of expression and association guaranteed in the European Convention on Human Rights (ECHR). The Court found that Portugal can oppose the entrance on allegation of violating the 'innocent passage' conditions and local laws, however, opined that Portugal violated the freedom of expression of the women on waves by adopting measures not compatible with a democratic society.[120]

The relevance of human rights with the law of the sea regime has been multiplied manifold, given some recent incidents. The loss of lives of the refugees in the Mediterranean Sea at the outbreak of the Libyan and Syrian crisis brings the human security question at sea to the forefront. The labour conditions on the board of fishing vessels have also been a concern. The practice of overfishing and the gradual depletion of fish stocks exposes the issue of how to make a balance between the property rights of the present and upcoming generations.[121] The surge of piracy in different seas has brought to the front a series of problems featuring legal ambiguity about human rights including permitted restriction to the right to liberty and due process of law.

Thus, it is seen that the ITLOS and the ECtHR have applied human rights principles by resorting to 'other principles of international law' enunciated in art 293 in ascertaining some UNCLOS claims, other sea

---

116 *Rigopoulos v Spain* (1999) ECtHR (App. No 37388 of 1997).

117 *Medvedyev and others v France* (2004) ECtHR (App. No 37388 of 1997).

118 Cambodian and Panamanian ships were seized on the allegation of carrying narcotic drugs by France and Spain respectively.

119 *Women on Waves and Others v Portugal* [2009] ECtHR (App. No 31276 of 2005).

120 Ibid.

121 Irini Papanicolopolu, n 95, p 26.

tribunals like the Permanent Court of Arbitration took a restrained approach in some later cases by refusing to expand its jurisdiction to some non-UNCLOS claims.

8. Conclusion

We live at a time when access to marine resources plays a pivotal role in achieving people's socio-economic rights. The translation of the goals and objectives of the UNCLOS can usher a new economy through which a state can go a long way to eradicate the poverty of its people and respect the development of community interests as a whole. The international incentives for economic cooperation advocated by the UNCLOS, however, are frequently overshadowed by a state's political system. UNCLOS paradoxically believes that the national governments will work for the people in the spirit of understanding, neighbourliness and cooperation. The 'sovereign rights' discourse is yet to go a long way to ensure access to marine resources by the developing countries or their people or a particular marine community. In most cases, human rights norms simply oblige states to do what they are allowed to do under the law of the sea, turning the jurisdictional right into a duty to take measures to appreciate human rights. Therefore, in the face of increasing dependence on marine resources, humankind will look forward to a just international system capable of fine-tuning the sovereign rights notion with the obligation to meet the demands of human rights consideration.

This paper examined the interactions between the 1982 Law of the Sea Convention and the international human rights norms, from a state-centric as well as a people-centric natural law approach. In the case of rights and obligations of states relating to different sea zones, the UNCLOS may supply an interpretative frame of reference to fashion developmental rights or vice-versa. The principles of non-discrimination, equity, solidarity and cooperation spelt out in the UNCLOS may guide the law of the sea in a direction where human rights of individuals and the collective right to development might be more relevant than ever before. As far as the people-centric approach is concerned, I have argued that the state's activities on the sea zones affect the individuals, ships and the other entities in a way that they directly call for the application of

human rights norms. The increasing trend of case laws regarding the capture of ships, captains and crews, crimes at sea, imprisonment, arrest and detentions, freedom of expression and right to movement indicate that they have been a finer source of human rights jurisprudence. The ITLOS has adopted a process of humanisation of the prompt release obligations of the state through the interpretative mechanisms. As such, the study of UNCLOS through the lens of human rights enjoys a persuasive value in furthering the objectives of the former.

IN QUEST FOR A REGIONAL HUMAN RIGHTS MECHANISM IN SOUTH ASIA

Khair Mahmud*

Abstract

South Asia is a place of diverse ethnic, religious and domestic political conflicts. Most of the countries have colonial past which still reflects in the domestic laws and administrations. The colonial practice of violation of human rights and injustice still exists. Domestic political differences often lead to the substantial violation of human rights. Violation of international covenants and Universal Declaration of Human Rights (UDHR) are often found in this region. SAARC is the most vibrant organization of this region and capable of providing a suitable platform for peace and dialogue in South Asia. It can close the gap between national human rights practice and international standards because sometimes these countries are suffering from lack of adequate resources, essential know-how, socio-cultural practices, preferences and policy priorities. Combating human rights violations often struggled because of the physical differences between international human rights mechanism and national mechanism. This paper tries to go through the existing south Asian platform for establishing a central human rights mechanism and also discusses the dream of south Asian human rights commission in comparison with the existing regional human rights mechanism like European Court of Human Rights (ECHR) and Inter-American Court of Human Rights (IACHR). This paper also makes an effort to find the triggers that can reduce the overall level of human rights violation and establish a more accountable environment in South Asia.

* Assistant Professor, Department of Law, Jagannath University.

1. Introduction

South Asia has a long history of fighting for human rights and freedom. It's a multicultural place with lots of ethnic, religious and political battles. Due to its long colonial past most countries still have the colonial judicial and administrative setups. The colonial practice of oppression and injustice still subsists. Domestic political differences often lead to the substantial violation of human rights. Violation of international covenants and Universal Declaration of Human Rights (UDHR) are often found in this region.

A huge number of complaints have been investigated and published by the human rights NGOs and different civil society groups but South Asia still lacking a comprehensive state party movement. South Asian Association for Regional Cooperation (SAARC) consists of eight countries namely Bangladesh, India, Pakistan, Bhutan, Nepal, Sri-Lanka, Maldives and Afghanistan. Afghanistan joined SAARC in New Delhi summit 3April 2007.[1] These countries are concentrated in about 3 percent of the total land mass of the world and is a place of approximately one fifth of the world's total population.[2] So it is easily understandable that these are the most densely populated country in the world. Therefore, there is an enormous political and economic imbalance which eventually leads to abuse of individual rights and group rights. SAARC is the most vibrant organization of this region and capable of providing a suitable platform for peace and dialogue in South Asia.[3] It can close the gap between national human rights practice and international standards because sometimes these countries are suffering from lack of adequate resources, essential know-how, socio-cultural practices, preferences and policy priorities.[4] Combating human rights

---

1 SAARC Secretariat/News (2007) <http://saarc-sec.org/saarc-summits> accessed on 15 July 2018.

2 Ali, *A New History of India and Pakistan* (Pakistan Book Centre, first published 1992) p 20.

3 Javaid Rehman, *International Human Rights Law*, (Essex, Pearson Education Limited 2010) p 384.

4 Anjum Ara and others, *Understanding Regional Human Rights Mechanisms & The need for A South Asian Human Rights Mechanism (ed)*, Asian Forum for Human Rights and Development (FORUM-ASIA), (2017) p 24.

violations often struggled because of the structural differences between international human rights mechanism and national mechanism. A regional or sub-regional mechanism can play a vital role in this substantial gap between national and international mechanism. On the other hand, it should be remembered that the regional and international mechanism does not replace national and international systems. When the domestic system collapses to tackle violations satisfactorily, the regional mechanism provides an extra cover of protection and thus it narrows the gap between international treaty obligations and domestic laws and policies.[5] This paper examines the feasibility of the existing south Asian platform to establish a central human rights mechanism. Alongside, it discusses the dream of south Asian human rights commission in comparison with the other prevalent regional human rights mechanism like European Court of Human Rights (ECHR) and Inter-American Court of Human Rights (IACHR). This paper also tries to find the triggers that can reduce the overall level of human rights violation and establish a more accountable environment in South Asia.

2. The Human Rights Culture in South Asia

South Asia has a unique and diverse history. It is not only a set of countries rather it resembles a continent.[6] Two of the world's most widely practised and followed religions Hinduism and Buddhism came from this region and also it has the most ancient of the world's civilizations. It also has a great number of followers of Islam than the Middle East or North Africa.[7] At the world conference on human rights in Vienna in 1993, the cultural differences and value differences between regions have been stressed by the official delegations.[8] In this conference

---

5 Christof Heyns and Mahnus Killander, Towards Minimum Standards for Regional Human Rights System, ed. Mahnoush H. Arsanjani et al. (Leiden, Martinus Nijhoff Publishers, 2010) p 523.

6 Rehman and Roy, *South Asia in the world directory of Minorities*,(ed)(Minority rights group, London 1997) p 535.

7 Javaid Rehman, *International Human Rights Law*, (Essex, Pearson Education Limited 2010) p 385.

8 Shveta Dhaliwal, 'Development of South Asian Human Rights Cultural: The role of South Asian Association for Regional Cooperation (SAARC)'(2008) Vol. LXIX, No. 3 The Indian Journal of Political Science, p 565.

the foreign minister of Singapore, and he pointed that the universal recognition of the idea of human rights can be harmful if universalism is used to deny or mask the reality of diversity.[9] South Asian human rights culture has long been evolving too many corners. Most of the countries share a common colonial past and this British colonial legacy resembles in the political set up as well as in the administration of justice. Due to these long colonial exploitation countries are still facing some of the gravest tragedies of human history. Kashmir still remains the most militarized zone in the world;[10] almost all the south Asian countries have arbitrary laws like special power act, preventive detention, and emergency laws. These laws do not respect essential notion or due process, which encourage law enforcing agencies to exercise extra power like arbitrary arrest and detention, assault and extra judicial killing and also killing of innocent people. For the long colonial past and struggling democracy afterward all most all the countries have suffered from poverty, violence, illiteracy, unemployment and other social group discrimination like children and women.[11]

Afghanistan has been the worst victim of war in this region. Human rights watch recent report shows that the United Nations documented 8,397 civilian casualties as of September last year which is approximately the same as the record number set in the first nine months of 2015.[12] For this long civil war, the country has had to face serious issues affecting peace, security and human rights. Women and children are the worst victims of this violation, in fact, there is no such culture of women and other group human rights. Even after the civil war still there

---

9 Amarty Sen, 'Human Rights and Asian Values' (Lecture at the New YORK University 1997) <http://www.nyu.edu/classes/gmoran/SEN.pdf>accessed on 16 July 2018, p 12.

10 Shubh Mathur, Memory and Hope: new perspectives on the Kashmir Conflict- an introduction, [2014] Vol 56(2)<http://journals.sagepub.com/doi/pdf/10.1177/0306396814542906> accessed on 16 July 2018, p 33.

11 Shveta Dhaliwal, 'Development of South Asian Human Rights Cultural: The role of South Asian Association for Regional Cooperation (SAARC)'(2008) Vol. LXIX, No. 3 *The Indian Journal of Political Science* 566.

12 Human Rights Watch, 2016 World Report (U.S.A. January 2016) <https://www.hrw.org/world-report/2017/country-chapters/afghanistan> accessed on 19 July 2018, p 3.

are a lot of complaints about torture by the security forces, freedom of expression has been suppressed, and terrorism is still a big issue.

Human rights situation in Bangladesh is worsening for many years especially after the election of 14th January 2014. The main opposition party Bangladesh National Party (BNP) did not participate in that election and they had decided to protest the election on the field. They burnt buses, private cars and killed innocent people. In contrast, government forces used excessive power to suppress the opposition move resulting in a huge number of extra judicial killings, killings in custody, forced disappearance. Human rights watch very recently on 6th July 2017 published an 82-page report on forced disappearance situation in Bangladesh. The report says since 2009 there about 320 people disappeared including suspected criminals, militants, and opposition leaders.[13] Freedom of expression has been seriously violated,[14] several journalists and online activists faced arbitrary criminal charges as the new Information and Technology Act contain a very repressive section 57,[15] under which anybody can file a sue for his comments and posts in social media if it contains defamatory elements. Lack of political stability and weak democracy crushed human rights of the innocent people.

The biggest human rights crisis of Bhutan lies in its ethnic problems. Bhutanese refugee situation is one of the under focused and neglected refugee crises in the world. From 1990 the country has had one sixth of the population in exile.[16]

---

13 Human Rights Watch, 'We don't have him' secret detention and enforced disappearances in Bangladesh. (Report) (6 July 2017) <https://www.hrw.org/report/2017/07/06/we-dont-have-him/secret-detentions-and-enforced-disappearances-bangladesh> accessed on 19 July 201, p 2.

14 Amnesty International, 'Bangladesh, (2016/2017) Annual report (London 2017) <file:///Users/khairmahmud/Downloads/POL1048002017ENGLISH.PDF> accessed on 19 July 2018, p 4.

15 *Information and Communication Technology Act* 2006 <http://www.icnl.org/research/library/files/Bangladesh/comm2006.pdf>accessed on 6 July 2018.

16 Amnesty International, 'Bhutan human rights, human rights concerns' (2017)<https://www.amnestyusa.org/countries/bhutan/> accessed on 19 July 2018.

India, the biggest democracy in this region also suffers from the same legacy. Since the partition, Kashmir has become a victim of the proxy war between India and Pakistan and the people of Kashmir become the major victim of this conflict. Freedom of speech and media, caste-based discrimination, communal and ethnic violence, extra judicial killing, violence against women, attacks on religious minorities often led by the vigilant group of the ruling Party are an increasing concern in India.[17]

In Nepal human rights remain unpleasant since the adoption of the new constitution in 2015. Refugee problems, high rate of child marriage, Maoist insurgency, and discrimination on the basis of cast are common human rights violation there.[18]

Due to the long absence of democracy, deep rooted terrorism and communal violence in Pakistan has had terrible records of violation of human rights. Violence against women, child marriage, child labor, honour killing, adequate health facilities are the common human rights violation in Pakistan.[19]

Sri Lanka has gone through 26 years long civil war which ended after a bloody battle in 2009 between government and the Liberation Tigers of Tamil Eelam (LTTE). The LTTE claimed that core international crimes were committed against them. The Sari Lankan authorities have been accused of torture, illegal detention, extra judicial killings and other human rights violations.

3. Level of Human Rights Protection Available

Human Rights is often about looking at what has gone wrong and then looking at how to fix it in future. Lack of accountability itself is a human

---

17 Human Rights Watch, 'We don't have him' secret detention and enforced disappearances in Bangladesh. (Report) (6 July 2017)<https://www.hrw.org/world-report/2017/country-chapters/india>accessed on 19 July 2018, p 2.

18 Shveta Dhaliwal, 'Development of South Asian Human Rights Cultural: The role of South Asian Association for Regional Cooperation (SAARC)' (2008) Vol. LXIX, No. 3 *The Indian Journal of Political Science* 567.

19 Ibid.

rights violation. There are needs for different layers of safety nets to handle the overall situation of human rights and to repair the future harm. The term accountability for human rights violation is a mixed bag, where three levels of protections are available; domestic protections, regional protections and international protections.[20] Domestic one is the most immediate, the most apparent and the most important mechanism of all. It is the first line of defence that one has to face before getting into the regional and international mechanism. To be able to respond a violation, a domestic level of protection must have constitutionally guaranteed human rights, independent judiciary, effective enforcement mechanism and a human rights culture. National human rights institutions are often seen as part of chain but they can often be a smokescreen for violations as well but if they work they can play a different role than the courts in addressing structural changes. National inquiry could be a domestic protection mechanism if there has been a national incident of significant importance.

If one falls through the smaller holes of the domestic system, then regional system will pick them up. Regional mechanisms might bring human rights closer to home, so that states that don't usually get involved in international do not feel like they are passive players in human rights norm making.[21] The Regional Mechanisms that successfully going on are: The Council of Europe (European Court of Human Rights), Organization of American States (Inter-American Commission and Inter-American Court), African Union (African Commission that sits in the Gambia). There are some other regional bodies too, like Arab League and the Association of South East Asian Nations (ASEAN) created an "inter-governmental" commission on human rights in 2009 which is not an independent treaty body.

There was a tension between universality and regional specificity since these regional organisation began to grow. Historically the UN was in tension with these regional mechanisms because it was worried that they would break-away systems in conflict with the UN. The two broad UN

---

20 Christof Heyns and Mahnus Killander, Towards Minimum Standards for Regional Human Rights System, ed. Mahnoush H. Arsanjani et al. (Leiden, Martinus Nijhoff Publishers, 2010) pp 527-529.

21 Ibid.

mechanisms are charter based mechanisms and treaty based mechanisms. Mainly there are nine main treaty bodies and with the sub-committee on torture the total number is ten. Compulsory obligation is only applicable when a state sings into the treaty. Under the treaty bodies in the Human Rights Council there are universal periodic review, where states have to submit their report on human rights situations. There are special procedures, investigations and commissions of inquiry also.

When the European Court created a Court that the individual could present themselves in front of it the idea of state sovereignty took a big jump since this was the first time that individuals were subjects of international law. Not only that, but one could get a legally binding judgment and go over the head of the government. So thinking about that development and evolution since 1945 to date, that's a big deal and a very different picture than how the UN was imagined.

4. SAARC and Its Institutions

The idea of establishing the south Asian regional cooperation and the first draft was done by the Bangladesh in 1980. There had been a series of round table discussion for years in different South Asian countries and in different levels after the proposal.[22] Finally the South Asian Association for Regional Cooperation (SAARC) was launched in Dhaka on 7-8 December 1985.[23] The SAARC charter has voiced to promote the welfare of the peoples of South-Asia through advancement in the quality of their lives, development at the social and cultural level. It also speaks to advance economic growth, opportunity and realizing full potentials of every individual. It further asserts to build trust, share growth, understanding and promote stability to the region. Pacific settlement of disputes, regional co-operation and promoting sovereign equality is its firm agenda.[24]

---

22 M Rabiul Hasan, *Fundamentals of International Organization* (Shams Publications, Dhaka 2013) pp 278-279.

23 SAARC information and Publication division, 'From SARC to SAARC: Milestones in the evolution of regional cooperation in South-Asia' (Nepal, 1990), vol. 1 and vol. 2.

24 *SAARC Charter* (Adopted on 8 December 1985) 4 AsYIL, p 473.

The bodies of SAARC are multi-layered with different kinds of meeting opportunities. Among them the SAARC summit is the highest one, where the heads of the state or member of the governments are meeting on particular issues. It is generally held once a year but may be more if the member states consider necessary.[25] Although there is a provision of holding summit at least once in a year, the association could not do it properly due to the rigidity of the article III of the charter which clearly urges the participations of the heads of the state, there were 19 meetings, Islamabad, Pakistan was the last one among them held on 15-16 November 2016.[26]

There are two other high level committees, first one consists of the foreign ministers of the member states called the council of ministers and committee with foreign secretaries called the standing committee. Council of ministers basically responsible for examining the new policies for future co-operation and assessing the existing one as well.[27] Whereas the standing committee has the prime responsibilities to monitor the overall coordination of the programs and projects. The council of ministers generally meets twice a year, but in urgent case is may meet number of times.[28] Standing committee comprises the foreign secretaries of all the member states of the association.[29] The committee is liable for the overall checks and balance of the programs and projects.[30] The standing committee approves the projects and the methods of their supporting, it also identifies the new areas of cooperation and determines the inter-sectorial urgencies for assembling the internal and external resources based on proper research and findings.[31] To increase cooperation in the concerned sectors, the delegates of the member states of the technical committees will be accountable for implementing,

---

25 Milton park and others, *The South Asian Association for Regional Cooperation (SAARC): an emerging collaboration architecture (Routledge, New York, 2011),* p 24.

26 Ibid.

27 *SAARC Charter*, art IV (1).

28 *SAARC Charter*, art IV (2).

29 *SAARC Charter*, art V.

30 *SAARC Charter*, art V (1).

31 *SAARC Charter*, art V (2) & (3).

coordinating and monitoring their programs.[32] These committees largely work on agricultural and rural progress, well-being of population, gender, youth and children, forestry and environment, technology, human resources growth and energy.[33] The standing committee may set up an action committee to implement these projects comprising of few member states.[34] Therefore, SAARC has all the necessary set up for elevation and safety of regional human rights mechanisms. Through these associations, SAARC can easily assist state parties to apply their conventional human rights obligations. These SAARC institutions could be a platform for the South Asian people to raise their voice against human rights violations and all forms of injustices.

5. South Asian Human Right Initiatives

I) By SAARC

The SAARC charter does not offer any references to human rights rather it stresses more on economic growth, promoting welfare and other socio-cultural growth. Number of institutions has been established by SSARC to achieve its goal. Despite these technical limitations SAARC countries have in principle come closer to agreeing on some of the fundamental principles of human rights and group rights. In 2002, SAARC adopted two regional treaties that impact on human rights: The SAARC Convention on Prevention and Combating Trafficking in Women and Children for Prostitution and the SAARC Convention on Regional Arrangement for the Promotion of Child Welfare in South Asia.[35]The SAARC regional convention on the suppression of terrorism is another example of the commitment of the SAARC leader to fight against terrorism.[36] The fundamental international law principles of *aut dedere*

---

32 *SAARC Charter*, art VI.

33 Zillur R. Khan (ed), *SAARC and the superpowers* (University Press Limited, Dhaka 1999) p 34.

34 *SAARC Charter*, art VII.

35 Anjum Ara and others, *Understanding Regional Human Rights Mechanisms & The need for A South Asian Human Rights Mechanism (ed)*, Asian Forum for Human Rights and Development (FORUM-ASIA), (2017), p 34-35.

36 Javaid Rehman, *International Human Rights Law*, (Essex, Pearson Education Limited 2010) p 392.

aut judicare (state obligation to prosecute a person who has committed serious international crime) are also established through these conventions. Now member states are upon receiving request from the proper authority extradite or submit the alleged offender for the purpose of prosecution. SAARC is also committed to eliminating terrorism as this region is under extreme terrorist threat. SAARC Terrorist Offences Monitoring Desk (STOMD) has been established in Colombo, Sri Lanka.[37] STOMD is the central organization in this region to collect, collates, analyses the information about terrorism and disseminates among the member states. The success of STOMD encourages signing an additional protocol to SAARC regional convention on the suppression of terrorism in the Islamabad summit 2004.[38] The protocol is a great tool to fight against terrorism because it's not only preventing terrorism but also it is a bar to finance terrorism. SAARC as a platform of the eight countries has staged some innovative ideas to bring people closer, South Asian promotion of people to people linkage is one of them. Under these countries are sharing their cultural actives like the television program, sports and so one which eventually helps them to come closer and create a regional environment. This type of relationship building programme could be a better way to set up an accountability mechanism for future.

Furthermore, United Nations human rights council has universal periodic review (UPR) system, since all the SAARC countries are engaged with that they have to submit report under UPR. These kinds of initiatives, involvements show a positive trend to establishing a South Asian human rights mechanism.[39]

II) By NGOs and Civil Society Bodies

South Asia is a very fertile land for the growth of Non-Governmental Organizations. Many NGOs of world repute ordinate here. It has a significant role in investigating and publishing reports in human rights violation in this region. SAARC itself also encourage NGOs to work on

---

37 Ibid, p 393.

38 Ibid.

39 Abdullah Al Faruque, *International Human Rights Law: Protection Mechanism and Contemporary Issues,* (New Warsi Book Conrporation, Dhaka 2012) p.153-154.

human rights issues and to create a network, South Asian forum for human right (SAFHR),[40] South Asian Human Rights Documentation Centre (SAHRDC)[41], Asian Human Rights Commission (AHRC)[42] are the little examples of that initiatives. SAFHR is the regional hub for the local human rights NGOs. It has created a network among the South Asian human rights NGOs and they jointly believe in the concept of Universal Human rights although they try to solve the human rights problems.[43] SAHRDC is collecting information about human rights violation, gather document about the human rights laws, conventions, treaties in this region and internationally. It has an affiliation with the Economic and Social Council of the United Nations. Other leading human rights NGOs working in this region is the AHC based in Hong Kong. In 1997 they produced Asian Human Rights Charter with the collaboration of over hundred NGOs from different Asian countries.[44] This regional charter has some great impact on the development of the South Asian version of human rights mechanism. This initiative probably leads the path to establish something big, specially a place like Asia where the size of the region itself is a big problem.

---

[40] SAFHR a Human Rights Organisation. Started its journey in 1990 <http://www.safhr.org/index.php?option=com_content&view=article&id=47&Itemid=697>accessed on 22 July 2018.

[41] SAHRDC is a Delhi based human rights documentation centret<http://www.hrdc.net/index.php?option=com_content&view=article&id=1&Itemid=111>accessed on 22 July 2018.

[42] AHC was founded in 1984 in Hong Kong by a group of jurist and human rights activist. Though they are named as Asian Human rights commission but they have a great focus on South Asian human rights violation. They have published regular human rights report on south Asian countries<http://www.humanrights.asia/about> accessed on 22 July, 2018.

[43] Shveta Dhaliwal, 'Development of South Asian Human Rights Cultural: The role of South Asian Association for Regional Cooperation (SAARC)' (2008) Vol. LXIX, No. 3 *The Indian Journal of Political Science* 568.

[44] *Asian Charter on Human Rights* (2000), Asia-Pacific Journal on Human Rights and the Law 1:126-143, Netherland.

6. Other Regional Mechanism and South Asia: European System

The European system of the protection of human rights is the most successful and most effective one amongst the regional mechanism of human rights.[45] The system had developed in the context of appalling atrocities and devastating and massive human rights violation occurred during the Second World War.[46] The European Convention for the protection of Human Rights and Fundamental Freedoms (1950) was adopted by the council of Europe (CoE) in 1949. The European Convention on Human Rights (ECHR) established both the European Commission and European Court of Human Rights. The aims of the council are described in its very first article:[47] The article stipulates that through the active mechanism of it the region will achieve greater progress safety and economic proliferation. It also prioritised common interest of the European people like cultural, scientific, social and legal matter. CoE prioritizes human rights more because of its existence, and this special focus caused a huge number of pending cases.[48] The convention emphasises more on the human rights record of a country to consider its membership application. Council of Europe has taken the issue further by giving options to its citizens that every individual has to accept the principle of rule of law. Chapter I of the CoE has focused on how effective co-operation is important in promoting human rights and fundamental freedom.

Sates were rarely submitting allegations at the beginning, it was always the victim himself or herself to the commission and the ability of the commission was concentrated only in examining those allegations and their admissibility. Whenever commission finds something to start the

---

45 Brice Dickson (ed), *Human Rights and the European Convention*, (Sweet Maxwell, London, 1997) p 55.

46 Abdullah Al Faruque, n 39, p 108.

47 European Convention for the Human Rights and Fundamental Freedoms (Adopted on 4 November 1950, entered into force on 3 September 1953) Article 1. ETS 5; 213 UNTS 221.

48 Christof Heyns and Mahnus Killander, Towards Minimum Standards for Regional Human Rights System, ed. Mahnoush H. Arsanjani et al. (Leiden, Martinus Nijhoff Publishers, 2010) p 535.

proceedings they prepare a report about the admissibility of the application.

There are three options for those admissible claims; first they can directed the case to a political body, Second, to the Committee of Ministers of the Council of Europe and thirdly to the European Court of Human Rights.[49] Significant changes were made to the convention in the recent years and it has been done through sixteen protocols.[50] One individual can now file a complaint directly to the court. According to article 34 of the convention,[51] any individual, non-government organisation who were previously been aggrieved on a violation can directly file application to the court.[52] The court has to follow four stages in the processing of a complaint: the committee stage; the chamber; the grand chamber and the committee of ministers. Admissibility, merits, appeal and enforcement aspects of process are the four stages should replicate usually.[53] Advisory opinions may be given upon the appeal from the Ministers' committee regarding any explanation of the European Convention on Human Rights and its Additional Protocols.[54] After hearing of a case the court may find that there has been a breach of the Convention or the protocols thereto. On the finding of a breach, the court may award just satisfaction to the victim and grant the legal costs. The declaratory nature of the judgement has been ensured therefore any judgement produced cannot contradict national law or repeal.[55]

One of the exceptional matters is that European system has initiated first is the European Social Charter.[56] The ESC preamble makes it clear that

---

49 Oliver De Schutter, *International Human Rights Law* (Cambridge University Press, Cambridge, 2010) p 900.

50 Ibid.

51 Ibid.

52 Ibid, pp 900-901.

53 Abdullah Al Faruque, n 39, p 117.

54 *European Convention on Human Rights*, art 47.

55 D. J Harris, M O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, (Butterworths, London, 1995) p 630.

56 *European Social Charter* 1961. (Adopted on 18 October 1965 and entered into force on 26 February 1965), 529 UNTS 89; ETS 35.

the Charter is an extension of ECHR and it aims to develop the living standard of member populations.

6.1. The Inter-American System

The American continent has a long history of human right violation and repressive military regimes at the same time it is one earliest attempt to forge inter-state cooperation. Pan-American Union a vibrant organisation at its time was come to end in the year 1948 after the formation of the Organisation of American States (OAS) in 1948.[57] The OAS concentrated some special area to focus on that time which made it unprecedentedly exceptional like democracy, freedom of speech, encourage civil society group to participate in the government, foster different kinds of human rights mainly cultural, children and women's rights. It also emphasis on rule of law, fight against illegal use of drug and strengthen inter-American legal development. The OAS charter put Independence is the only criteria to become a member and the possible loss of membership depends on the stability of the democracy of that country.[58] The Inter-American system of human rights consists of the American Declaration of the Rights and Duties of Man,[59] the American Convention on Human Rights (ACHR) 1969,[60] the Inter-American Convention to Prevent and Punish Torture 1985,[61] the Additional Protocol to the American Convention on the Human Rights in the area of

---

57 Javaid Rehman, *International Human Rights Law*, (Essex, Pearson Education Limited 2010) p 271.

58 *Charter of the Organization of the American States* (Adopted on 30 April 1948, entered into force on 13 December 1951), 119 UNTS 3, arts 8 & 9.

59 *The American Declaration of the Rights and Duties of Man* (Adopted on 2 May 1948, entered into force on May 1948) OAS Res. XXX, Reprinted in Basic Documents Pertaining to Human rights in the inter-American System,OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949).

60 *The American Convention on Human Rights* (ACHR) (Adopted on 22 November 1969, entered into force on 18 July 1978) OAS Treaty Series no 36; 114 UNTS 123; 9 ILM 99 (1969).

61 *The Inter-American Convention to Prevent and Punish Torture* 1985, (Adopted on 9 December 1985, entered into force on 27 February 1987) OAS Treaty Series No. 67; reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4Rev. 9 (2003)

economics, Social, and Cultural Rights 1988,[62] the Protocol to Abolish the Death Penalty 1990,[63] the Inter-American Convention on Forced Disappearance of Persons 1994, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994.

The Jurisdiction of the Inter-American Commission on Human Rights extends to all OAS member states. Initially, the statue of the Commission had been mandated to receive individual communications and act as an autonomous entity. The Charted revised in 1970 and recognized Commission as one of the principal organs of the Organization.

Article 1(2) of the Commission provides the purpose of the present Statute. It denotes that all the member states of OAS not parties to ACHR continued to be bound by standards of the Charter. Also the mechanism established by the Commission as a Charter institution was preserved. The Commission also has a specific mandate to oversee all human rights obligations undertaken by the OAS States. The Commission comprises seven members who are nationals of the OAS and they must be people of high moral personality with standard competence in the ground of human rights.[64] The statute also provides the Commission with a fact-finding investigative jurisdiction and it can also receive individual complaint under both the OAS Charter system and ACHR system.[65]

The Inter-American Court of Human Rights along with its protocols represents the second part of the inter-American human rights system. The ACHR contains traditional civil and political rights as well as economic, social and cultural rights. Many similarities can be found

---

62 *The Additional Protocol to the American Convention on the Human Rights in the Area of Economics, Social, and Cultural Rights* 1988, (Adopted on 17 November, not yet in force). OAS Treaty Series No. 69 (1988), OEA/Ser.L.V/ii.82 doc.6 rev.1 at 67 (1992).

63 *The Protocol to Abolish the Death Penalty* 1990, (Adopted on 8 June 1990) Treaty Series No. 73.

64 *ACHR*, art 34.

65 *ACHR*, arts 18 & 44.

within the rights contained in the convention, the international covenant and ECHR, although there are significance differences.[66] The ACHR contains some special features which distinguish it from other regional mechanism. For example, it contains 'federal clause' under Article 28[67] which affects the domestic application of the American Convention in those states that have a federal system of Government.[68] The provision has been incorporated to ensure that a federal state should not be deemed to have assumed any international obligation to prevent violations of the American Convention involving rights or acts within the jurisdiction of any government entity other than the federal government.[69] It also allows federal states to ratify the American Convention without making its provision applicable within its entire entity.[70] The ACHR has some derogation clause also which recognize that in certain circumstance the state parties may suspend some of the rights incorporated in the convention.[71] Individual petitions are to be submitted in writing, stating the facts of the case, the details of the victim, the name of the state alleged to have violated the rights, and the alleged breaches. Unlike European system, the ACHR system allows wider access to the court, before lodging complaint, domestic remedies must be exhausted and the communication should satisfy other admissibility requirements.[72] The ACHR provides for an inter-state complaint mechanism. However, unlike ECHR, the state is required to make a declaration recognizing the ability of the commission to accept and inspect communications from another state.[73]

OAS charter clearly mentioned the process of selection of judges. Member state meaning the states parties to the charter can propose names for the appointment but it is not limited by nationality that means

---

66 Oliver De Schutter, n 49, pp 920-921.

67 *Protocol to Abolish the Death Penalty*, n 63.

68 Thomas Buergenthal, 'The inter-American system for the protection of Human Rights', in Theodor Meron (ed), *Human Rights in the International Law: Legal and Policy Issues*, (Clarendon Press, Oxford 1984), p 443.

69 Ibid, p 446.

70 Ibid.

71 *ACHR*, art 27 (1).

72 *ACHR*, art 44.

73 *ACHR*, art 45 (1).

countries can nominate anyone other than their nationality. The number of judges has limited to seven at this moment. The court can practice two types of jurisdictions namely contentious and advisory jurisdictions.[74]

6.2. The African System

The African regional mechanism is the latest one, among the three regional human rights mechanisms.[75] The African Charter on Human and People's right, 1981[76] is the main African human rights instrument and all the member states of the African Union (AU) has ratified the charter. Organization of African Unity (OAU) helped and nurtured to grow the African regional system, which was transformed in 2002 into African Union (AU). The 1963 OAU Charter did not recognize the realization of human rights as such as one of the objectives of that body. But the alteration of the OAU into AU has announced a fresh development especially with regards to protection and promotion of human rights on the continent.[77] The African charter recognizes most of the internationally accepted human rights types. Rights include social and cultural rights, economic rights, political rights, civil rights and some third generation rights. The civil and political rights recognized in the Africa Charter are in many ways similar to those recognized in other instruments.[78] African charter however, missing some important civil and political rights. For instance, there is no clear reference in the charter to a right to privacy; the rights against forced labour. The right to a fair trial and the right of political participation are given also scant protection in contrast with international standards.[79]

---

74 *ACHR*, art 52.

75 Arthur E. Anthony, 'Beyond the paper Tiger: The Challenges of a Human Rights in Africa', (1997), 32 Texas International Law Journal, p 510.

76 *The African Charter on Human and People's Right*, 1998, (Adopted on 1981, entered into force on 21 October 1986). OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

77 Christof Heyns and Magnus Killander, 'Africa in International Human Rights Textbooks' (2007), 15 *African Journal of International and Comparative Law* 130.

78 Oliver De Schutter, n 49, pp 948-949.

79 Javaid Rehman, *International Human Rights Law*, (Essex, Pearson Education Limited 2010) pp 306-307.

The best approach of the charter is the inclusion of economic-social rights in conjunction with civil and political rights in a regional mechanism also it emphasizes the individuality of human rights and the importance of development issues, which are obliviously significant matter in the African setting.

In contrast with the other two regional mechanisms, the African Charter provided only for the creation of a Commission not a court of human rights for the implementation of rights. In case of complain both individuals and states can initiate their accusation before the African Commission if any infringement of the charter happened. The commissioners of the court serve with their individual capacity and there eleven commissioners.

In the year 1998 the African Charter on Human and People's Rights issued a protocol to establish The African Charter on Human and People's Rights. The African Court of Human and People's Rights was established by a protocol to the African Charter on Human and People's Rights 1998. The first judges of the African Court were elected in January 2006. The Judges are elected from among African jurists and judges of proven integrity, qualifications and experiences, having been nominated by individual member states.[80] The jurisdictions of the court are mainly the advisory jurisdiction and contentious jurisdiction. In so far as contentious jurisdiction is concerned, the court has jurisdiction over all cases and disputes submitted to it regarding the interpretation and application of the African Charter on Human and People's Rights.[81]

6.3. ASEAN System of Human Rights

The Association of South East Asian Nations (ASEAN) is one of the most effective regional forums for economic cooperation. The ASEAN charter established a sub-regional human rights body to create a safety net for its member countries. In 1967 ASEAN was created for economic development of the region, it also focuses on social progress and cultural development in the region. In 2007 the establishment of the sub-regional

---

80 Ibid.

81 *African Charter*, art 3.

mechanism is promised by the adoption of ASEAN Charter which is legally binding on the member states. The ASEAN charter contains a number of references to human rights in its preamble and principles also it established the human rights body. The establishment, powers and functions of the ASEAN human rights body is described in the article 14 of its charter. ASEAN human rights body work on the promotion and protection of human rights and fundamental freedom.

The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in October 2009. The AICHR will cover the ASEAN countries to promote and protect human rights and fundamental freedoms, to live in peace and dignity and prosperity, to enhance regional cooperation aiming to harmonizing domestic and global endeavours to promote and protect human rights.[82]

However, concerns remain about the perceived limitations of the AICHR's mandate. During the development process, concerns were expressed about the limited scope of the mandate. But it is evident that ASEAN has increasingly involved and committed to human rights.

6.4. Towards a South Asian Mechanism in Contrast with the Above Three

South Asian countries have no inter-governmental regional system for human rights like Europe, the America, and Africa.[83] A regional mechanism in South Asia can address common human rights issues and concern and provide remedies for cross border human rights violations. Most of the constitutions of South Asian countries have incorporated human rights as fundamental rights. There is a well-developed and growing body of jurisprudence on constitutional rights in South Asia. Many South Asian Countries have ratified or acceded to human rights treaties, though the present state of compliance by South Asian countries with such international human rights standards is not satisfactory.

---

82 Abdullah Al Faruque, n 39, p 151.

83 Shveta Dhaliwal, 'Development of South Asian Human Rights Cultural: The role of South Asian Association for Regional Cooperation (SAARC)' (2008) Vol. LXIX, No. 3 *The Indian Journal of Political Science* 569.

Implementation of human rights norms in South Asian states is half-hearted as some South Asian countries have not ratified optional protocols to global human rights treaties.[84] Although, like other regional human rights mechanism, it is the moral obligation of SAARC countries to establish a regional system. All the South Asian Countries have endorsed Vienna Declaration and Programme of Action 1993.[85]Vienna Convention Article 37 provides,[86] Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities. The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist.

This document urges for the establishment of a regional body to promote and protect human rights. Furthermore, most of the South Asian nations made a reservation to almost every instrument of human rights they have ratified in one form or another, which effectively excludes accountability of states to implement human rights at the international level.

The South Asian region currently does not have a human rights mechanism to deliver justice in case of the inability or unwillingness of the domestic setting. The SAARC Charter does not mention about human rights. However, the preamble of the SAARC Charter stipulates strict adherence to the principle of the UN Charter, which among others, emphasizes the principle of equality, non-discrimination, and self-

---

84 Gurjeet Singh and Maninder Kaur, 'Promotion and Protection of Human Rights: need for an Asian Regional Initiative', (2000) Vol .IX *Amritsar Law Journal, Guru Nanak Dev University Amritsar,* pp 112-113.

85 Shveta Dhaliwal, 'Development of South Asian Human Rights Cultural: The role of South Asian Association for Regional Cooperation (SAARC)', (2008) Vol. LXIX, No. 3 *The Indian Journal of Political Science* 569.

86 *Vienna Declaration and Programme of Action* 1993 (Adopted on 25 June 1993), UN Doc. A.CONF.157/23 ILM 1661 (1993), art 37.

determination, as well as the need to 'provide all individuals with the opportunity to live in dignity and to realize their full potentials.' SAARC has adopted a number of conventions since 2002 for the promotion and protection of human values. Convention preventing and combating human trafficking, convention for the promotion of child welfare, SAARC social charter and charter of food are noteworthy development of SAARC. Compared to the European court of human rights, Inter-American court of human rights or the African system, SAARC is still young. The main obstacles are the extreme poverty and inconsistent democracy. If one has an empty stomach and bare foot, she or he cannot enjoy human rights. These are the first thing that a state should arrange. The problem is most of the South Asian countries are fighting against extreme poverty and corruption which eventually the greatest problem creates a better domestic human rights mechanism. There are many initiatives and consultations at the civil society level about the establishment of sub-regional mechanism in South Asia. There was some discussion at the 16th SAARC summit about human rights mechanism and the representative felt the necessity but could not forward afterward.

SAARC has to take lessons from other successful regional mechanism as it has no success story yet. A South Asian human rights commission is an oblivious choice now which must have both protective and promotional mandate. The charter of the commission must have an elaborated and specific human rights mechanism which engaged the inter-governmental level to create a successful regional mechanism. The function of the proposed Commission should be: to promote human rights, to collect information about human rights violation, under take studies and research, to cooperate with national institutions of human rights of South Asian countries, ensure the protection of human rights, monitor adherence and compliance of South Asian countries with human rights treaties and interpret the provisions of the proposed Charter.

7. Conclusion

Among all the regional and sub-regional organizations South Asia is the rarest which is running without a human rights treaty of its own.[87]

[87] Shveta Dhaliwal, 'Development of South Asian Human Rights Cultural: The role of South Asian Association for Regional Cooperation (SAARC)'(2008) Vol. LXIX, No. 3 *The Indian Journal of Political Science* 569.

SAARC members States continue to have significantly divergent perspectives on issues ranging from the role of religion and the armed forces in the government of the state, constitutionalism, democracy and human rights. This form of diversity is not unique when compare to other regional mechanisms although possibly the greatest stumbling block in the development of SAARC is the protracted conflict and lack of trust between two of the powerful member states- India and Pakistan. But for the cross-border human rights solution, it is the high time to establish a South Asian human rights mechanism. The long proxy war between India and Pakistan could be resolved through the South Asian Human Rights Courts. While regional mechanism cannot be a substitute of national mechanism, it can act as an additional means of protecting human rights in the region. Establishment of such a mechanism can lead to greater harmonization and unification of human rights laws of the region, which can eventually contribute much towards the goal of South Asian cooperation.

LABOUR RIGHTS OF DOMESTIC WORKERS IN BANGLADESH: AN EMPIRICAL STUDY

Md. Asaduzzaman Saadi[*] and Md. Shahidul Islam[**]

Abstract

Despite their toilsome labour, domestic workers in Bangladesh are neglected in many areas. The main objective of this article is to investigate the situation of domestic workers from field level regarding their labour rights. To this end, it conducts an interview among 30 domestic workers using pre-structured interview schedule and gathered qualitative data. Thus, this article discovers that the domestic workers do not get labour rights in minimum standard. They are left out of the legal coverage outlined in the Bangladesh Srama Ain 2006 (Bangladesh Labour Act 2006) in respect of appointment letter, employment contract, leave and holiday, employment guarantee, food, accommodation, maternity leave and benefit. This article, therefore, suggests the Government to create awareness among the domestic workers and their employers about the rights of the domestic workers. Finally, it recommends the Government of Bangladesh to ratify ILO Convention 189 and to enact a law to ensure their rights.

1. Introduction

Persons, who carry out 'domestic work'[1] at any private house, mess, dormitory, etc. either as part time or full time worker, are known at the

[*] Associate Professor, Department of Law, Jagannath University.

[**] Assistant Professor, Department of Law, Jagannath University.

[1] The term domestic work includes rendering assistance in cooking and cooking related works, shopping, keeping the household clean and doing other associated works relating to household. It also implies washing dress and cloths, taking care of child, sick elderly and handicapped people living in the house where the domestic worker works. For details see *Domestic Workers Protection and Welfare Policy* 2015, Ministry of Labour and Employment, Government of Bangladesh, para 5.1.

domestic workers.[2] The term, domestic workers also implies a person who is 'engaged in domestic work within an employment relationship'.[3] However, one who 'occasionally' or 'sporadically' carries out domestic work without 'occupational basis' is not a domestic worker.[4] Domestic work is also well known as informal employment. Of the domestic workers 91.7 percent belong to the youth aged from 15-29 and 84.1 percent come within the category of adult aged 30-64.[5] Around 58.1 million labour forces are employed as domestic workers (informal workers).[6] This working class contributes a lot to the nation building by rendering their valuable assistance in carrying out all the household works. However, the domestic work is 'undervalued and invisible' and discriminated against as regards the 'conditions of employment and of work, and to other abuses of human rights'.[7] This is a reality in the developing countries where 'domestic workers constitute a significant proportion of the national workforce' as opportunities for formal employment is 'scarce' for historic reason.[8] They are marginalised here.[9] Bangladesh, being a developing country, presents similar dilapidated condition of the domestic workers.

Even today, it is hard to find a society who treats a domestic worker as a worker other than a servant or a maid or a helper. It is popular to treat them as domestic aid. In Bangladesh these groups are workers are neither treated as workers nor paid as workers. Even they are not under the protection of law as a worker in various perspectives. It is because the *Bangladesh Labour Act* 2006 does not recognize them as worker they

---

2 *Domestic Workers Protection and Welfare Policy* 2015, Ministry of Labour and Employment, Government of Bangladesh, para 3.

3 *Domestic Workers Convention* 2011 (No. 189), art 1(b).

4 *Domestic Workers Convention* 2011 (No. 189), art 1(c).

5 Dr. Wajedul Islam Khan, *Domestic Workers Rights Network-DWRN & Construction Workers: An Experience of Bangladesh* <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/presentation/wcms_508910.pdf> accessed on 29 June 2021.

6 Ibid.

7 *Domestic Workers Convention* 2011 (No. 189), preamble.

8 *Domestic Workers Convention* 2011 (No. 189), preamble.

9 *Domestic Workers Convention* 2011 (No. 189), preamble.

remain out of the protection of this *Act*.[10] The scenario and practice regarding appointment, legal framework and vulnerability situation of this group of workers can be traced from the following statement:

> Employing domestic helper of varying ages is a common practice in urban areas of Bangladesh. Over 80% of them are underage girls. There exists no regulatory framework for the minimum age of employment, pay and working hours for these poor and vulnerable workers. As documented by news portals and human rights organisations, domestic workers are routinely subjected to violence. As per the report of Ain o Salish Kenda (ASK), only in the first six months of 2019, there have been 15 reported cases of violence against domestic workers, of which 8 were cases of rape.[11]

Domestic Workers Protection and Welfare Policy 2015 is formulated by the Government of Bangladesh to specify some provisions relating to domestic works. This Policy provides provisions regarding contract of employment, leave and holiday, fixed working hour, minimum wages, security of tenure of employment, compensation for injury, maternity leave and so on. ~~B~~eing a mere policy, the Government of Bangladesh is not bound to implement it. Its abiding nature is also another reason for it's not having enforceability. Provisions of this Policy do not speak of the rights of domestic workers according to the standard of the *Bangladesh Labour Act* 2006and other international instruments.[12]

Domestic Servants' Registration Ordinance 1961 provides specific provisions regarding the registration of domestic workers in certain areas in Bangladesh but does not speak of any regulatory aspect and it also does not confer any rights or remedies to the domestic workers.[13]

In Bangladesh National Women Lawyers Association (BNWLA) v *Government of Bangladesh*[14] the Court acknowledged the rights of the

---

10 *Bangladesh Labour Act* 2006, s 1(4)(nna).

11 Monirul Islam, Domestic Workers Rights in Bangladesh, *The Daily Star*, August 06, 2019.

12 Md. Asaduzzaman Saadi, A Comparative Analysis on the Rights of Domestic Workers and Ordinary Workers under the Legal Legal Regime of Bangladesh, *Jagannath University Journal of Law*, V 1 No. 2 (2013), pp 100-101.

13 Ibid, p 89.

14 2011 BLD 265.

domestic workers for the first time. The Court also said that the child domestic workers of Bangladesh between the ages of 14-18 should be incorporated automatically within the provisions of the *Bangladesh Labour Act* 2006.[15] However, this recognition has been largely ineffective.[16]

Convention C 189: Domestic Workers Convention 2011 and *Recommendation 201: Domestic Workers Recommendation 2011* provides various important aspects of labour rights but unfortunately Bangladesh has not yet ratified these instruments.[17] Bangladesh Bureau of Statistics (BBS) and UNICEF in 2006 report that around 4 lacs and 21 thousand children between ages of 6 to 17 years are working as domestic workers in Bangladesh out of which around 132,000 are in Dhaka city.[18]

2. Methodological Approach

This is a socio-legal study. Therefore, it adopts qualitative data collecting approach. It is qualitative in the sense it discusses the legal issues of domestic workers' rights under different legislation both in national and international aspects. On this ground, it analyses the basic provisions of the relevant laws governing the issue of the domestic workers' rights. Most of the questions in the schedule are open ended. Thirty (30) domestic workers were selected purposively for interview. Two case studies are also used to get the data and information from them. All the domestic workers interviewed are woman under this study and are fulltime-workers.[19] Among the domestic workers under this study, 21 of them are illiterate, 5 of them can read only and others are below SSC and are studying.

---

15 2011 BLD 265.

16 Monirul Islam, n 11.

17 Saadi, n 12, p 101.

18 Emdadul Islam, *et al*, Situation of Domestic Workers in Bangladesh, (2013) 13 (7) *Global Journal of Management and Business Research Finance*<www.globaljournals.org/GJMBR_Volume13/4-Situation-of-Child-Domestic-Workers-in-Bangladesh.pdf>accessed on 20 November 2019.

19 Fulltime-workers refer those who stay at employers' residence at night.

3. Domestic and International Legal Instruments *vis-à-vis* Rights of Domestic Workers

Domestic workers are guaranteed a bundle of rights and facilities under different national and international legislations. The *Constitution of Bangladesh* and the *Domestic Workers Protection and Welfare Policy* 2015 are the two prime legislations governing the field. Meanwhile, the *Migration for Employment Convention (Revised)* 1949 (No. 97), the *Migrant Workers (Supplementary Provisions) Convention* 1975 (No. 143), the *Workers with Family Responsibilities Convention* 1981 (No. 156), the *Private Employment Agencies Convention* 1997 (No. 181), and the *Employment Relationship Recommendation* 2006 (No. 198), as well as ~~of~~ the *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (2006) are the basic legislations which operate to manage affairs of the domestic workers. This section makes a critical analysis of the rights guaranteed to the domestic workers under these legislations *vis-à-vis* the rights they are allowed to enjoy in practice in Bangladesh.

3.1. Employment Contract

Contract of employment describes the rights and responsibilities between the workers and the employers.[20] Upon the terms and conditions of the employment contract, it is the duty of the employer to issue appointment letter and job identity card which can be used for various purposes after the contract of employment, even after the termination of contract.[21] Under the provisions of the *Domestic Workers Protection and Welfare Policy* 2015, it is not mandatory to have a written employment contract.[22] This Policy of 2015 also does not make it compulsory to issue job identity card with photograph.[23]

To find out the nature of implementation of the above provisions of law a question is asked "Do you have any documents of appointment?" In

---

20 Saadi, n 12, p 88.

21 *Bangladesh Labour Act* 2006, s 5.

22 Saadi, n 12, p 88.

23 Saadi, n 12, p 89.

response to this question a very peculiar answer is found. Domestic workers do not think themselves as workers. So, they never think of appointment letter or any form of contract. In most of the cases they are appointed by a worker who worked previously to the same owner. They are appointed even without seeing the employers. In almost all cases they are appointed without any hard document. But in majority of the cases they are appointed by an oral contract. According to their statement only the matter of wage is negotiated and other terms are rarely negotiated at the time of contract. Oral contract is made in presence of parties only and they feel no interest in keeping witnesses. Sometimes, the persons who bring the workers to the owners' house may be present. Their parents sometimes make contract over phone. In most of the cases workers do not know the terms of their appointment. Terms of contract is only communicated to their guardians and the persons who bring them to owners' residence. It is clear from this study that workers do not negotiate personally rather their parents do that. Only the matter of wage is negotiated and other vital terms are not in their negotiation. Other terms which are not negotiated at the time of contract are completely dependent on the discretion of the owner. They never get hard document of employment or any identity card.

3.2. Leave and Holiday

Bangladesh Labour Act 2006 provides provisions for compulsory weekly holidays, compensatory holidays if necessary along with festival leaves.[24] The workers protected under this *Ain* also enjoy annual leave.[25] The *Ain* also ensures casual and medical leave to the workers,[26] whereas *Domestic Workers Protection and Welfare Policy* 2015 has no specific provisions relating to classification of leave. The *Policy* only provides a provision to ensure leave and holidays according to national standard.[27]

Field investigation of this study finds that fixed day of leave and holiday is absurd for domestic workers. They get leave and they have also

---

24 *Bangladesh Labour Act* 2006, ss 103 and 101(1).
25 *Bangladesh Labour Act* 2006, ss 117 and 117(2).
26 *Bangladesh Labour Act* 2006, ss 115 and 116.
27 *Domestic Workers Protection and Welfare Policy* 2015, s 7(3) (4).

holidays but that is completely upon the discretion of the employers. With a little exception all the workers under this study mention that they don't have weekly holidays. They also inform that they do not get holiday on special day like festivals or any other government declared holidays. Most of the domestic workers go home once a year and they enjoy leave and holiday at that time. At that time, they get one to two weeks as leave and holiday. A small number of respondents whose own residence is near to the owners' residence get leave and holiday for three to seven days in every six or more months. A worker tells that she hasn't celebrated *Eid* with her family for seven years for not getting leave even on those holidays. Two of the respondents usually get leave after any of the *Eids* for one week. One of them laments that she has not got leave on her sister's marriage ceremony. One remarkable is that "*morar khobor aahe, kandi kintu chute paina*" (We get the news of death of our near relatives, we just cry but cannot go to their funeral for want of leave). Another one tells that she is not allowed to see off her visiting guardians outside the residence. Another one expresses that she gets leave when her parents force her employer for granting leave. One says she doesn't ask for leave because of the fear of losing job.

3.3. Working Hour

Ordinarily the *Bangladesh Labour Act* 2006specifies the working hour of a worker and which is eight hours in a day and 48 hours in a week.[28] They are also entitled to extra wages for overtime working.[29] According to *the Domestic Workers Protection and Welfare Policy* 2015 working hours of domestic workers should be divided in such a manner that the workers get reasonable time to sleep, rest, recreation and religious activities.[30]

Domestic workers are workers as well as human being also. So they should have fixed working hours. This is the only one sector which has no fixed working hours at all. All of the workers under this study have no fixed working hours. They have to work from the early morning to

---

28 *Bangladesh Labour Act* 2006, ss 100 and 102.
29 *Bangladesh Labour Act* 2006, s 108.
30 *Bangladesh Labour Act* 2006, s 7(4)(8).

midnight without any break. They take rest when they complete one task and start a new task. "In the early morning we enter into the kitchen and prepare breakfast. Then we clean rooms, washrooms and rearrange everything for regular use. After doing all these we serve breakfast in the dining table. When all the members complete their breakfast, we take our breakfast while doing other tasks. We wash clothes at this time if necessary. In the meantime, we start cooking lunch. It is regular that we complete preparation and serving, cleaning lunch and related works in between 2:00 pm to 3:30 pm. Now we get some time to have some rest while taking our lunch. Now time to clean rooms and to prepare snacks. While serving snacks we start cooking diner. Everything comes to an end in between 11:00 pm to 12:00 am if there is no special task" this is the common routine of every domestic worker according to one of them. Two of them have rest time between 3:00 pm to 5:00 pm. But in actual sense they have no rest and leisure because they have to stay ready for any call of the employer. From the statement of the domestic workers it is evident that they have to work 15 to 18 hours with little break or without break. In most of the cases they have to work 15 to 18 hours.

3.4. Wage Standard

Workers protected under the *Bangladesh Labour Act* 2006get wages not below the standard determined by the Government time to time.[31] It is punishable if any employer fixes wage at a rate below the standard declared by the Government.[32] Fixation of wages for the domestic workers under the Domestic Workers Protection and Welfare Policy 2015 is determinable by the contracts between an employer and a worker at a rate which will not throw a worker in a hardship to run his family.[33]

In absence of protection mechanism and also for extreme economic, social and cultural backwardness, in some cases even 10 to 15 years ago in Bangladesh household work was free of wages except daily maintenance of the domestic workers. But in present time it is not in the same footing. Under the present study all the workers are paid workers.

---

31 *Bangladesh Labour Act* 2006, ss 148 and 149.

32 *Bangladesh Labour Act* 2006, s 289.

33 *Domestic Worker Welfare Protection and Welfare Policy* 2015, s 7(1)(a)(b).

They don't have any fixed structure of wages. It is dependent on the age of the worker and on the economic status of the employers. This study reveals that workers below 15 years get lowest amount of wages, workers between 15 to 50 years of age get highest amount of wages and workers above 50 years get equal or less than 15 t0 50 years. Lowest wage of the respondents is Taka 2000. And the highest is Taka 8000. But most of the respondents get in between Taka 3000 to 5000. Only one respondent gets the highest amount Taka 8000 and two of the respondents get lowest amount 2000.

Domestic workers do not get wage regularly in every month. Even they cannot claim it to the owner. Generally it is paid directly to the guardians of the workers. In some cases, even they do not know the amount of wage which is paid to their family members. In most of the cases wages are paid in every three or six months or on the demand of the family members or of the workers. Very few get regular monthly wages.

None of the respondents gets fixed yearly increment. But the workers or their family members demand more than the wage is fixed after six to 12 months and most of the times they get it. In every demand wage is increased by Taka 500 to 1000. Every time when they demand for increment or enhanced wage they have to altercate with the employers. In many cases, they need to switch job for the demand of their wages.

There is no fixed *Eid* or any other festival fixed bonus for the domestic workers. Cent percent of the respondents of this study gets no fixed festival bonus. This is completely upon the desire of the employer. But fortunately all the respondents get festival bonus from their employer. In most of the cases they get dresses and other necessary daily commodities for them or for their family members and a small amount of money at times. They cannot claim it as of right. It is simply a gift from the owner. Generally it is given from the *zakat* or *fitra* of the owner.

3.5. Employment Guarantee

Bangladesh Labour Act 2006 provides provisions against unlawful dismissal, retrenchment, layoff and any other forms of termination.[34] In

[34] Saadi, n 12, p 92.

every kinds of termination, this *Act* ensures various rights of the workers and of the employers.[35] But ironically *Policy* of 2015 provides no provisions for ensuring rights in the above cases except serving notice.[36]

Whatever the law is, in all cases under this study domestic workers are appointed by oral contract where generally only the term regarding wage is mentioned. Provisions like duration of contract, termination of contract and other important provisions are not mentioned in the contract. In every case worker stays at their working place for at least six months to one year. This is not a part of contract rather a tradition. But this is not binding upon the parties. One thing is remarkable here those workers are not interested to fix their length of service. Any party can come out from this contract at any time.

Most of the respondents of this study are working at the same owners' residence for more than one year. Two of them are working for not less than seven years. Five of them are working for more than two years but not more than three years. Others are working in between more than three years to less than five years.

A worker mentions that they can switch job at any time even without any notice. Sometimes they hesitate to ask the owner of the unpaid wage when they leave owners' house without notice. If such situation comes they ask the new owner to pay the unpaid wage of the ex-owner. She also mentions "Owner does not terminate us rather we switch because of the owners' misbehavior or refusal to increase wage or refusal to grant leave."

3.6. Treatment for Injury and Sickness

The *Bangladesh Labour Act* 2006 ensures compensation for injury, occupational diseases, disablement and also for death.[37] The Policy of 2015 also imposes duty upon the employer to ensure medical treatment to the workers at the cost of employer. This Policy also provides a

---

35 *Bangladesh Labour Act* 2006, ss 12(7), 16(1)(2), 20(1)(2) and 22.

36 Saadi, p 92, also see *Domestic Workers Protection and Welfare Policy* 2015, s 15(a)(b).

37 *Bangladesh Labour Act* 2006, ss 150-151.

provision to give compensation according to the nature of injury.[38] In spite of having these provisions of law, no respondent of this study gets grievous injury at their working place. According to their statement they get slight injury at their hands especially on their fingers. Sometimes though in a very rare case they get fracture at arms or legs while working. They get primary medical treatment from their owners. If necessary they are taken to hospitals. In most of the cases they are not happy with the treatment initiatives taken by the owner. The reason is that they are given treatment not by doctors rather by the owners. Sometimes they are taken to the nearest medicine shop and they get medicine on the advice of the sellers of medicine. In rare case, they are taken to the hospital. A respondent mentions that she was taken to hospital two or three weeks after the accident when she got fractures at her hand and finally she was sent back home because of her incapability of doing work. She also mentions that she got a very little amount to take medicine or other medical treatment. She gets no wage when she is sent back to her house. But in most of the cases for small injury and treatment they get treatment costs from the owner and they are not sacked from their employment rather they got less burden of work on those days. Another worker says, "I was suffering from dengue and I was given medical treatment by my owner. I got sufficient medicine and food at that time and I am happy with my owner." Another one says, "Two to three years ago, I got chicken pox and I was directly sent back to my home without giving me a single taka. I stayed home for about two months and I got no wages at that time."

3.7. Maternity Benefit

Maternity benefit is a legal right of workers under the labour law of Bangladesh. At the time of pregnancy, female workers are entitled to 16 weeks leave.[39] She will also get wages at this period.[40] The 2015 Policy states that pregnant woman workers are entitled to maternity leave for 12 weeks, hospital treatment with full amount of their wages.[41] As the

---

38 *Domestic Workers Protection and Welfare Policy* 2015, s 7(7) (9).
39 *Bangladesh Labour Act* 2006, ss 45-50.
40 *Bangladesh Labour Act* 2006, s 48.
41 *Domestic Workers Protection and Welfare Policy* 2015, s 7(5).

domestic workers are workers, they should have same and equal rights of the other categories of workers. With a little exception, most of the domestic workers are woman and it is natural they may get pregnant. Only two of the respondents of this study were pregnant while they were in service. One of them says, "I didn't give my owner the news of my pregnancy. But after one and half months, it became clear to my owner for having various physical complexities. My owner rebuked me several times for my being pregnant. I got no sympathy from my owner on this ground. I had to perform same duties as I performed before pregnancy. However my physical condition worsened for doing many duties. I requested them to give me relief from washing clothes and cleaning floors. But they did not relieve me of these heavy works. Finally, I refused to do these works and I was sent back to my home without giving me any wage of that month. I didn't return back to this owner afterwards." Another one says, "When I gave notice to my owner about my pregnancy they became very rude to me. They told me to leave their house but I took time from them because it was not possible for me to leave alone. But after few days they requested me to stay there because they got no other else for this purpose. I stayed there for about the total period of my pregnancy and finally left before one month of my delivery. I got wages for the period I worked there. They also gave something more from my wage from their *jakat* fund. But they did not give me any leave and pay for my pregnancy leave. Even my owner did not relax any task at this time. I was very worried at that time because of my hard work which may cause unwanted abortion.''

3.8. Food

Most of the respondents of this study have no complain regarding food and water supplied for them. According to their statement they are provided same food as the employer takes regularly. Quality of food depends on the economic condition of the employer. They are happy with the quantity of food they get. One thing they mention that separate and substandard glasses and plates are given to them. Generally they have to take meal at the kitchen and they are not allowed in the dining room. Two of the respondents say that their employer gives them separate rice to cook and different curry which is ordinarily eaten by the

employer. The respondents who are satisfied with food quality and quantity have shown their deep concern in special items of cooked for guests and prepared on special occasion. Very rarely they are provided such food. They ordinarily take the wastages and the remaining portion if there are. A small number of respondents say that they are not happy with the quality and quantity of food they are provided because all the time they have to take stale food which is not sufficient and good to take. Most of them say that they are to take meal after all members and guests complete their meal. A small portion says that they have to take meal after completing all works in the kitchen and at that time we feel no interest in taking meal. One says that she has no fixed timetable for taking food. Her expression is like that "*diner khabar raite ar raiter khaber dine*!" (breakfast at night and dinner in the morning)!

3.9. Accommodation

Accommodation is very much mandatory for those domestic workers who are fulltime appointed and resides in the residence of the employer. All the respondents of this study are fulltime appointed and they reside in the employers' residence. With a little exception, most of the respondents of this study are very much dissatisfied with the accommodation provided to them by their employers. Most of them mention that they have no permanent and separate room to stay. They pass day time at kitchen and night at any room allowed by the employers. Generally it is drawing room or living room or kitchen or veranda. In most of the cases they are not provided any cot to sleep. They usually use quilt (*katha*) and pillow. It is rare to get a mattress. They face many difficulties when guests come to visit employers home. At that time, they have to sleep even under the dining table. Only one respondent mentions that she has got separate room furnished with cot and cabinet having separate washroom. In most of the cases they don't have separate safe and private arrangement for keeping their personal dresses and other utensils. Usually they keep these in bags under employers' cot or on the false ceiling washroom or in the kitchen. One of them given information that they are not even allowed to use fan at hot summer and they are also not provided standard warm clothes and blankets in winter.

3.10. Freedom of Movement

Every person has a right to move freely according to his/her will and necessity. This right resides at the core among the fundamental human rights and also it is recognised as a fundamental right which is recognised by constitutions of various countries. The UDHR, ICCPR etc. under the cover of the International Bill of Rights recognise this right. The UDHR states that everyone has the right to freedom of movement and residence within the borders of each State.[42] It rather states that everyone has the right to leave any country, including his own, and to return to his country.[43] Bangladesh Constitution also provides same provision though some reasonable restrictions are imposed.[44]

Domestic workers are human being. In some cases, they are citizen of the country where they work. In some cases they may not be the citizen but always be treated as human being. So, a domestic worker must have the rights to move freely. Most of the respondents of this study claim that they are not allowed to move freely. Sometimes, they are allowed to go outside of residence but in presence of their employers or employers' representatives. Even they cannot go outside to purchase their personal commodities. A remarkable statement is given by a respondent which is like this, ''I get everything necessary, I have no problem here, I get many things which is unnecessarily costly. But unfortunately, I get no scope to go out to choose for myself. Then I think myself no more than a captive lady.'' Only two of the respondents say that they are allowed to go outside according to their demand. One of them says that she is not allowed even her brother or near relatives like to visit her. One says, ''I have not seen the sky from outside of this campus for three years.'' One reports that she is usually kept locked when her employer leaves residence so that she cannot go out. Another one reports that she went out of employer's residence without their permission on an occasion but she was punished for that.

---

42 *UDHR*, art 13(1).
43 *UDHR*, art 13(2)
44 *Constitution of Bangladesh*, art 36.

3.11. Trade Union, Inspection and Grievance Procedure

One of the most vital rights of any kinds of worker is to be a member of their respective trade union or organization like the same. In Bangladesh, there are no well-organized organizations. But some NGOs work for the welfare of the domestic workers. Present study shows that none of them are members of any domestic welfare organization. They are not recruited through any organization and before their appointment they were not the members of any such organization. Most of them say that they have not even heard the existence of such organization. Only a few have heard that there are some organizations which work for them. Even they have not heard any Government initiatives in this issue.

Disputes are common to every society. Most of the domestic workers under this study faced disputes between them and their employers. In most of the cases, their parents discussed the matter with their employers to solve the problem. In most of the cases they were not satisfied with the solution. In one case the local community member of the employer and the worker solved the problem sitting together.

3.12. Rights of Child and Adolescent Workers

Most of the domestic workers of this study are children. In most of the cases they get no benefit or extra privilege for their tenderness. They do the same as an adult worker does. One of them said, “We are two who work at the same house. Probably, I am 11/12 years old. My coworker is about 35 to 40 years of age. I do the same as she does. We sometimes share our work by ourselves. But she gets more salary than me.” Most of the young workers of this study are interested to study at school but unfortunately they don’t get permission to go out for study. But two of the respondents get this scope. One of them says, “My owner was very interested about my study and they sent me to a community school. I was given a house tutor also. They helped me a lot about my study. But, I had to work hard for the rest of the time to complete my tasks. I was very happy with my employers. Now I can read and write in Bengali, English and Arabic.” Another one says, “My parents requested my employers to admit me at nearest school at the time of my employment and I was

admitted to a school. They gave me everything for my study like books, papers and pens. But it was hard for me to attend school regularly because of hard work. Especially, I was not allowed to go to school at the days when their guests visited their house or at any occasion. So far I know, my parents got little salary for my work because of this facility."

4. Reasons behind this Situation

Vigilantibus Et Non Dormientibus Jura Subveniunt which means law assists those who are vigilant with their rights and not those that sleep thereupon. So, it is obvious to know the rights to enjoy rights. A question is asked to the respondents that why they don't enjoy their rights which is given to them by law? In response to this question, most of the respondents say they do not know that there are laws which ensure their rights. It means domestic workers are completely ignorant of the laws on their rights which ultimately cause violation. Another remarkable portion of the respondents says they are illiterate. Thus no news on their rights comes to them. They also report that they are reluctant on their rights because if they try to exercise those they will be sacked from their job. One of them says that they have no association or organisation which will inform their rights to them. Another one says that they do not like to fight against employers so, they don't get their rights. One says that law is for the rich and not for the poor. Domestic workers are ordered by their parents not to ask anything to their employers or do anything against the will of their employers. One also reports that it is beyond the courtesy to ask anything to employer according to their culture. Some workers get extra benefit from their employers like *Eid* gifts for their family members, job assistance for their family members, *jakat* etc. which will be stopped if they go against their employers.

5. Case Studies

CASE 1

Lucky (fictitious name) is a domestic worker of 14 years of age who lives at her employer's house. She is a Muslim and her employer is also a Muslim. Her residence is at Madhupur, Baliadangi, in the district of Thakurgaon, Bangladesh. Her father is Mobarul Islam who is poor

having a small tea stall and her mother is Jahura Begum. She has three sisters and one brother. All her sisters have got married and her brother is studying at a local school. When she was only seven years of age, she was sent to Dhaka for working as a domestic worker. Her neighbour brought her to Dhaka. He sent her to her previous employer's house. She worked there for about four and half years. From there, she was appointed here by the assistance of her same uncle. Both of her employers were unknown to her and her family at the time of her appointment. She said, "My family members don't know where I was appointed". But after employment, her parents visited her employer's house once more. "When I was appointed for the first time, I requested my parents not to send me to Dhaka" she mentions. Her parents were poor and that's why they sent her with her neighbour. She reported, "I don't know how much I got from my previous employer". She was appointed without any contract, just on verbal communication. Her neighbour who appointed her had made verbal contract with her employers and that was communicated to her parents. Her father never contracted directly with her previous employer. Her parents directly made verbal contract with her present employer. She also reports, "So far I know, my family gets Tk. 3000/= for every month. My family takes it in advance. I get no fixed *Eid* bonus. But my employer gives new clothes and also unfixed hand cash to me and my family members". Her working hour is not fixed. She wakes up early in the morning to prepare food and to do other works.

Her main task is to cook food and to serve it to her employer's family members. She gets little instruction from them to cook. It depends on her choice to cook and to choose dishes. But in doing so, she prefers the choice of the members of this family. She says, "I eat after they finish their meal. I never choose my meal; I get what they allow for me. In case they offer me snacks and other occasional food, sometimes I accept and sometimes I refuse. I like eating less." She gets break in afternoon which is not fixed. She goes to bed after the closure of all the rooms for sleeping at night which is usually 11pm. She says, "I work every day of the week, of the month. I go home once a year. I stay 10 to 20 days at my village. I get full salary at this period of time". When she gets sick, the lady of the house reduces her work load. Her owner prescribes medicine

for her usually but in some cases they take her to local hospital. She gets no other type of leave other than going home once a year. She usually sleeps at drawing room on the floor having a mattress, a pillow, a blanket and a net to protect her from mosquitoes. It disturbs her a lot if they watch TV for late night because she has to wake up early in the morning to prepare breakfast. She has places to keep her dresses and other personal utensils but that is not under her sole control. In no case, her salary is reduced by her employers. If she breaks any instructions, sometimes they rebuke her but they never physically torture her. Her employers gave commitment to her parents that they would help her family at the time of her marriage.

CASE 2

Her name is B (fictitious name) and people call her *Sonekar Ma* (Soneka's mother). Every employer calls her '*Bua'*.[45]. She is a Muslim married woman having four children. She is around 40 years of age. She lives in *Kamrangir Char* in Dhaka. Her husband sells cigarettes and battle leafs at street. She works at several apartments of BUET[46] quarters. She reports, "I work in six different apartments under different employers. I have to work from four to six different specific tasks at every employer's house. I get Taka 600 for every different task. My monthly income is around Taka 15000 to 18000." She enters into oral contract by herself with her employers. She fixes only salary, specific task and time of her work at the time of entering contract. She does not reside at her employer's residence. She gets one day break in every week. She also gets leave when she gets sick. But if the sickness lasts long, she is dismissed without showing cause or without any benefit. Her employer does not pay her anything extra for medicare. She also gets *Eid* bonus but it is not fixed. It is completely dependent upon the mercy of the employers. She doesn't have leave and holydays excepting weekly one. One thing must be mentioned here that she gets one week leave after *Eid* but not on *Eid* day. She gets extra benefit when she works more. So

---

45 The expression '*Bua*' is popularly used to address the domestic aid all over Bangladesh particularly in the Dhaka city.

46 Bangladesh University of Science and Technology, Dhaka, Bangladesh.

far she knows, they do not have any organisation in their locality which works for domestic workers. They are around 50 in number who work at BUET campus. They sit together informally and discuss about their wages, leave and misbehaviour the received from their respective employer. She is not registered anywhere. The parties to the contract may terminate the contract at anytime without serving any notice. She gets wages for those days she works for her employer in such case. She has not faced any situation where her wages has been reduced for unauthorised leave or breaking cookeries of the employers.

6. Findings

This article discusses the rights of the domestic workers based on a field study. In some cases, this article analyses the rights of domestic workers catalogued in various domestic and international laws. However, the main focus is to find out the nature and scope of labour rights which they are actually getting and which they are not getting. This article shows that domestic workers in Bangladesh are out of the protection of labour law because of section 1(4)(*nna*) which declares that this Act of 2006 will not be applicable for the workers in informal sectors like domestic workers. Recent enactment of Bangladesh Government entitled as *Domestic Workers Protection and Welfare Policy* 2015 (Policy) recognises some of the rights of the domestic workers which are not as standard as provided by the *Bangladesh Labour Act* 2006. Rights declared in this *Policy* are also not as standard as those in international instruments.

The study shows that domestic workers do not get appointment letter as a proof of their appointment. Most of the employment contracts are oral and unwritten. Even in the unwritten contract they only negotiate about their wages. Workers under this study do not get wages in their hands every month. In most of the cases, guardians of the workers receive their wages. The range of wages found under this study is between Taka 2000 to 8000. This article reveals that most of the domestic workers have no fixed working hours. They have to work from early morning to late night with little exception. They have no weekend and there is no established norm that they will get leave on holidays even on *Eid* day. Some of them

get weekend leave and a very little percentage, which is statistically ignorable, gets vacation after *Eid*. There is no guarantee of their employment. Both the employers and the workers can come out from the employment contract at anytime. At the time of their sickness, they get small treatment according to the advice of their employers, a little portion of them get advice and treatment from local government hospitals. Maternity leave and other benefit are completely unknown to the employers even to the workers. In some cases, they are given money for treatment which is dependent on the wish of the employer and it is paid from employers' *jakat*, *fitra* fund or funds of the same kind. Most of the workers under this study are child and adolescent. They get no special rights. Employers do not allow them to go to school. Only two of them are allowed to go to school. Unlike workers in formal sectors, none of them is member of any trade union or any organisations which work for them. Most of the workers are happy with the quality and quantity of food they are provided. But in most of the cases, they are unhappy in terms of accommodation because they pass their little leisure at kitchen and sleep at living room or dining room or at veranda. In terms of freedom of movement, they mention themselves as captive because they are not allowed to go outside of the employers' house even in grave necessity like death of nearest relatives.

7. Recommendation and Conclusion

The findings of the article reveal that that overall situation of domestic workers is miserable. Except one or two rights like food and clothes, most of the rights of a domestic worker are under the lower level of minimum standard. Therefore, this article suggests for various steps to be taken by the governmental and non-governmental organisations (NGO) to improve this situation. To this end, immediately the Government should take necessary steps to create awareness of the workers, employers and public and private authorities by advertisement, leaflet, and pamphlet or by other means about the rights of the domestic workers. Radio and television can play important role in this regard. NGOs should come forward to train and aware the domestic workers. Finally, this article suggests the Government of Bangladesh to ratify *ILO Convention* 189 and bring the workers of informal sector under the protection mechanism of the *Bangladesh Labour Act* 2006.

LEGAL AWARENESS AND RAISING OF AGRICULTURAL INCOME TAX: ROOT LEVEL EVIDENEC FROM A NORTHERN VILLAGE OF BANGLADESH

Sharmin Aktar[*]

Abstract

The paper looks at the awareness of crop farmers about agricultural income tax in a village of a northern district of Bangladesh. The findings of this examination are located and then interpreted with a view of assessing how far Bangladesh needs to go for making crop farmers aware of agricultural income tax taking their financial situations into account. Outlining principles, taking into consideration legal framework, analyzing everything so far as awareness of crop farmers in relation to agricultural income tax is concerned, it demonstrates that this regime is to be secured in a coherent manner and must be perceived by law-makers as matters of public policy. The law suggests an in-built mechanism to promote awareness about agricultural income tax and protect the rights of crop farmers. Moreover, the lack of educational qualification and the shortage of manpower in the tax administration are two added problems to the issue. It is revealed from survey that crop farmers are not all aware of agricultural income tax. However, this awareness among these crop farmers will not enhance the quantity of agricultural income taxes, if certain requirements are not fulfilled, for example, they must be financially solvent and fall within the taxable limit. Therefore, the issue is comparatively less explored and as such calls for in-depth study to bring the matter to the forefront.

[*] PhD, Assistant Professor, Department of Land Management and Law, Jagannath University.

1. Introduction

Taxation is a significant issue in modern state governance and developmental paradigm. Every country fashions its own tax system to collect revenue requiring the performance of pressing obligations. Tax is an obligatory contribution given by the citizens to the government and the government spends the revenue for the common good of the public. Tax compliance is a complex issue, since it is not easy task to persuade taxpayers to comply with tax requirements even though tax laws are in existence. It is also an important factor in the realization of the tax revenue target. The higher the tax compliance, the tax revenue has increased. Awareness and understanding of the taxpayer about tax laws greatly affect tax compliance. However, Bangladesh is a small country with large population and with fertile landscape. Farmers are no doubt the heart of the economy, though their words are not heard in tax system of the country. Except large few investors in agriculture, earnings of most of the farmers are seasonal and negligible from the context of tax assessment. Hence, this research is an initiative to go through the consciousness of crop farmers about income tax laws. The present study further conducts a socio-legal research to find out awareness level of crop farmers about agricultural income tax and taxpayer compliance to increase tax revenue and suggest ways out for further improvement of their awareness.

It is undeniable that effective and sustainable social development depends on proper formulation of public policies, legislation and implementation of those ensuring rights of all citizens. Further, the concept of the welfare state has now become more popular, enclosing the protection role of the state by promoting equal opportunities and equitable distribution of public resources and responsibilities for its citizens. In modern system of governance, the relationship between taxation and economic and social development is important because it provides governments with reliable and sustainable means of revenue collection; reduces dependency on foreign aid, increase financial autonomy; enables government to provide various cash support to deserving citizens; encourages good governance, accountability, and transparency; helps formalize the economy and promote economic

growth etc. In line with the undeniable reality, the present study conducts a socio-legal research to find out awareness level of crop farmers about agricultural income tax and taxpayer compliance to increase tax revenue and suggest ways out for further improvement of awareness among crop farmers which will speed up public policy.

However, the necessity of paying taxes is not felt by most of the crop farmers due to lack of consciousness and knowledge. Registered and non-registered crop farmers have no full access to tax information. This paper will take into account and reveal as to how many crop farmers have Tax Identification Number (TIN). This is an important factor, after all, since; people tend to evasion of tax payment that starts with not register himself as a taxpayer. Taxation has a variety of rules that have been set in legislation. Every taxpayer, whether registered or unregistered, must know and understand all the tax rules. The knowledge or understanding of taxpayers on tax laws can affect the obedience of the taxpayer itself and the more people understand the tax laws, the higher the state revenue obtained from the tax sector because the public realizes the importance of taxes to the state.[1]Moreover, literacy rate in the country has increased satisfactorily in present days in comparison to the last two decades, though farmers in the country lack adequate information about their tax obligation towards the state. This study examines existing legal provisions and endeavours to investigate as to whether crop farmers are vigilant about income tax laws or income tax laws are enough to make crop farmers aware of their obligations and whether those are making them compliant with income tax laws properly. Furthermore, taxpayer compliance is influenced by several other factors, namely, conditions of the tax administration system of the country, service to the taxpayer, tax law enforcement, tax audit and tax rate. This research will try its best to look into all these factors so far as these issues touch the research title.

Besides, the object of the study is to reduce economic inequality in income and wealth by taxing rich crop farmers, if circumstances allow,

---

[1] NR Adhikari, "Taxpayer Awareness and Understanding on Taxpayer Compliance in Nepal", (2020) 1 *Management Dynamics* 23, pp 163-168.

reasonably and conferring benefit to the poorer section. It is possible only when rich crop farmers would be brought in practice under the purview of income tax laws. Making them aware of income tax laws can ease the matter. If most of the crop farmers are aware, some of them would pay their income taxes,[2] and it would eventually accelerate economic growth of the country. Therefore, accelerating economic growth is another objective of the research. Further, the research looks for reasons and causes for which laws are not properly going to the knowledge of crop farmers. This study also endeavors to find out policy and legal concerns and suggest policy reforms including legal and administrative reforms. In brief, the study endeavors to find out answers of two questions. The first question is -Are crop farmers aware of income tax laws? Under this question, there are four other questions. These are a) If they are aware, are they paying taxes?, b) If they are aware and not paying taxes, then why they are not complying with laws?, c) If crop farmers are not aware of income tax laws, why they are not aware? and d) Is there any relation between awareness of crop farmers and tax compliance? / Does the awareness of taxation affect the compliance of individual taxpayer who is a crop farmer? The second question is as to why crop farmers are not complying with income tax laws, though lots of laws exist?

2. Methodology

A blend of both quantitative and qualitative approach has been used in this socio-legal research. Quantitative data has been collected by field work using social survey tools and techniques. Both structured and open-ended questionnaire have been used for survey. Simple statistical and arithmetic calculation tools, techniques and formula have been used in analyzing numeric or quantitative information but no statistical or mathematical model have been used. Crop farmers of Mesot in Gaibandha district of Bangladesh are the population of this study. Convenience and purposive sampling technique have been utilized to collect primary data from the respondents having knowledge and understanding of income tax regulations. In addition to survey, intensive interview has been conducted to find the critical and differentiated

[2] Income Tax refers to a tax that is directly imposed by the government on the financial income of any individual and business incurred in a year.

information which are not covered and obtained by survey. Besides, two case studies have been conducted for the purpose of the research in the project area. Case studies have been conducted to collect more specific and detailed information from crop farmers who have experienced extreme situation and severe violation of rights and faced severe difficulties to get remedies.

3. A Closer Look to Awareness and Understanding *v* Income Tax Laws

Agriculture remains the most important sector of Bangladesh economy. It contributed 13.31 percent to the national GDP according to Agriculture Census, 2019 and provided employment for 40 percent of the population. GDP from agriculture in Bangladesh averaged 8879.79 BDT million from 2006 until 2018, reaching an all-time high of 10468.80 BDT million in 2018 and a record low of 7017.10 BDT million in 2006.Our agriculture is day by day flourishing and it is known to all that all the farmers are not living in acute poverty and are eligible to bear the burden of public revenue. Those crop farmers, who are eligible to pay income taxes, must be informed of the importance of paying income taxes. Close connection exists between awareness and understanding and paying income taxes. Awareness about income taxes and its laws put an impact on tax compliance. Awareness here means understanding the meaning, function and purpose of the payment of taxes.

If the tax justice demands submissive behavior from the tax payers, Knowledge of tax rules has to be given to them. If taxpayers feel that all taxpayers are treated fairly, then every taxpayer tends to run his tax obligations. The taxpayers must obey the tax laws in order for the tax revenue of the state to reach the target. Peoples active role in supporting national development is indispensable, particularly the taxpayer. Compliance is very important to promote taxation in the country because tax compliance determines state revenues. Currently, the burden of income tax lies on a limited number of persons with higher marginal income tax rates. The rationale behind the study is to bring crop farmers under the income tax revenue collection system following the policy of progressive income tax. Agriculture is the pillar of the country, though

farmers are the grass-root people. The opinion of these grass-root people, that means, farmers about their understanding on knowledge, attitude and practice of tax system and tax laws are vital in augmenting revenue and achieving fiscal discipline and increasing self-finance. If there is lack of awareness and understanding about income tax laws, a culture of paying income taxes could never be developed.

In addition, awareness and understanding about income tax laws are the ingredients of income tax justice. Tax justice is about understanding why we tax, about defining the attributes of a good tax system, about defining the process that delivers tax justice and finally it is about understanding transparency.[3] Furthermore, tax evasion has to be prevented in order to ensure tax justice. Tax evasion or dodging of tax return is causing a significant amount of revenue losses in Bangladesh.[4] Corporate tax payers are more involved in the crime of tax evasion than individual tax payers in Bangladesh as a result our inflation rate has been in double digit.[5] He added that the government is trying to motivate tax payers paying the appropriate amount of tax, but unethical tax payers are always finding out the loopholes that exist in our current tax policy and continuing their tax evasion practice with pride. It was opined that the higher the level of awareness of the taxpayers, the taxpayers will be able to determine their behavior better and in accordance with the provisions of taxation, so taxpayers have a high compliance rate.[6] It was also

3 R Hashmi and *et al*, "Knowledge, Attitude and Practice of Tax System in Bangladesh: Towards Tax Justice", *AIUB Journal of Business and Economics,* 12, No. (2015), pp 01-20.

4 M Rahman and *et al*, "Estimating Revenue Losses Evolve from Tax Evasions in Bangladesh: A Formal Model Under Direct Taxation", *AIUB Business Economics Working Paper Series*, Working Paper No. AIUB-BUS-ECON-2018-19, June 2008.

5 Hasan and *et al,* Tax Compliance in Bangladesh-A Structural Equation Modeling Approach, *American Journal of Trade and Policy*, 4, No. 1 (2018), pp 87-94.

6 Suyanto and *et al*, "The Influence of Tax Awareness Toward Tax Compliance of Entrepreneurial Taxpayers and CELENGAN PADJEG Program As a Moderating Variable: A Case Study at the Pratama Tax Office of Wonosari Town", *Inferensi*, 10, No. 1 (2016), pp 47-68<https://www.researchgate.net/publication/ 309963474_ THE_INFLUENCE_OF_TAX_AWARENESS_TOWARD_TAX_COMPLIANCE_ OF_ENTREPRENEURIAL_TAXPAYERS_AND_CELENGAN_PADJEG_PROG

expressed that taxpayer compliance is influenced by several factors, namely, conditions of the tax administration system of the country, service to the taxpayer, tax law enforcement, tax audit and tax rate.[7] It was added that individuals with stronger ethical mind may have favorable compliance attitude as they will regard complying with rules and regulations as an obligation that must be honoured.[8]

Indeed, income tax is one of the major components of tax revenue. The main use of the money government collects from taxes is to spend for goods and services given to the public. Tk. 568,000 crore budget has been announced for the fiscal year 2020-21. Total revenue collection has been estimated to be Tk. 3, 30,000crore. The overall budget deficit has been estimated at Tk. 1, 90,000crore, which is 6 percent of GDP. In financing the deficit, Tk. 80,017crore will come from external sources and Tk. 1,09,983 crore from domestic sources. In order to provide a better life for the people, government needs money and thus internal sources are the key for sustenance and development of a nation. Awareness and understanding of income tax laws among all including crop farmers will promote income tax collection and the collection will help financing development activities, achieving self-sufficiency and reducing excessive reliance on foreign aid or bank loan.

4. Legal Regime of Income Tax in Bangladesh

Bangladesh is agriculture –prone least developed country (LDC).Agriculture and economic development are interrelated. It was thought that there is a close connection between agriculture and

---

RAM_AS_A_MODERATING_VARIABLE_A_Case_Study_At_The_Pratama_Tax_Office_Of_Wonosari_Town> accessed on 23 June 2019.

7 Nurkhin and *et al* (2018), The Influence of Tax Understanding, Tax Awareness and Tax Amnesty toward Taxpayer Compliance, (2018) 2 *Padjadjaran Nursing Journal* 22.

8 J Albede and *et al*, "Individual Taxpayers' Attitude and Compliance Behaviour in Nigeria: The Moderating Role of Financial Condition and Risk Preferance", (2011) 5 *Journal of Accounting and Taxation* 3, pp 91-104; also available at: <https://www.academia.edu/1424991/Individual_taxpayers_attitude_and_compliance_behaviour_in_Nigeria_The_moderating_role_of_financial_condition_and_risk_preference>accessed on 23 June 2019.

economic development in developing countries.[9] It was believed that a growing agricultural sector contributes much in eradication of poverty.[10] On the one hand, people are benefitted by the agricultural sector and on the other hand, the state gets revenue including income tax from here". However, Research Department of Bangladesh Bank published Quarterly Analysis on Government's Revenue Receipts (January-March 2018). It is found from the report that during January-March 2018, the contribution of direct tax in the total NBR revenue collection was 30.15 percent amounting to TK. 15436.88 crore which was 2.78 percent and 6.21 percent higher than that of previous quarter and the corresponding quarter of preceding fiscal year respectively. In the direct tax, contribution of income tax is 98.18 percent. In this revenue receipts, net income tax is shown, but collection of income taxes from different sources including agriculture is not found. Hence collection of income taxes from agriculture is beyond public knowledge.

However, involving the issue of income tax concerning crop farmers, there are several laws and a number of them are in the pipeline. At present, 'income tax', the largest sources of direct taxes, is governed by the Income Tax Ordinance, 1984 and Income Tax Rules, 1984. Apart from this Act and Rules, some other legislation is also being followed to assess the income of any entity. Those legislations are: 1. SRO or Gazette Notification; 2. Income Tax Circulars; 3. General or Special Order; 4. Explanation/Clarification/Office Memorandum; 5.Verdicts of Appellate Tribunal for equivalent fact; 6.Verdicts of the High Court Division on question of law; and 7. Verdicts of the Appellate Division on judgment of the High Court Division. In fact, the country inherited the British Indian tax structure as a part of Indian sub-continent after its liberation in 1971. Up to 1984, Bangladesh followed the Indian Income Tax Act 1922 in the name of Income Tax Act to govern the income tax department. In 1984, Bangladesh introduced the Income Tax Ordinance, 1984 (XXXVI of 1984) in place of the Indian Income Tax Act, 1922 which came into activation on the 1st July, 1984.Agricultural income tax was first imposed in the sub-continent by the Bengal Agricultural Income

9 Ghatak and *et al*, "Agriculture and Economic Development", (1985) 2 *American Journal of Agricultural Economics* 67, pp 451-452.

10 Ibid.

Tax Act, 1944.[11] The taxable limit with some exceptions was then set at more than taka 3500.00 per year. The exemption limit was lowered to taka 3000.00 in a later period and this provision continued up to June 30, 1976. Agricultural income tax was merged with general income tax and this amendment of the Income Tax Act became effective from the first July of 1976.

So far as the research title is concerned, earnings of crop farmers are regarded as agriculture income and so they are liable to pay agricultural income tax, if their income is taxable. According to section 20 of the Income Tax Ordinance, agricultural income is the fourth head among seven heads of income. Section 2 (1) of the Income Tax Ordinance, 1984 defines agricultural income as any income derived from any land or building in Bangladesh that are used for agricultural purposes. Besides, some other sources of income are also considered as income generated under this head as per sections 19(17), 19(19), 26(2) and 26(3) of the Ordinance. Considering provisions of the Income Tax Ordinance, 1984, agricultural income is classified into three categories, namely, fully agricultural income, partly agricultural income and other agricultural income. As per section 27 of the Ordinance, some expenses, namely, land development tax, local tax, production costs, insurance premium, maintenance cost for irrigation plant, depreciation, interest on mortgage, interest on borrowed capital, losses from sale of demolished machineries, losses on sale or exchange of machineries and other expenses are allowed to be deducted from the revenue, while computing taxable income under the head 'agricultural income'. Net agricultural income is derived after deducting admissible expenses from the total gross agricultural income. But in any assessment year, if the amount of allowable expenses is greater than the amount of gross agricultural income, then it will be considered as net loss. According to section 37 of the Ordinance, such loss can be set off against his income from any other head of income excluding capital gain. According to section 41, where, for any assessment year, such loss has not been so set off, it shall be carried forward to the next following assessment year.

11 The Bengal Act No. IV of 1944.

However, agricultural income not exceeding TK. 2 lacs is non-assessable for an individual assessee, where only source of his income is agriculture under the 6th Schedule, Part A, Para 29 of the Ordinance of 1984. Moreover, reduced tax rates are applicable for certain agricultural incomes and this is found in the SRO. Moreover, it is required to take note of the classifications of agricultural income so that it will help the researcher to assess the income of crop farmer and put the crop farmers under any of the three categories, namely, fully agricultural income, partly agricultural income and other agricultural income. Furthermore, agricultural incomes are non-assessable subject to some conditions elaborated in Paragraphs 27, 29, 42; Part A, Sixth Schedule of the Income Tax Ordinance, 1984. Nevertheless, reduced tax rate for certain agricultural incomes are found in the SRO No. 199-AIN/IT/2015 dated 01/07/2015, SRO No. 254-AIN/IT/2015 dated 16/08/2015, SRO No. 255-AIN/IT/2015 dated 16/08/2015. However, as per section 27 of the ITO, 1984, in computing the taxable income under the head 'agricultural income', some expenses are allowed to be deducted from the revenues under this head. Those allowable allowances and deductions are: land development tax, local tax, production costs, insurance premium, maintenance cost for irrigation plant, depreciation, interest on mortgage, interest on borrowed capital, losses from the sale of demolished machineries, losses on sale or exchange of machineries and other expenses.

Further, the Income Tax Ordinance, 1984 addresses tax evasion and tax avoidance. Tax evasion is mentioned in sections 123, 124, 124A, 124AA, 125, 126, 127, 128, 129A, 129B, 130, 131, 132, 133 of the Ordinance of 1984. Penalty provisions have been incorporated therein in order to tackle the tax evasion practice. Moreover, no one can be penalized unless he has been heard or has been given a reasonable opportunity of being heard. Though tax evasion is illegal, tax avoidance is legal. Provisions addressing the issue of tax avoidance are found in sections 104, 105, 106 and 107 of the Ordinance. For conducting all such functions concerning income taxes, one department, called, the Income Tax Department is in existence in the country. The Income Tax Department is governed by the National Board of Revenue under the

Internal Resource Division (IRD) of the Ministry of Finance of the Government of Bangladesh. Currently there are 31 tax zones under which there are 649 circle offices across the country under this department. Commissioners of Taxes are the zonal heads. They are appointed by NBR on a territorial basis in most of the time and may enjoy the supreme power of their jurisdiction. They work as per the direction of NBR and holds liable for the functioning of the department headed by them. Circle offices are responsible for assessing, imposing and collecting direct taxes from the taxpayers. However, the government imposes income tax on financial income generated by all entities within their jurisdiction in an income year.[12] This is the key source of funds that the government uses to finance its activities and serve the public. The Income Tax Department which is responsible for all activities related to the taxation process desires a system that would make the process of filing of income tax returns easier for taxpayers than manual filing process as well as reduce the time required for data entry at their end on receipt of the income tax returns. From this point of view, electronic return filing has been introduced since 2016 in Income Tax Department of Bangladesh.

5. Data Analysis and Findings

As stated earlier, primary data is collected from the respective circle office and from the respondents. Primary data found from the circle office and data collected from the respondents, who are crop farmers, is enumerated below. Side by side theories explaining primary data are highlighted.

5.1. Factor Analysis for Knowledge and Awareness of Crop Farmers about Income Tax

It is a duty of every individual living and earning through different ways in Bangladesh to pay proper amount of taxes for the economic development of the country. According to National Board of Revenue

12. Entity includes a person, a partnership, an organization, or a business that has an authorized and separate identity.

(NBR) data, as of June 2018, there are about 3.5 million tax identification number (TIN) holders, of which about 1.95 million submitted tax returns. The research is not intended to say that crop farmers are not paying taxes. But they are rich among others who may be defaulters and whose issues have to be addressed. The study in the following Table: 1 depicts educational qualification of crop farmers and endeavours to demonstrate as to whether knowledge and awareness on income tax is affected by their educational profile.[13]

Table:1
Descriptive Statistics of Education of Crop Farmers

Educational Qualification	Total	Percentage
Below SSC	17	85%
SSC and further higher degrees	3	15%

The educational information on the respondents as presented in Table: 1 indicates that all three crop farmers having SSC and higher education background know about agricultural income tax. Table: 1 equally reveals that 1 out of 17 crop farmers, having no degrees, know about this respective class of taxes. It appears that an intimate connection exists between knowledge on agricultural income tax and educational degree. Therefore, crop farmers require achieving minimum SSC and this education will make them aware of agricultural income taxes. In addition, 4 respondents, who know about agricultural income tax, were asked as to how they came to know about agricultural income tax, they replied that they knew of it through his acquaintances, Govt. circulation, tax return form and books. Further, answer of one question, namely, 'How much amount of land do you cultivate?' is shown in the following Table: 2.[14]

---

13 S Aktar, "In Quest of Awareness of Crop Farmers about Income Tax Laws: An Empirical Study in Agricultural Sector of a Village of a Northern District of Bangladesh", *Research Report,* financial year 2019-2020, Jagannath University, p 14.

14 Ibid, p 15.

Table: 2
Descriptive Analysis of Land Cultivated by Crop Farmers

Amount of land cultivated by farmers	Total	Total
Upto 3 bighas	14	70%
More than 3 bighas	6	30%

Case Study 1

Tahirul, who resides in Mesot village of Sagatha Upazila of Gaibandha district, is a farmer. He is 38 years old. He produces onion, pepper, nut and black cumin. He owns 35 bighas of land and no land is usually taken by him as barga. In the last assessment year 2019-2020, TK. 1.5 lakh was earned and TK. 1 lakh was spent for seeds, plants, irrigation, fertilizers and for buying and maintaining other agricultural instruments and for making store house for preserving crops etc. He knew about tax and income tax but did not know about agricultural income tax. He never gave agricultural income tax and did not know as to why he avoided paying this respective type of taxes. How did he know about taxes and income taxes, this question were negatively answered by him. But, of course, he did not know of it through books, papers, radio, TV. Furthermore, no income tax official went there to make them aware of agricultural income tax. However, as he did not know of these relevant taxes, no question arises about knowing and complying with laws concerning agricultural income tax. He was asked as to whether he should pay taxes to the Govt. or not, he gave negative answer. He opined that government never assist them in purchasing seeds, plants, fertilizers, boats; in purchasing irrigation machineries or in preserving crops.

In addition, he presented his three crop related sufferings before the researcher. First of all, he discusses about the growing of onions. He spends TK. 700 for producing each K.G.40 onions and K.G. 40 onions are sold at price TK. 400. The statistics show as to how he suffers terribly. He opined that when he sells onions in the season, Govt. at that time imports onions, which eventually push the market to fall down the

price. Besides, lots of onions are also damaged because of lack of preservation. There is no warehouse in this village to store onions. Secondly, he is trying to do poultry farming. Tk. 120 is spent for each broiler chicken and each K.G. of it is sold at TK. 100. It was said that the severe difficulties are faced by poultry farmers. Last of all, he pointed out his cow farming. Herein he spends per day average TK. 647 for feeding each cow for improving dairy cattle productivity. Those are lactating cows. He gets from each cow average daily K.G. 7/8 milk, which is sold at price Tk 60 per K.G. His average daily earning is TK. 420/480. It appears that he spends a lot for cow farming and do not get benefit out of this farming.

A number of factors are responsible for lack of knowledge and awareness of crop farmers about income tax regime in Bangladesh. In addition to tax education, the influence of taxpayers' knowledge and awareness found to be moderated in the above case study by his financial condition. It was exhibited that his financial dissatisfaction never urged him to get information about income tax laws, income tax rights and obligations. This finding suggests that financial conditions exert significant effect on the impact of crop farmers', who are taxpayers', attitude on tax compliance. Furthermore, when respondents were asked as to what type of crops they produce, they said that they usually produce paddy, jute, potatoes, eggplant, onion, pepper, black cumin, mustard, green leafy vegetables. Answers of two questions, namely, '1. How much amount of money do they earn by selling the produced crops from their land under cultivation or land under other farm activities last year? and 2. How much amount of money do they spend for purchasing seeds, fertilizers etc. or for purchasing and repairing necessary instruments in their cultivation or in their agricultural activities last year?' of twenty farmers are shown below.[15]

[15] Ibid, p 16.

Table: 3
Descriptive Analysis of Net Agricultural Income of Farmers

No.	Income from agriculture	Expenses	Net income from agriculture
1.	44,000	35,000	20,000
2.	30,000	10,000	20,000
3.	22,000	20,000	2,000
4.	60,000	40,000	20,000
5.	15,000	12,000	3,000
6.	45,000	35,000	10,000
7.	40,000	30,000	10,000
8.	12,000	8,000	4,000
9.	1,50,000	1,00000	50,000
10.	35,000	30,000	5,000
11.	65,000	60,000	5,000
12.	88,000	70,000	18,000
13.	16,000	8,000	8,000
14.	20,000	10,000	10,000
15.	30,000	20,000	10,000
16.	2,00000	1,00000	1,00000
17.	9,000	4,000	5,000
18.	30,000	20,000	10,000
19.	46,000	34,000	12,000
20.	44,000	25,000	19,000

The above table shows that the net income of any farmer does not exceed taxable limit of two lakhs. This statistical data evidences economic conditions of crop farmers. Earnest effort has to be spent by the Govt. by giving them subsidy in order to raise their income if the Govt. wishes to get agricultural income taxes from them. Further, the policy of a progressive income tax is now being followed by the responsible governments throughout the world. Those with higher incomes are

expected to pay a higher percentage of their income tax than those with lower incomes. But the policy makers of Bangladesh must think about this independently rather than compare income tax rates with neighbouring countries. Considering our socio-economic conditions, the present income tax structure is not suitable to attract enough people to pay taxes. Hence, government requires focusing on devising a long term plan to increase income tax revenue. The income tax rate needs to be brought down to a level where crop farmers with taxable income feel comfortable to pay income tax. The income tax net would then be wider

Case Study 2

Mr. Asadullah is a farmer, aged 33 years. He is a Master in Business Studies. He produces different kinds of seasonal vegetables, owns three bighas of land and did not take any land in the last assessment year as barga. In the last assessment year, 2 lakhs was earned and spent TK. 1 lakh for seeds, plants, irrigation, fertilizers and for building and maintaining other agricultural machineries or for making store house for preserving crops etc. He knows about tax, income tax and agricultural income tax. He never gave agricultural income tax, though he did not know as to why he avoided paying this respective type of tax. He became aware of this agricultural income tax while studying in Bachelor in Business Studies and Masters in Business Studies. He is aware of laws regarding agricultural income tax in the country and opined that everyone should pay this tax to the Govt. According to him, Govt. purchases paddy from the farmers at a higher price than the price available in the market in order to assist them financially. He added that the scenario is just opposite as the local leaders purchase paddy from the farmers at a comparatively lower price, sell them to the Govt. by using the identity card of those root level farmers and earn profit, which eventually deprive farmers from getting financial assistance from the Govt. He suggests that circulation, promoting awareness, proper distribution of subsidy and removal of corruption conducted by local leaders are required to uplift the situation of crop farmers and thereby to bring them within the list of agricultural income taxpayers.

Muslichah successfully proved the influence of tax simplification on tax compliance behavior.[16] Alternatively, all tax matters are complicated and therefore, income tax laws and issues have to be easier to make crop farmers aware of them. Knowledge and awareness through simplified tax structure and laws will cultivate a submissive behavior and make them compliant, if they come within the taxable limit. Further, one of the factors affecting taxpayer compliance level is the level of taxation understanding. The taxpayer understanding of tax laws is the ways of taxpayers comprehend the existing rules. The lack of taxpayer's understanding of the tax laws causes them to be unable to comply with their obligations, so they become non-compliant taxpayers.[17] Several researchers have proved that tax understanding is able to influence taxpayer compliance positively and significantly. However, taxpayer compliance can be measured through how much taxpayers understand all prevailing tax laws and regulations, and how taxpayers can carryout the procedure of submitting tax correctly. So, tax simplification, taxpayer awareness and understanding of tax laws and crop farmers' compliance as a taxpayer are all connected.

Taxpayer compliance is further influenced by tax-payer awareness. Self-awareness of taxpayers is needed because the prevailing collection system isa self-assessment that provides full opportunity for taxpayers to complete their tax obligations. It is emphasized that the tax payer with his awareness must have paid their income tax on agriculture correctly. But in reality, everyone tends to avoid paying taxes. Nevertheless, causes that promote taxpayers including crop farmers avoiding taxes are-a) Dissatisfaction with public service, b) Unequal development of infrastructure, c) Number of corruption cases conducted by the governments, d) Tax amnesty program of the government, e) Conditions of the tax administration system of a country, f) Lack of tax law enforcement, g) Tax audit, and h) Tax rate.

16 Muslichah, "The effect of tax implementation on taxpayers' compliance behavior: religiosity as moderating variable", (2015) 1 *Journal of Finance and Banking* 19, pp 98–108.

17 P Hardiningsih & N Yulianawati, (2011) 1 *Influencing factors willingness to pay tax. Financial Dynamics and Banking* 3, pp 126–143.

However, notwithstanding the various fiscal reforms of the recent past, Bangladesh Tax system continues to suffer from a number of major weaknesses: 1. Low level of revenue mobilization, 2. Regressive nature of taxation (especially VAT), 3. High tax incidence, 4. Low tax base, 5. High degree of tax evasion, 6. Limited administrative capacity, 7. Resource constraints (Human and logistics), and 8. Cumbersome legal procedures.[18]

Table: 4
Knowledge of Respondents about Tax, Income Tax and Agricultural Income Tax

Tax		Income Tax		Agricultural Income Tax	
Yes	No	Yes	No	Yes	No
9	11	6	14	4	16

The above table depicts as to how many crop farmers know about tax, income tax and agricultural income tax. As stated earlier, total respondents are 20. The above statistical table has been prepared on the basis of 20 crop farmers. However, crop farmers were asked as to have they ever given agricultural income tax. They replied negatively. If the answer of the respondent were positive, then they would have been asked as to where did they give agricultural income tax, how did they give agricultural income tax, have they maintained any document or related papers of given agricultural income tax, how many times have they given their agricultural income tax. These questions are irrelevant, so far as the negative answer of the first question is concerned. They were further asked as to why they don't give agricultural income tax. 12 respondents, that means, 60% of them said that they did not know the reason, whereas8 respondents, that means, 40% of them told that deficiency of income, no inspection from the Govt. push them not to give taxes. Not a single respondent know about Taxpayer Identification Number (TIN), which is an identity of taxpayer.[19] Crop farmers were further asked as to

18 S Aktar, n 13, p 17.

19 Once the taxpayer has a tax ID, then all taxation activities undertaken by the taxpayer will be recorded and monitored by the Directorate General of Taxes through the Taxpayer Identification Number (TIN) as a means of tax administration.

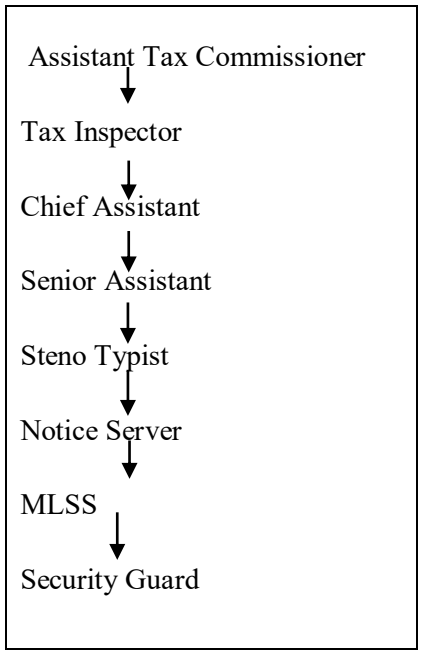
have anyone informed them of giving agricultural income tax and have any executive of the tax office communicated them to collect the agricultural income tax ever. Only one, that means, 5% of them replied positive answer and the rest gave negative answer. They were asked again as to whether they know about legal provisions of agricultural income tax. 7 respondents, that means, 35% answered positively and 13 respondents, that means, 65% gave negative reply. In addition to the last question, they were asked as to why they don't obey the law. They said that they did not know.

The researcher further asked the respondents as to whether they think that agricultural income tax should be given. 18 crop farmers, that means, 90% think that they should pay agricultural income tax for the administration and development of the country, whereas 2 respondents, that means, 10% of them opine that they should not give this. Last of all, opinion was sought from them as to how the amount of agricultural income tax can be raised. Some of the respondents said that they did not know. Others suggested that giving loan to poor farmers without any interest, agricultural expenses born by the Govt., removal of corruption among the local leaders through whom Govt. subsidy is distributed, raising of production, promoting awareness, increasing the activity of the Govt. through giving agricultural machineries, like, power tiller, tractor, harvester, water pump, boat etc., proper distribution of Govt. subsidy can boost the economic situation of crop farmers and then they will fall within the list of taxpayers, since it is expected that rich crop farmers must not be beyond obligation. If taxpayers are aware of the obligation to pay taxes, of course, the state revenue from taxes will continue to increase because the number of potential taxpayers tends to grow every year.

5.2. Inquest from Circle 19, Inspecting Range 4, Tax Zone,Bogra

It is found that 6 upazilas, namely, Sagatha, Sadullapur, Sundarganj, Fulchori, Gaibandha Sadar are under Circle 19.It's tax zone is in Bogra.Mesot is a village of Sagatha upazila and therefore, it is within the domain of this circle 19. Before revealing any information gathered from

circle 19, its organogram is required to be noted. The hierarchy of that circle 19 is mentioned below.[20]



It is revealed that in the last fiscal year 2019-20 total income tax collected from that circle 19 is 42 crore 73 lakh. They collected the highest income tax from the head 'business'. Among businesses, the most noticeable was the income which came from contractors. It is found that not a single farmer in the last fiscal year gave income tax under section 26 of the Income Tax Ordinance as agricultural income tax. Alternatively, no individual taxpayer fills up serial nos. 4, 10 and 12 of taxpayer's income description, which is the second page of individual taxpayer's return form.

However, it is opined by the officials of that respective circle that agricultural income tax is not paid by individual taxpayer under the only head 'income from agriculture', rather is paid in addition to other heads, titled, income either from business or salary or security. It is said that income coming from agriculture is a seasonal one and it is difficult to inspect as to whether any assessable income is coming or not in any fiscal year. Since agricultural income is seasonal, it is not visible like income coming from infrastructure, salary or security etc. Furthermore, Tax Inspectors rarely go to the villages and inspect it. Sometimes, farmers earn profit in one season and in another season face losses and do not feel obliged to pay taxes. It appears after examining record of flood situations in the last few years that farmers are actually suffering losses or at least earning for fulfilling the demands of bread and butter. In this situation, no question arises for payment of taxes. Therefore,

[20] S Aktar, n 13, p 12.

financial conditions of an individual crop farmer have a positive or negative effect on the behavior of paying income taxes.

However, outdated tax administration based on geographical basis (circles), absence of co-ordination among the three main wings,[21] lack of computerization and reliance on physical control instead of accounts are the major factors contributing to the failures in tax administration. If it is looked to the above organogram, it transpires that only one person for each post is working, since there is a shortage of manpower. This gap needs to be filled up by modernizing the tax offices with ICT instruments. Circle offices must be equipped with more modern ICT instruments to collect enough information to assess crop farmers' tax liabilities. Linking and establishing a database with the land registration office, Bangladesh Road Transport Authority, Dhaka Electric Supply Company, etc is required to gather enough information about income taxpayers for estimating the total income from taxation. Also, a strong and efficient tax administration is required to execute income tax policies and to enhance the volume of revenue collection.

5.3. Digitalisation of Income Tax Collection: An Innovation

By law, businesses and individuals who incur a distinct amount of income specified by law must file an income tax return every year to determine whether they owe any taxes or are eligible for a tax refund. There are about 3 million registered taxpayers in Bangladesh and about 1.5 million taxpayers file income tax return in a year.[22] There are two ways through which Income Tax Returns can be submitted to the respective authority in Bangladesh. These are: 1. Manual Filing and 2. E-Filing. E-Filing system is developed to create a friendly environment for the taxpayers in calculating and submitting tax returns.[23] In order to run the software smoothly the income tax department has started an independent portal for E-filing of Income Tax Returns. The web address

21 VAT, Income tax and customs.

22 National Board of Revenue, Bangladesh.

23 Habib, S., "A Step Towards Paperless National Board of Revenue, Bangladesh: An Empirical Study", Masters Thesis Paper, South Asian Institute of Policy and Governance (SIPG) Program, North South University, 2018, p 3.

of the portal is www.etaxnbr.gov.bd. Through this portal one can conveniently submit income tax return from anywhere at any time. Customized return forms have been derived by the Income Tax Authority which is available on the website. All the tax circle offices are well equipped with required system software.[24] Officers and staffs have been trained on online filing system to manage their tasks in efficient way.[25] Then E-filing facility was introduced by the Income Tax Department for the first time during assessment year 2016-17. Now it is continuing along with traditional paper based manual filing system. The following Table reflects that the tax payers of Bangladesh are moving towards electronic era.[26] But the rate of switching from paper based return to E-Return is very low.

Table: 5
Scenario of E-Return in Bangladesh

Assessment Year	Number of total return filed	No of E-Return Filed
2016-2017	15,56,162	393
2017-2018	14,78,434(up to Nov 2017)	40,750

Source: National Board of Revenue, Bangladesh.

The respondents were asked as to whether they know about E-Filing system of income tax return. They all replied negatively. Negativity of the answer switches off other ancillary questions, like, how did they come to know, did they submit return himself through his own device or by resorting the help of others etc. However, agricultural income receives special tax treatment throughout the region (Table 5). In Bangladesh, selected agricultural activities, such as, poultry farming and production of corn and sugar beet, receive tax concessions. The rationale behind concessional treatment of agricultural income is questionable as the policy protects the source of income without differentiation between poor and wealthy farmers.[27] The current policy provides disincentives for

24 Ibid, p 4.

25 Ibid.

26 S Aktar, n 13, p 13.

27 A Reva, "Toward a More Business Friendly Tax Regime: Key Challenges in South Asia", Policy Research Working Paper 7513, *World Bank Group*, 2015, p 7.

firms and individuals to move away from agriculture to higher productivity sectors.[28] It also creates opportunities for tax evasion as taxpayers can abuse the legislation by declaring business income as agricultural income to avoid taxation.[29]

Table: 6
Taxation of Agricultural Income

Bangladesh	Selected agricultural activities are subject to tax exemptions: all income from poultry farming (up to June 30, 2015); 50% of income from the production of corn and sugar beet.

Source: Bangladesh Income Tax at a Glance 2014‐15.

6. Conclusion with Recommendations

Attaining a sustainable income tax regime is a difficult and unenviable task, but nevertheless critical for revenue generation required for accelerating growth and to improve the quality of life of the citizens. Governments in developing countries including Bangladesh sometimes use taxation to fulfill other goals ‐ promote industrial policies, support economic activities deemed to employ the poor and facilitate development of lagging regions. Historically, Bangladesh's direct taxes have been heavily skewed against salary-earners and corporate sector. Direct taxes can also be given by the farmers if they become aware of income tax laws. Indeed, many people in the country are engaged in farming or agriculture. If they come under the purview of tax net, it would meet up budgetary expenditure. It is known that inability to meet up the budgetary expenditure incurred for various development activities obligates government to incur debt. This debt may come from internal or foreign sources. Foreign debt costs huge interest and makes the development more expensive. So raising awareness of income tax regulations among farmers and promoting revenue collection is important for the government.

28 Ibid.
29 Ibid.

For raising awareness, Govt. circulation and publicity among crop farmers at the root level is required. Again, as mentioned in section 4 of this study, net income tax for any fiscal year is shown in this revenue receipts, but collection of income taxes from different sources including agriculture is not found. Collection of income taxes from agriculture is beyond public knowledge. Agricultural income tax collection has to be published separately. It would be better if this collection for different types of farming could be shown under the single head 'income from agriculture'. The government can give priority to that respective farming, from where low income is coming, on the basis of this publication. Side by side, people will be informed of this collection.

Besides, crop farmers require achieving minimum SSC and then the study will make them aware of agricultural income taxes. Nevertheless, this awareness among these crop farmers will not enhance the quantity of agricultural income taxes, if they are not financially solvent and do not come within the taxable limit. Therefore, giving loan to poor farmers without any interest, agricultural expenses born by the Govt., removal of corruption among the local leaders who distribute Govt. subsidy among crop farmers, raising of production, promoting awareness, increasing the activity of the Govt. through giving agricultural machineries, like, power tiller, tractor, harvester, water pump, boat etc., proper distribution of Govt. subsidy can boost the situation of crop farmers and then they will fall within the list of taxpayers. Above all, Tax Inspector of Circle 19 has to go to villages to make crop farmers aware of agricultural income taxes and relevant laws. Reform of tax administration is required in this regard. It is for the reason that it is not possible for only one Assistant Tax Commissioner and Tax Inspector to cover 6 upazilas. Adequate manpower for that circle 19 has to be given for proper circulation and publicity about rules, regulations about agricultural income taxes.

NAVAL BLOCKADE: THEORIES AND PRACTICES

Ahmed Ehsanul Kabir* and Shuvra Chowdhury**

Abstract

Belligerent parties to an armed conflict either international armed conflict (IAC) or non-international armed conflict (NIAC) may impose naval blockade without violating the rules and principles of the International Humanitarian Law (IHL). A naval blockade will remain lawful until it causes disproportionate impact on the civilian population. Humanitarian assistance or support including medical supplies shall not be denied during the continuation of naval blockade. But from the recent experiences of Israeli blockade on Gaza strip in 2009, the casualties on the M/V Mavi Marmara as well as Saudi Arabia led Coalition blockade on Yemen in 2015 clearly resulted in unnecessary suffering to the civilian population. Thus, a minute examination of these incidents clearly reveals a huge gap between the laws of naval war and its applicability in times of naval blockade. It is also identified that there is no codified law of naval blockade which is universally accepted. Finally, necessary recommendations have been given after considering the existing customary laws of war at sea and the corpus of IHL to guide the naval blockade.

1. Introduction

Naval blockade is a widely accepted method which is applied in an armed conflict at sea. The main aim of the naval blockade is to create an obstacle in the naval route by which the adverse party is navigating marine vessels and also carrying goods and personnel from their own territory to a neutral state. The modern practice of naval blockade can be traced from the historic Dutch blockade against the Flemish ports in

* Assistant Professor, Department of Law, Jagannath University.

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

1584. There are certain formalities to be followed to make the naval blockade enforceable, these are: declaration, notification, effectiveness and impartiality. In addition, the rules and principles of International Humanitarian law are also applicable during the naval blockade. From the beginning point of the use of naval blockade to the present date, there is no legal instrument exclusively addressing the practice of this method in the armed conflict at sea. As a result, the parties to the conflict are relying on the traditional practices which actually reflecting the principles of customary law. From the experiences of various notable armed conflicts,[1] it becomes evident that, there is a lack of uniformity in the practices of the naval blockade.[2] Moreover, the views expressed by the different commissions formed to investigate the incident of *Mavi Marmara* also confirmed that there is a lack of consensus among the states about the rules and principles relating to naval blockade during the armed conflict at sea. However, another shortcoming regarding naval blockade is that this method is not applicable in an armed conflict which is non-international where common article 3 of the *Geneva Conventions (GC),* 1949 and the *Additional Protocol (AP) II* of 1977 are applicable. Consequently, the armed conflict which has been taken place in Yemen in the recent years is outside the ambit of the practice of naval blockade because this prevailing conflict in Yemen has been recognized as non-international armed conflict. So, the practice of naval blockade which was applied earlier is no more effective at present. In addition, there is no universally acceptable legal instrument on naval blockade which is equally applicable to both in international armed conflict and non-international armed conflict. Therefore, it becomes urgent to adopt a legal instrument on naval blockade which will play the pivotal role in an armed conflict at sea.

2. Definition of Naval Blockade

1 Civil war in China from 1945 to 1949, the war in Korea from 1950 to 1953, the war between Indian and Pakistan in 1971, the war taken place in Vietnam in 1972, the war between Israel and Arab states in 1973, the war between Iraq and Iran in 1990, the war between Lebanon and Israel in 2006.

2 Ian Kennedy, 'Practice Makes Custom: A Closer Look at the Traditional Law of Naval Blockade', (2012) 70 *University of Toronto Faculty of Law Review* 10, p 33.

Naval blockade is the barrier in the route of navigation and transportation of the enemy state which is applied during naval war.[3] Phillip Drew defines naval blockade in the following words that it actually creates an impediment to enter and exit of any unauthorised marine vessel or aircraft to the enemy state's ports or territorial sea, even if the vessels or aircrafts are neutral in nature.[4] Another definition of the naval blockade can be found in the Helsinki Principles which identifies naval blockade as an approved method of armed conflict at sea restraining the maritime traffics of the belligerents. The naval blockade to be valid in the eye of law if it has complied with the four essential requirements i.e. declaration, notification, effectiveness and impartiality. If any vessel is not complying with the naval blockade then she may be warned and captured. In case of any resistance from the non-complying vessel will give an authority to attack the vessel by the blockading party.[5] Certain features of the naval blockade can be identified from the above-mentioned definitions of the naval blockade. First, it will raise the question of legality of the use of force or the naval blockade during the armed conflict at sea, this feature is the manifestation of the jus in bello principles of the law of armed conflict. Second, the naval blockade stops entering and exiting any unauthorized vessels or aircraft from the coastal areas, ports and harbours of the enemy state. Third, the main purpose of the blockade is to create an economic pressure on the enemy state by stopping export and import through sea. Fourth, it ultimately stops international trade and commerce with all states even they are neutral and playing non-partisan role in the armed conflict.[6]

---

3 Wolff Heintschel von Heinegg, 'Naval Blockade' (2000) 75 *International Law Studies Series,* US Naval College, 203, p 205.

4 Phillip Drew, *The Law of Maritime Blockade: Past, Present and Future,* (Oxford University Press, Oxford, 2017) p 10.

5 Para 5.2.10, Helsinki Principles on the Law of Maritime Neutrality, 2002, Viadrina International Law Project<https://archive.org/stream/pdfyzwUMQoiwLk5e3kj_/Helsinki%20Principles%20On%20The%20Law%20Of%20Maritime%20Neutrality#page/n0/mode/2up> accessed on 12 March 2018.

6 Phillip Drew, n 4, p 10.

So, the principle of naval blockade enunciated from the customary law include the formal declaration with particular date from which it starts and the geographical limits where it applies *vis-à-vis* the time frame of its duration. The declaration must be notified through diplomatic channel and the blockade remains effective and impartial throughout the operative period.[7] If any vessel breaches the principles of naval blockade then the vessel must be stopped and captured. Even the vessel can be attacked after giving necessary warning if non-complying with the blockade.[8] After seizing the non-complying vessel, it can be brought before the Prize Court of the seizing state.[9] There are a number of situations which may render the blockade unlawful. First, if the requirements of declaration; notification; effectiveness and impartiality are not complied with by the declaring state. Second, if the requirements of art. 33 of the *Fourth GC* of 1949 are not fulfilled by the belligerents. Art. 33 provides that collective punishments, intimidation, act of terrorism, pillage and reprisals are prohibited. Third, where the main purpose of blockade is the starvation of civilian population or restrains goods or commodities which are indispensable for the survival of the civilian population.[10] So, if the naval blockade causes scarcity of foodstuff and medical supplies, then it breaches the provisions[11] of the *Fourth GC* of the 1949 and the *AP I* of 1977.[12] In these circumstances, the naval blockade becomes unlawful, even though there is no specific provisions in *GC* of 1949 and *AP* of 1977 which explicitly stated the term naval blockade.[13]

---

7 *Declaration of London* 1909, arts 2, 5, 9 & 11.

8 Wolf Heintschel von Heinegg, n 3, p 215

9 The enemy property seized in the sea in violation of rules of blockade or contraband are called prize. In order to acquire ownership over such goods or ships the general practice is that such goods or ships produced before the courts which are called Prize Courts. Prize Courts are national courts.

10 Martin David Fink, 'Contemporary Views on the Lawfulness of Naval Blockade', (2011) *Aegean Review on Law of Sea,* pp 204 – 206.

11 *Fourth Geneva Convention,* 1949, arts 23 and 59 and *Additional Protocol* I 1977, art 70.

12 'Yemen: Coalition Blocking Desperately Needed fuel', Human Rights Watch, 10 May 2015<https://www.hrw.org/news/2015/05/10/yemen-coalition-blokcing-desperately -needed-fuel can be found in the https://casebook.icrc.org/print/20987> accessed on 12 March 2018.

13 Phillip Drew, n 4, p 207.

3. Legal Instruments on Naval Blockade

The international legal instruments relating to naval blockade can be classified into two broad headings: Customary law of naval blockade and Contemporary law of naval blockade.[14]

3.1. Customary Law of Naval Blockade

The customary law of naval blockade based on two legal instruments such as *Paris Declaration* of 1856[15] and the *London Declaration* of 1909.[16]

Paris Declaration of 1856

The treaty of Paris was signed in March, 1856 after the cessation of the War of Crimea which was taken place from 1853 to 1865.[17] The *Paris Declaration* was the integral part of the *Treaty of Paris*. The main objectives of the Declaration were to regulate the practices of the naval blockade during the armed conflict at sea.[18] There were some obligations which had been conferred upon the state parties by the Paris Declaration. The first initiative was taken by the *Paris Declaration* was to abolish the practice of privateering.[19] In addition, it guarantees the safe transportation of neutral goods from the threat of capturing by the belligerents. The Declaration reiterated the importance of effectiveness during the continuation of the blockade. This declaration was marked as the beginning of the era of codified laws on armed conflict and a 'substantive advancement' in the law of naval blockade.[20]

---

14 Ibid, p 194.

15 Declaration Respecting Maritime Law, Paris, 16 April 1856<http://ihl-database.icrc.org/ihl/INTRO/105?> accessed on 11 March 2018.

16 Declaration Concerning the Laws of Naval War, London, 20 February, 1909<www.http://ihl-database.icrc.org/ihl/INTRO/255> accessed on 11 March, 2018.

17 General Treaty of Peace between Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey, 30 March 1856 in Charles H. Stockton, 'The Declaration of Paris', (1920) 14(3) *The American Journal of International Law*, pp 356-368.

18 Phillip Drew, n 4, p 43.

19 A ship privately owned and crewed but authorized by a government during wartime to attack and captured enemy vessels.

20 Ibid, p 44.

The London Declaration of 1909

For the codification of law on naval blockade, the British Government organized the event of *London Declaration* in 1909. There are some requirements under the *London Declaration* for the lawful establishment of naval blockade. First, the blockade must be established and maintained effectively by the engagement of sufficient forces so that there shall be no access in the coastline of the enemy state; second, the blockade must be declared and notified properly by the power who enforcing the blockade. The notification must contain the date of beginning of blockade, the area where it would apply and the duration of its continuity. The blockade must remain impartial throughout the time and respect the rights of navigation and transportation of any neutral vessel.[21]

The main limitation of London Declaration was that it only applied to those countries who had been implemented the instrument through domestic legislation.[22] Subsequently, during the First World War, the Declaration was rejected by the parties to the conflict which ultimately made the instrument ineffective.[23] As the Declaration was only signed by the state parties and never ratified by them, so it failed to attain the status of treaty. Nonetheless, the Declaration contributed substantially in the development of the law of naval blockade and treated as an important record of customary international law[24] and is also considered guidelines to the practices of naval blockade during the armed conflict at sea.[25]

3.2. Modern Law of Naval Blockade

The parties to an armed conflict at sea are now bound to follow the rules and principles of international humanitarian law which comprises both Geneva law and Hague law. The corpus of Geneva Law and emphasizes

---

21 *Declaration of London*, 1909, arts 1, 5, 8, 9, 17, 18 and 19.

22 James Wilford Garner, *Prize Law during the World War: A Study of the Jurisprudence of the Prize Courts, 1914-1924*, (McMillian, New York, 1927) 161.

23 J A Hall, *The Law of Naval Warfare* (Chapman and Hall, London, 1921) 193.

24 Ian Kennedy, 'Practice Makes Custom: A Closer Look at the Traditional Law of Naval Blockade', (2012) 70 *University of Toronto Faculty of Law Review*, p 18.

25 Martin David Fink, n 10, p 195.

on the protection of the wounded, sick and shipwrecked at sea, on the other hand, Hague law regulates the means and method of warfare which can be used in an armed conflict. It has been admitted that by the International Criminal Tribunal for the former Yugoslavia that there is no uniform treaty law which can be applied in the practice of naval blockade.[26] But the rules emanate from the modern international legal instruments can be treated as a source of the naval blockade. The modern international legal instruments relating to naval blockade include the *San Remo Manual*, *Helsinki Principles on the Law of Maritime Neutrality*, HPCR Manual, *GC* of 1949 and their *AP* of 1977.

The San Remo Manual of 1994

The San Remo Manual was adopted by the *International Institute of Humanitarian Law* (IIHL) situated in San Remo, Italy. This manual is the outcome of the project initiated by the IIHL with a view to modernize the law of armed conflict at sea.[27] The rules of this manual are the reflection of the principles of customary international law.[28] Art. 38 of the Statute of the International Court of Justice (ICJ) identified the customary international law as a source of international law. It was held in the *North Sea Continental Shelf Case*, 1969 that to establish a customary international law, there are two requirements which have been satisfied: first, the existence of the evidence of opinion juris and second, the uniformity of practices of the states concerning the rule. The San Remo Manual composed of the customary rule having 'significant influence' on the development of the national manuals relating to the practices of naval blockade.[29] The contents of the San Remo Manual can be divided into two parts, the substantive part of the manual covers the rules relating to the naval blockade and the rest of it reiterated the

---

26 The ICTY in *Prosecutor v Pavle Struger* (2005) Trial Judgement, IT-01-42-T, 31 January, paras 31-39 mentioned the use of a blockade by the Yugoslav People's Army against Dubrovnik.

27 Martin David Fink, n 10, p 200.

28 *North Sea Continental Shelf Case*, 1969, ICJ Rep 3, para. 77.

29 Both the USN and British Ministry of Defence have quoted the SRM rules in their manuals dealing with the Law of Armed Conflict (LOAC) (US Navy, the Commander's Handbook on the Law of Naval Operations, July 2007<www. Jag. Navay.mil/documents/NWP-1-14M-Commanders-Handbook.pdf> UK Manual, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004).

principles of international humanitarian law. So, the manual relies on both the customary international law and the treaty law adopted by the state parties afterwards.[30] The rules of San Remo Manual reiterate the traditional principles such as it urges the blockading party to declare the blockade formally and notify it to both the belligerents and the neutral parties.[31] In addition to the requirement of formal notification, the blockading party shall inform the time, duration and the geographical limit of the applicability of the blockade.[32] The blockade shall remain effective and shall be impartially applied to the parties to the conflict and the neutral states.[33] During the continuation of blockade it has to be remembered by the blockading party that, starvation of civilian population shall be strictly prohibited. Moreover, there shall be no denial of the delivery of essential commodities i.e. foodstuff and medical supplies which are indispensable for the survival of the civilian population. However, the blockading party must ensure that the consequences of blockade shall be proportionate and shall not be excessive causing unnecessary suffering to the belligerents.[34]The protected persons must receive the basic protections as enshrined in the *GC* of 1949 and the *AP* of 1977 i.e. the wounded, sick and shipwrecked must be collected and provided the medical attention.[35] In addition, the parties to the conflict shall receive relief and other consignment delivered by the neutral humanitarian agencies i.e. ICRC, national Red Cross or Red Crescent Society.

The provisions relating to the prohibition of starvation and the entitlement to receive relief are recognized as the customary principles of international law, even if the belligerents are not the signatory states to the *GC* of 1949 and the *AP* of 1977 but they are bound to comply with the provisions.[36] Heinegg identified that the San Remo Manual has also

---

30 Steven Haines, 'Wat at Sea: Nineteenth-Century laws for Twenty-first Century Wars?' (2016) 98(2) *International Review of the Red Cross*, War and Security at Sea, 435.

31 *San Remo Manual,* para 93.

32 *San Remo Manual,* para 94.

33 *San Remo Manual,* paras 95 & 100.

34 *San Remo Manual,* para. 102.

35 *San Remo Manual,* para 104.

36 Martin David Fink, n 10, p 202.

two limitations, first, there is no specific reference to the use of military aircraft during the naval blockade and second, whether the blockade can be enforced by the naval vessel only or the military aircraft can also be deployed.[37] Then he also raises the necessity of the constructive presence of the naval vessel when the military aircraft is in operation during naval blockade. Moreover, he raises another important question regarding the effectiveness of the blockade when the blockading party deploying the military aircraft only without engaging any naval vessel. Finally, he concludes that the effectiveness of the blockade maintained by the military aircraft shall not be depended upon the presence of the naval warship. Nonetheless, the San Remo Manual provides the basic rules of the naval blockade which offer guidelines to the development of the national manuals concerning the armed conflict at sea considering the technological advancement in the twentieth century.

Naval Blockade under the IHL

International humanitarian law provides four basic principles which are applicable during the armed conflict. These principles are: first, the principle of distinction which means there shall be a distinction between the combatant and civilian and attack must be operated against the military personnel and military objective only, second, the principle of military necessity which means that whether the attack will offer definite military advantages, third, the principles of humanity which means the wounded, sick and shipwrecked, prisoners of war and civilian population must receive humanitarian protection at all times, fourth, the principle of proportionality that the attack must be proportionate, there shall be no unnecessary sufferings or superfluous injury.[38] These principles of IHL are equally applicable to the armed conflicts in land and also at sea.[39] Art. 48 of the *AP I* of 1977 deals with the principle of distinction but there is a disagreement at the Working Group level whether this principle is applicable to the naval blockade during the armed conflict at sea.[40] It

---

37 Wolff Heintschel von Heinegg, 'Current State of the Law of Naval Warfare: A Fresh Look at the San Remo Manual', (2006) 82 *International Law Studies Series*, US Naval War College, 269, p 278.

38 Phillip Drew, n 4, p 92.

39 Steven Haines, n 5,, p 432.

40 *Protocol Additional to the Geneva Conventions* 1949 and relating to the *Protection of Victims of International Armed Conflicts* (Additional Protocol I) (8 June 1977).

was unanimously accepted by the Working Group that *AP I* of 1977 should cover the military operations in land and at the sea.[41]

There are three types of naval operation, first is benign which deals with the search and rescue operation as well as distribution of relief in disaster, the second form of naval operation is known as constabulary which enforces the quarantine requirement, regulates customs and fiscal matters, combats against illicit drug trafficking and ensures the safety of navigation. The third is military which actually deals with the practices of naval blockade. Besides, these three types of naval operation, there are two other forms of naval operations such as economic warfare and hybrid warfare.[42] The glaring example of the economic warfare is the United Nations initiated maritime economic embargo. In addition to the regular navy, sometimes militia forces are deployed in the disputed areas of the sea in claiming the sovereignty and to resist the exploitation and exploration of natural resources from that disputed area of sea.[43] The meaning of the word 'operation'' is similar to the meaning of the word 'attack' as stated in art. 49 para 1 of the *AP I* of 1977. Attack means an act of violence against the adversary either in offence or in defence. Traditionally, attacks mean and include the use of physical force which will not cover the blockade or economic embargo.

So, the consequence-based interpretation of attack can be adopted to cover the blockade or new form of naval operation. The consequence-based interpretation was accepted by the International Court in *Prosecutor v Bosco Ntaganda*.[44] So, on the basis of the consequence-based interpretation the consequences of attacks are death, injury, destruction, harm, damage etc. As the indirect effect of blockade is hunger, disease and starvation which are not immediate and too remote to qualify the blockade as an attack. The corpus of international humanitarian law has been enriched by the principles of humanity and humanitarian treatment. So, starvation as a means of attack is always

41 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva (1974-1977), Committee Three Reports, Official Records, Vol.III, 255.
42 Steven Haines, n 5, p 421.
43 Ibid, p 443.
44 Trial Chamber (2014) ICC – 01/04-02/06, para 46.

prohibited. To avoid the unnecessary sufferings the indiscriminate attack has also been prohibited. During the naval operation, proportionality test must be considered before applying the naval blockade.[45]

As part of the international humanitarian law, Hague law deals with the means and methods of warfare. There are a number of legal instruments which depicting the guiding principles concerning the means and methods of warfare which are applicable to the naval operations. In 1936, *London Protocol* was adopted to regulate the submarine warfare. In addition to this, there are five conventions which have been adopted in 2010 regarding the means and methods of naval warfare. First, *Hague Convention VII* which regulates the conversion process of the merchant ships into war-ships. Second, *Hague Convention VIII* which guides the practices of laying automatic submarine contact mines. Third, *Hague Convention IX* which actually controls the bombardment actions during the armed conflict at sea. Fourth, *Hague Convention XI* provides the process of capture during naval blockade. Fifth, *Hague Convention XIII* concerning the Rights and Duties of Neutral Powers in Naval War. So, the rights of the belligerents during naval armed conflict are not unlimited to choose the means and methods of warfare.

4. The Incident of *Mavi Marmara* and the Applicability of the Law of Naval Blockade

The Operation Cast Lead which was an armed conflict between the Palestinians in Gaza and the Israeli forces. This conflict lasted for three weeks started on 27 December 2008 and ended on 18 January 2009. During this conflict, Israeli forces announced naval blockade on Gaza strip on 03 January 2009. To assist the helpless peoples of Palestines, the *Freedom Flotilla* comprising the six marine vessels including the *M/V Mavai Marmara* were approaching towards the coastline of Gaza. When the *M/V Mavi Marmara* was close to the blockade zone, after giving several warnings, the Israeli elite forces attacked the ship on 31 May, 2010 and resulted in nine casualties.[46] To investigate the incident, four

---

45 Phillip Drew, n 4, pp 108-109.

46 Andrzej Makowski & LauranceWeinbaum, 'The Mavi Marmara Incident and the Modern Law of Armed Conflict at Sea', (2013) 7(2) *Israel Journal of Foreign Affairs*, p 75.

commissions were established by different entities i.e. a) Turkel Commission was established by the Government of Israel on 14 June 2010, b) Palmar Commission was established by the Secretary General of the United Nations on 02 August 2010, c) Hudson-Phillips Commission was founded by the United Nations Human Rights Council on 22 September, 2010 and d) The Turkish Report was prepared by a National Commission of Turkey on February, 2011.

Both the traditional law of naval blockade and modern law of naval blockade were taken into consideration by the Turkel Commission at the time of investigating the incident. But the Commission did not use the Helsinki Principles which were relating to the maritime neutrality.[47] The Commission was unwilling to consider that the blockade causes humanitarian crisis which breaches various provisions of the *GC* of 1949 and the *AP* of 1977.[48] On the other hand, the Palmar Commission considered the *Charter of the UN*, the law of the sea convention of 1982 including the convention on High Seas adopted in 1958, the San Remo Manual and the principles of international humanitarian law but did not refer the *Helsinki Principles on Maritime Neutrality* at the time of investigating the incident.[49]

The observations of the Hudson-Phillips Report emhasises on the principles of international humanitarian law and the violation of these provisions of IHL will render the blockade unlawful. This Report in first phase considered the traditional law of naval blockade then in second phase discussed the modern perspective of the law of naval blockade.[50] The Turkish Commission argued that the blockade can only be enforceable against a state but the territory of Gaza is not recognized as a State, so the applicability of the naval blockade against Gaza strip is a clear violation of the international law. Moreover, the Commission found that the aim of the blockade was to cause civilian casualties. The Report concludes that starvation, deliberate use of force and targeting civilians make the blockade unlawful.[51]

---

47 Ibid, p 81.

48 Martin David Fink, n 10, p 209.

49 Ibid, p 81.

50 Martin David Fink, n 10, p 209.

51 Alan Craig, *International Legitimacy and the Politics of Security, The Strategic Deployment of Lawyers in the Israeli Military* (Lexington books, Plymouth, 2015) 223.

After analyzing the reports of the all four Commissions, it becomes clear that each commission has taken different views about the incident on the basis of different sources of the law of naval blockade. The Turkel Commission found that the blockade was legal,[52] Turkish Report[53] and Hudson-Philips Report[54] found that the blockade was illegal and the Palmar Report[55] found that the blockade was legal but there was disproportionate use of force by the Israeli forces. So, there was not consensus on the legality of the blockade imposed by the Israeli forces because of the lack of consistent and uniform rules concerning the naval blockade. The practice of naval blockade traditionally exercises only in an armed conflict at sea which is international in character, so armed conflict which remains non-international in nature outside the ambit of the applicability of the law of naval blockade.[56] Prof. Heinegg suggests that when there is an armed conflict of non-international character, then the conflict must take place within the territorial sea or contiguous zone but is should not extend to the international waters[57] affecting neutral shipping.

Crisis in Yemen and NIAC

In March, 2015, the coalition forces were formed under the auspices of the government of Saudi Arabia in support of the government of Yemen against the Houthis revolutionaries. The coalition forces initiated several military operations including naval blockade which ultimately resulted in severe humanitarian crisis in Yemen.[58] The conflict in Yemen is purely

---

52 Israel, The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Report (23 January 2011) para 61.

53 Turkey, 'Turkish National Commission of Inquiry: Interim Report on The Israeli Attack on The Humanitarian Aid Convoy to Gaza on 31 May 2010' Turkish Ministry of Foreign Affairs

54 United Nations, Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident July 2011.

55 United Nations Human Rights Council, Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, 27 September 2010.

56 Phillip Drew, n 4, p 111.

57 Wolf Heintschel von Heinegg, 'Methods and Means of Naval Warfare in Non-International Armed Conflicts' (2012) 88 *International Law Studies,* p 211.

58 Martin David Fink, n 10, p 295.

non-international character because here the government is in one side and the Houthis on the other. Though the conflict passed the threshold of intensity and organization to be qualified as NIAC,[59] but the law of naval blockade is not applicable in the conflict of non-international character. There was an effective naval blockade in Yemen but due to the nature of armed conflict, the law of naval blockade was inoperative. Prof. Fink suggests principles of IHL should apply to protect the civilian population in Yemen when the law of naval blockade was not applicable.[60]

5. Recommendations

It becomes essential to adopt a convention relating to naval blockade as there is no uniform and consistent set of rules guiding this issue. The naval blockade causes serious humanitarian crisis because it resulted in starvation, indiscriminate attack and deprivation of right to life. The use of disproportionate force brings unnecessary sufferings and the non-applicability of the provisions of IHL during the non-international armed conflict creates a vacuum which deprives protection to civilian population and other protected persons. In absence of guiding principles, it becomes difficult to control the consequences of blockade. The traditional law of naval blockade is no more effective so, the state parties should initiate the process of negotiation and other effective measures to address the incident of naval blockade. Due to the new nature of armed conflict at sea and the introduction of economic warfare, it becomes urgent to modernize the law of naval blockade in a comprehensive and codified manner. Moreover, new rules and principles must be incorporated to cover the consequences of new dimensions of warfare. The trend of derogation from the traditional law of naval blockade and the adherence to the new manuals and instruments demonstrate that the traditional laws are unable to provide sufficient protection during the severity of armed conflict at sea. Until the adoption of a new guiding convention, the principles of international humanitarian law have been provided protections during the naval blockade at sea.

---

59 ICTY, *The Prosecutor v Dusko Tadic* (1997) Judgment IT-94-1-T, 7 May, para 561-568, ICTY, *The Prosecutor v Fatmir Limaj* (2005) Judgment IT-03-66-T, 30 November, para 84.

60 Ibid, p 306.

6. Conclusion

Naval blockade is an effective method of warfare during an armed conflict at sea when it satisfies certain pre-requisites as enshrined in the traditional legal instruments. The process of declaration, notification, communication, effectiveness and impartiality are the essential steps to be followed by the blockading party when imposing naval blockade. The law of naval blockade is not applicable in the situation of non-international armed conflict or civil war. As a result, the belligerents are shielded by the provisions of common article 3 of the *GC* of 1949 and the *AP II* of 1977. By examining the incident of the *M/V Mavi Marmara* it becomes evident that there are no uniform rules guiding naval blockade. In modern times, some legal instruments have been developed by the international organisations which do not have the binding authorities. Nonetheless, on the basis of these international legal instruments, domestic legislations have been enacted in many countries. Unfortunately, no universally accepted convention has been adopted so far by the international community regarding the naval blockade. It is strongly recommended to adopt an international convention guiding the law of naval blockade to cover the modern trends of warfare at sea. In absence of such universally accepted convention, the belligerents must comply with the norms and principles enunciated in the international humanitarian law during the practices of naval blockade at sea.

THE EFFICACY OF PARLIAMENTARY QUESTION: A COMPARATIVE INVESTIGATION INTO THE HOUSE OF COMMONS AND THE *JATIYA SANGSAD* PRACTICES

Nirmal Kumar Saha[*] and M Jashim Ali Chowdhury[**]

Abstract

Westminster institution of Parliamentary Question Time (PQT) has a special significance in enforcing ministerial responsibility. While PQT focuses mainly on departments and ministries, the Prime Minister's Question Time (PMQT) in the UK Parliament and other Westminster traditions remained more of a theatrical episode than an affective accountability tool. Bangladesh's experience with PMQT also presents a theatrical monologue. PQT and PMQT taken together, accountability impact of these in Bangladesh are not uncontested. Purpose of this paper is to assess the accountability impact of the PQT and PMQT in Bangladesh Jatya Sangsad and compare it with the UK House of Commons with reference to the procedural rules governing the sessions, structural issues guiding the speaker's discretion in conducting sessions and the attitudinal issues regulating the individual legislators' and ministers' approach to the device. While the authors share the view that parliamentary questions in Bangladesh are "generally not successful in ensuring responsible behaviour", the current paper seeks to travel beyond this generalised claim and find the deeper reasons contributing to the failure.

1. Introduction

Westminster institution of Parliamentary Question Time (PQT) has a special significance in enforcing ministerial responsibility.[1] Asked and

[*] Associate Professor, Department of Law, University of Chittagong.
[**] Assistant Professor, Department of Law, University of Chittagong.

answered mostly on individual ministry basis, and at the beginning of each day's parliamentary business, parliamentary questions are important in the sense that these are dominated mostly by individual and private members. Since the question time is not controlled by parliamentary agenda setting power of the ruling party, the opposition and individual MPs may project 'spotlight upon every corner'[2] of the administration. An additional advantage of the question time is that unlike adjournment motions, motions for scheduled or unscheduled debates and motion of no confidence, MPs wishing to table parliamentary questions would not need a parliamentary majority behind their move.[3] If selected through balloting, government and opposition members alike get scopes to ask questions and solicit information and accountability. This explains why parliamentary questions get more attention than other individual tools of parliamentary work.[4]

While PQT focuses mainly on departments and ministries, Prime Minister is less stringently attached to the parliament than his/her ministerial colleagues. Though the Prime Minister's presence, participation, speech and statements in the floor is advocated as a key accountability mechanism,[5] the Prime Minister's Question Time (hereinafter PMQT) in the UK Parliament and other Westminster traditions remained more of a theatrical episode than an affective accountability tool.[6] Bangladesh's experience with PMQT also presents a

---

1 Frances H. Ryan, 'Can Question Period be Reformed?' (2009) *Canadian Parliamentary Review* 18, p 22.

2 Michael Cole, 'Accountability and quasi-government: The role of parliamentary questions' (1999) 5(1) *The Journal of Legislative Studies* 77, p 83.

3 Nizam Ahmed, 'Development and Working of Parliaments in South Asia' (2001) 9(1) *Asian Journal of Political Science* 18, p 29.

4 Nizam Ahmed, *Parliament and Public Spending in Bangladesh: Limits of Control* (Bangladesh Institute of Parliamentary Studies, Dhaka, 2000).

5 P Dunleavy and G Jones G, 'Leaders, politics and institutional change: The decline of prime ministerial accountability to the House of Commons, 1868–1990' (1993) 23(3) *British Journal of Political Science* 267, 267; GT Thomas, 'United Kingdom: The prime minister and parliament' (2004) 10(2-3) *The Journal of Legislative Studies* 4.

6 R.K Alderman, 'The Leader of the Opposition and Prime Minister's Question Time' (1992) 45(1) *Parliamentary Affairs* 66, p 66.

theatrical monologue. PQT and PMQT taken together, accountability impact of these is not uncontested. Sceptics argue that output of parliamentary question as an accountability tool and a method of extracting information is considerably circumscribed.[7] Apart from being used as part of the wider political confrontation,[8] its efficacy as an accountability tool is in decline.[9]

Purpose of this paper is to assess the accountability impact of the PQT and PMQT in Bangladesh *Jatya Sangsad* and compare it with the United Kingdom House of Commons with reference to the procedural rules governing the sessions, structural issues guiding the speaker's discretion in conducting parliamentary business and the attitudinal issues regulating the individual legislators' and ministers' approach to the device. While the authors share the view that parliamentary questions in Bangladesh are "generally not successful in ensuring responsible behaviour",[10] the current paper seeks to travel beyond this and find the reasons why.

2. Parliamentary Question as an Accountability Tool

Depending on the institutional and politico-cultural set up of different countries, parliamentary questions are generally asked for extracting information from government,[11] demanding accountability,[12] sponsoring

---

7 Franklin, et. al., 'Questions and Members', in Franklin and Norton (eds), *Parliamentary Questions* (Clarendon Press, Oxford, 1993) 10.

8 N. Johnson, 'Parliamentary Questions and the Conduct of Administration' (1961) 39(2) *Public Administration* 131, pp 144-146.

9 J Mackintosh, *The Government and Politics of Britain* (Hutchinson, London, 1970) p 27.

10 N. Ahmed and A. Ahmed, 'The quest for accountability: Parliament and public administration in Bangladesh' (1996) 18 *Asian Journal of Public Administration* 70, p 92.

11 Oliver Rozenberg, et. al, 'Not Only a Battleground: Parliamentary Oral Questions Concerning Defence Policies in Four Western Democracies' (2011) 17(3) *The Journal of Legislative Studies* 340.

12 Shane Martin, 'Parliamentary Questions, the Behaviour of Legislators, and the Function of Legislatures: An Introduction' (2011) 17(3) *The Journal of Legislative Studies* 259.

constituency interests[13] and enhancing the individual MPs' career prospects.[14] However, effectiveness of parliamentary questions in enforcing accountability is widely debated. While PQT's importance is acknowledged, its impact varies depending on the process that regulates the session (procedural aspect), the political set up within which the system operates (structural aspects) and the way the MPs utilize it (attitudinal aspects).

Seen from *a procedural perspective*, presence of scope to ask spontaneous questions and initiate debate is most likely to generate significant political confrontation[15] and backbench autonomy[16] which in its turn would extract more information[17] and generate greater accountability. Rules regarding the subject matter and number of questions, requirement of oral or written answers, scope of initiating further debate on answers given by the ministers, etc would determine how much pressure the executive may be put into.

On *a structural consideration*, PQT's success would largely depend on the minister's obligation to answer the questions on the first place and then to answer it wholly and truthfully in the second place. Party agenda and concealed constraints of partisan hierarchy within the process would hamper the PQT's accountability bites substantially.[18]

---

13 Michael Kellermann, 'Electoral Vulnerability, Constituency Focus, and Parliamentary Questions in the House of Commons' (2016) 18(1) *The British Journal of Politics and International Relations* 90.

14 Stefanie Bailer, 'People's Voice or Information Pool? The Role of, and Reasons for, Parliamentary Questions in the Swiss Parliament' (2011) 17(3) *The Journal of Legislative Studies* 302, p 303.

15 F Russo and M Wiberg, 'Parliamentary Questioning in 17 European Parliaments: Some Steps towards Comparison' (2010) 16(2) *The Journal of Legislative Studies* 215, p 226.

16 S Lazardeux, 'The French National Assembly's Oversight of the Executive: Changing Role, Partisanship and Intra-Majority Conflict' (2009) 32(2) *West European Politics* 287. See also: David Judge, 'Backbench Specialisation- A study in Parliamentary Questions' (1973) 27(4) *Parliamentary Affaires* 171, p 171.

17 M. Wiberg, 'Parliamentary Questionings: Control by Communication?' in H. Do¨ring, (ed.), *Parliaments and Majority Rule in Western Europe* (St. Martin Press, 1995) 183.

18 Nizam Ahmed, n 4.

Attitudinal problems like MPs' partisan manipulation of the session[19] ('dorothydixers' or friendly questions by the ruling party MPs for example),ministers' tendency to evade questions or provide vague answers or the speaker's inaction or partisan leniency towards the ministers would greatly reduce the accountability potentials of PQT.[20]

2.1. Modalities and Problems of Parliamentary Questions in the UK

2.1.1. *Procedural Issues*

PQT procedure of the UK House of Commons requires three days prior notice to table a question. Balloted through the computerised Shuffle process, a member is entitled to ask supplementary question once his question is answered. Ministers answer parliamentary on rotational basis. Questions are of two types – oral and written. Oral questions are placed in the Order Paper as numbered in the Shuffle, while written questions appear in the order paper and answer to those forms part of the proceedings and are printed in Hansard (UK parliament's official record of proceedings).Members are usually limited to one oral question per five-week-cycle of departmental rotation. As regards written question there is no such limit and members need not wait until the rotation of the minister concerned comes.

2.1.2. *Structural Issues*

The Speaker has discretion to make sure that sufficient supplementary questions are asked,[21] members from government and backbench ask alternately in a traditional bi-partisan mode and the respective Shadow Minister (opposition member in watch of a ministry) is called in at some

---

19 John Bercow, 'Prime Minister's Questions in the United Kingdom' (2012) *Canadian Parliamentary Review* 6, p 9.

20 Parameswary Rasiah, *Does Question Time fulfil its role of ensuring Accountability?* (Australian Audit, Discussion Paper 16/2006) <https://apo.org.au/sites/default/files/resource-files/2006/04/apo-nid3966-1077431.pdf> accessed on 15 June 2019.

21 Andrew McGowan, 'Accountability or Inability To what extent does House of Representatives question time deliver executiveaccountability comparative to other parliamentary chambers? Is there need for reform?' (2008) 23(2) *Australasian Parliamentary Review* 66, p 72.

point.[22] As regards supplementary questions, it is a standard rule that supplements are not opportunity to ask questions without notice. The essence of supplementary question therefore must be extracted from the original question.[23] Once the Speaker feels that enough spaces have been made through original and supplementary questions he may move to the next question.

An addition to the ministers' advantages is the British administrative notion of 'Next Step Agencies'. Next Step Agencies are the bodies delegated with operational responsibilities pursuant to broader principles framed by the ministers. It has been held that ministers are responsible for broader principles and executive heads in the Next Step Agencies are accountable for the failure of operational rules. The problem with this distinction is that ministers can frequently rely on this to deflect responsibility entirely.

Yet another advantage to the ministers is the emergence of so-called Osmotherly Rules in the UK. Named after E.B.C. Osmotherly, a civil servant who first drew up the rules in 1980, the rules would allow the executive heads answer questions asked by MPs to the minister. Should the members of parliament feel that the executive head's answer is insufficient, and the minister should answer the question, minister would step in. Agency heads would also answer the select committees 'on behalf and with approval' of the ministers. The UK Government Resource and Accounts Act 2000, Osmotherly Rules of 2009 and Ministerial Code of 2010 combined have secured parliamentary approval for this practice. It appears that the Osmotherly Rules would camouflage the actual role played and intervention done by the ministers in operational process.

2.1.3. *Attitudinal Issues*

Though the individual members, ministers and the Speaker attach a high level of importance to parliamentary questions, attitudinal seriousness

---

22 Ibid.

23 D McGee, (ed.), *Parliamentary Practice in New Zealand* (Office of the Clerk of the House of Representatives, Wellington, 2005) p 566.

fail to yield the expected level of accountability for the structural issues outlined above. As a commentator argued, the PQT as conducted presently "perpetuates the belief that [the individual ministerial responsibility] convention is simply a facade behind which the government can hide".[24] Given the context, individual ministerial responsibility to the House of Commons is now effectively limited to a minister's responsibility not to mislead it by supplying inaccurate and untrue information.[25] A minister misleading the parliament should resign.

2.2. Modalities and Problems of Parliamentary Questions in Bangladesh

Parliamentary Questions are asked and answered during the first hour of every sitting day except the day on which budget is presented. On Wednesday, the Prime Minister answers for an extra half an hour (PMQT).[26]

2.2.1. *Procedural Issues*

Members of the Parliament are required to submit at least fifteen days' notice of their questions.[27] At the beginning of each session, rotation of question time for individual ministries is decided by the Speaker in consultation with the ministers concerned.[28] Ministers would answer questions in relation to matter officially connected with his/her ministry or department. Question may be posed even to a private member who might be in charge of any Bill, resolution or other matter connected with the business of the House.[29] Urgent or short notice questions may be allowed by the Speaker subject to the agreement of the minister concerned. If the minister agrees s/he would answer within no later than five sitting days of the notice. It will be answered at the end of the questions enlisted and ordered for the day concerned.[30]

---

[24] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' (1997) *Public Law* 262.
[25] *The UK Ministerial Code* 2010, Para 1:2
[26] *The Rules of Procedure of Jatya Sangsad,* rule 41.
[27] *The Rules of Procedure of Jatya Sangsad,* rule 42.
[28] *The Rules of Procedure of Jatya Sangsad,* rule 47.
[29] *The Rules of Procedure of Jatya Sangsad,* rules 43 & 54.
[30] *The Rules of Procedure of Jatya Sangsad,* rule 59.

Questions are categorised either as starred questions requiring oral answer in the floor or as unstarred questions sufficing with written answers.[31] Though member in charge of a question would indicate whether his/her question is a starred or unstarred one, ultimately it is the Speaker who determines whether a question would be starred or not.[32] On the given day for a starred question, the member will ask the question by reference to its number only. Questions will be printed in advance and the minister shall reply orally. The member concerned, and then any other member permitted by the Speaker, may ask supplementary questions.[33] Unstarred questions will not be answered orally but printed answers are laid before the floor and there is no scope of supplementary question over that.[34] If a starred question is not called for answer on the day scheduled, the written answer already supplied will be considered laid on the table and no supplementary question will be allowed. In a given case, a minister may request delaying a question towards a subsequent day reserved for the ministry concerned.[35]

As a follow-up to any answer given by a minister, a member may submit a three days' notice requesting a half-an-hour discussion on the answer given and solicit further clarification and detailing.[36] There could be allotted a maximum of two half-an-hour session in a given week.[37] Speaker may, with the consent of the Minister concerned, waive the requirement three days' notice.[38] Speaker is allowed a wide discretion to accept or reject such notice if she feels that it 'seeks to revise the policy of the Government'.[39] As regards the conduct of the discussion, there is no formal motion or voting thereon. It is just a discussion that includes a short statement from the member and a reply from the minister concerned. Upon prior intimation of their interest, the Speaker may allow two other members to participate the discussion by asking questions.[40]

---

[31] *The Rules of Procedure of Jatya Sangsad,* rule 44.
[32] *The Rules of Procedure of Jatya Sangsad,* rule 45.
[33] *The Rules of Procedure of Jatya Sangsad,* rule 56.
[34] *The Rules of Procedure of Jatya Sangsad,* rule 51.
[35] *The Rules of Procedure of Jatya Sangsad,* rule 52.
[36] *The Rules of Procedure of Jatya Sangsad,* rule 60:1.
[37] *The Rules of Procedure of Jatya Sangsad,* rule 60:3.
[38] *The Rules of Procedure of Jatya Sangsad,* rule 60 (2) proviso.
[39] *The Rules of Procedure of Jatya Sangsad,* rule 60:5.
[40] *The Rules of Procedure of Jatya Sangsad,* rule 60:6.

2.2.2. *Structural Issues*

On a structural analysis, unlike the UK House of Commons, the PQT in Bangladesh *Jatya Sangsad* is not given a bi-partisan fabric. It means that confrontational aspect of the session is generally missing. Also, the parliamentarians are handicapped by serious shortfall of materials (office, logistics for example computer, and modern research library) and human resources (research aids). As a result, they find it difficult to use the parliamentary methods of accountability effectively.

Speakers' neutrality and independent mind set up has been a major criterion for success or failure of the question answer session. Within the Rules of Procedure (RoP), the Speaker has a wide discretion in relation to approval or denial of questions. S/he decides on the admissibility of a question within seven days from the date of the receipt of the notice.[41] S/he may disallow a question for reasons like contempt of court, matter sub judice etc as mentioned in the Rule 53 of the RoP.[42] The Speaker may also disallow questions on some very vague grounds like 'obstructing or prejudicially affecting the procedure of the House'[43] and involving 'policy too large to be dealt within the time limits' of a question.[44]

The Speaker may change the order of questions listed through balloting. Statistics show that the successive speakers have used their discretion towards the government's favour. Until Ninth Parliament only 2.9 percent Half-an-Hour Discussion motion were accepted and discussed. 81.4 percent of the motions were rejected straight, while the others got lapsed or withdrawn.[45] Most disappointingly, no adjournment motions were accepted, and half-hour discussion took place in the Seventh and Eighth parliament.

---

[41] *The Rules of Procedure of Jatya Sangsad,* rule 55.

[42] *The Rules of Procedure of Jatya Sangsad,* rule 53 proscribes questions referring to the character or conduct of persons not in relation to his/her official responsibilities, matters not falling within the primary concern of the government, matters under active consideration of a parliamentary committee, matters sub judice, etc.

[43] *The Rules of Procedure of Jatya Sangsad,* rule 55.

[44] *The Rules of Procedure of Jatya Sangsad,* rule 53.

[45] Nizam Ahmed, *The Bangladesh Parliament A Data Handbook* (Institute of Government Studies (IGS), BRAC University, Dhaka, 2013) 223.

Unlike the UK, the Speaker's discretion in Bangladesh unfortunately yields a retrogressive impact on the accountability potential of PQT. While Government's unwillingness to expose its lacunas to the parliament is understandable, the speaker's unwillingness to open the parliament secretariat itself up to the House is quite astonishing. As a rule, questions relating to the conduct of the members of the Parliament secretariat must be communicated to the speaker privately and answers to those questions are sent to the concerned members privately. No rationale whatever is offered so far as to why the House needs be by-passed on this important area of accountability.[46]

2.2.3. *Attitudinal Issues*

Parliamentary questions in Bangladesh are also hurt by deep rooted attitudinal flaws nourished by the MPs and Ministers themselves. Questions posed by the lawmakers mostly concern their constituency issues, are merely informative or explanatory and lack critical reflection on the public administration of Bangladesh.[47] A study over 130 sample question from the Eight Parliament indicated that around 40.77 percent of the total questions involved constituency issues. Another 39 percent of the questions concerned national and contentious political issues, while 29.23 percent questions attempted to know government steps about various issues. To our utter disgrace no critical questions were asked 'seeking clarification on administrative lapses'.[48]

An earlier study took 500 questions from each session of 1st to 4th parliament. It is seen that 55.65 percent questions were expolatory. 34.30 percent of them were what-questions dealing with day to day functioning of public administrative bodies while only 10.05 percent were why-questions with accountability tunes.[49]

---

46 Ibid, p 212.

47 Muhammad Mustafizur Rahman, 'Parliament and Good Governance: A Bangladeshi Perspective' (2008) 9(1) *Japanese Journal of Political Science* 39.

48 Ibid, p 48.

49 Salahuddin Aminuzzaman, 'Institutional Processes and Practices of Administrative Accountability: the role of Jatiyo Sangsad of Bangladesh' (1993) 10(2) *South Asian Studies* 44, p 55.

Ministers also have shown a general disregard for their obligation to answer parliamentary question. There is no mention in the RoP of the minister's power to deny answer nor is there any mention of the member's power to compel an answer. The Speaker decides on admissibility of questions.[50] Since a Member of Parliament in Bangladesh cannot compel a minister to answer questions, "the ultimate fate of a question depends greatly on both the Speaker's satisfaction and the minister's consent to address it".[51] Though the interest of the members in asking questions has increased over time,[52] statistics until the Ninth Parliament suggests that not more than 50 percent of the accepted ministerial questions are answered. While around 15-20 percent questions are rejected on procedural grounds, around percent of the accepted questions get withdrawn or lapse.[53]

Two other problems of the ministers are frequent requests for tabling of oral answers and transferring the answer to another day. Tabling of oral answer essentially coverts a starred question into an unstarred one and thereby prevents the members from asking supplementary questions. In the third parliament, the rate of tabling oral answers reached as many as 90 percent.[54] Advance request for transferring to another day means effectively killing the question and avoiding the answer and thereby causing it to lapse.[55]

3. The Prime Minister's Question Time (PMQT)

As stated earlier, PQT is primarily directed towards the ministers rather than the Prime Minister. Except that of a collective motion of no-confidence in the government, a Westminster Prime Minister's individual responsibility is very slick.[56]Within the parliament, Prime

---

50 The Rules of Procedure of Jatya Sangsad, rule 55.

51 Institute of Governance Studies, *State of Governance in Bangladesh 2008, Confrontation Competition Accountability* (BRAC University, Dhaka, 2009) 42.

52 Nizam Ahmed, n 3, p 33.

53 Rounaq Jahan and Amundsen, *The Parliament of Bangladesh: Representation and Accountability* (Centre for Policy Dialogue and Chr. Michelsen Institute, Dhaka and Bergen, 2012) p 54.

54 Nizam Ahmed, n 45, p 219.

55 Ibid, p 220.

56 Alexandra Kelso, et al., 'The shifting landscape of prime ministerial accountability to parliament: An analysis of Liaison Committee scrutiny sessions', (2016) 18(3) *The British Journal of Politics and International Relations* 740, p 754.

Minister marks the single most powerful individual and is also hailed as the 'controller and interpreter-in-chief of the rules of the games.'[57] On that capacity, the British Prime Ministers have historically refused to be present and attest before parliamentary committees. It is only in 2002 that Prime Minister Tony Blair agreed to appear twice every year before a Liaison Committee comprising the Chairmen of every departmental select committees. British Prime Ministers also relinquished the position of the Leader of the House since 1942. This effectively removed the requirement for Prime Ministers to attend parliamentary sessions.

Apart from the 30 minutes PMQT each Tuesday, the British Prime Ministers are not officially required to participate, intervene or vote in House debates. As regards the way of conducting the PMQT, Prime Ministers until Margaret Thatcher frequently transferred questions to relevant minsters over whose department or activity the question was asked. Margaret Thatcher for the first time agreed to answer during PMQT in detail any question over any ministry. Bangladesh also lacked PMQT until 1997 when Sheikh Hasina offered *ex-gratia* to face and answer parliamentary questions for 30 minutes a week.[58] Accordingly, the all-party Business Advisory Committee of the Seventh Parliament (1996-2001) initiated the process from its third session.[59]

3.1. Modalities and Problems of PMQT in the UK

The House of Commons PMQT has shown a substantial agenda setting potential. Research findings indicate that usually the opposition leader and backbenchers combined set the discourse of the session that is followed by the government party backbenchers participating the session. Aided by the Speaker's discretion, the procedure of the session itself makes sure that opposition members ask more questions than the ruling party backbenchers. The 'theatrical' PMQT thereby controls the agenda for the sitting and makes the government face issues have shown

---

57 P Hennessy, *The Prime Minister: The Office and Its Holders Since 1945* (Penguin Press, London, 2000) 58.

58 Jalal Firoj, 'Forty Years of Bangladesh Parliament: Trends, Achievements and Challenges' (2013) 58(1) *Journal of the Asiatic Society of Bangladesh (Hum.)* 83, p 118.

59 N Ahmed and A Ahmed, n 10, p 76.

a relative 'partisan dealignment'[60] and try to shape PMQT agenda independently from their leaders.[61] This makes the House of Commons PMQT even more meaningful.

3.1.1. *Procedural Issues*

British MPs submit Prime Minister's questions in advance which are then chosen through 'The Shuffle'. Shuffle is a random draw. MPs may either ask an engagement question (Question No. 1 that will usually ask the Premier to enlist his/her engagement for the day) or a topical question. The Shuffle list comprising fifteen MPs' names and their engagement or substantive topical questions is made available to the Prime Ministers and MPs in general.

In cases of more than one MPs seeking to table the engagement question, their names are only known from the list not the exact question they will be asking in the floor. PMQT starts with the engagement question. The MP asking this first question would have chance to ask a supplementary question which may be on any topic of current interest. All other MPs who tabled engagement question and enlisted in the Shuffle would be allowed to ask 'an untabled supplementary question'[62] question of their choice.

MPs enlisted with substantive topical questions in the Shuffle would mention their question numbers and Prime Minister would answer. S/he would then ask an untabled supplementary question. This means that the Prime Minister would not know in advance as to which questions, s/he would face. Prime Minister is therefore extensively briefed by government departments and ministries. MPs who have submitted topical questions but could not raise that in the floor due to time constraint, may expect written answer from the Prime Minister.

---

60 C.J Kam, *Party Discipline and Parliamentary Politics* (Cambridge University Press, Cambridge, 2009).

61 Shaun Bevan and Peter John, 'Policy Representation by Party Leaders and Followers: What Drives UK Prime Minister's Questions?'(2016) 51(1) *Government and Opposition* 59, p 78.

62 Richard Kelly, *Prime Minister's Questions (Standard Note: SN/PC/05183)* (Parliament and Constitution Centre, House of Commons, London, 2015).

The incumbent Speaker of the House of Commons has a declared objective of allowing more backbench questions than ever. To that end, even members who are not enlisted in the Shuffle are often allowed the floor to ask supplementary questions. The Prime Minister lacking a scope to de-select any such question, PMQT, now-a-days adds substantial spontaneity, surprise and unpreparedness which enhances the accountability potentials. Trend for the Speaker is to extend the PMQT by fifteen to twenty minutes more than the officially fixed half an hour.[63]

3.1.2. *Structural Issues*

The Leader of the Opposition (hereinafter LO) was not as prominent as s/he appears today. During the 1960s LO was called only once of the two days. By 1980s, agreement emerged to call the LO on both the days. Yet the LO would usually ask one question and a supplementary. It was Mr Neil Kinnock in 1980s that decided to take the chance of utilising theatrical lights for a boost of his stature visa-vis the Prime Minister Thatcher. Kinnock on an average asked 2.5 questions each session.[64] In 1997, Kinnock's threshold of around three questions in each of the two days' fifteen minutes sessions were combined into six questions for the LO in the current thirty minutes session of Wednesday. Additionally, two questions were assigned to the leader of the Liberal Democratic party in recognition of its emergence as a vital third-party group in parliament. Since 2010, the Liberal Democrats does not have two set questions since they formed a coalition government with the Tories. LO's question to the PM are not tabled nor do they go through the Shuffle.

The process being well regulated, established and consistent, it allows the most pressing issues of the day be raised directly to the top-notch of the government. That this political ritual of adversarial questioning is helping sustain 'political accountability'[65] to some extent is exemplified

---

63 The Prime Minister's Questions on 22 May 2019, for example, lasted for around 54 minutes <https://www.youtube.com/watch?v=Z4nwEmfPlCI> accessed on 18 December 2019.

64 John Bercow, n 19, p 6

65 Peter Bull and Pam Wells, 'Adversarial Discourse in Prime Minister's Questions' (2012) 31(1) *Journal of Language and Social Psychology* 30, 48.

by the exchanges between formal Leader of the Opposition Ed Miliband and Prime Minister David Cameron over the British phone-hacking scandal. After around of debates over the issue Cameron conceded to Miliband's demand for public enquiry into the culture and practices of British newspapers, known as the Leveson enquiry.[66] An important contribution in terms of parliament-citizen relationship is made by the current Leader of Opposition Jeremy Corbyn. Corbyn frequently quotes direct messages from the emails and letters he receives from lay persons. Corbyn directly names the individuals and puts the people in direct interaction with the premier at the PMQT.[67]

3.1.3. *Attitudinal Issues*

The present format of the House of Commons PMQT, however, is criticised as 'a political point scoring show' for the PM and LO.[68] The backbench members' chance to participate being curtailed, the PMQT has been labelled as 'scrutiny by screech'.[69] Additionally, the rough and adversarial[70] temperament of the session 'sanctions and rewards'[71] aggressive face threatening activities[72] and rowdiness.[73] Cumulative result of the evolution is that the PMQT in the UK is now a weekly political debate show between the Prime Minister and the Leader of the Opposition. With the backbenchers' scope to question the Prime Minister sacrificed and the theatrical 'Punch and Judy'[74] appearance exaggerated,

---

66 Peter Bull, 'The role of adversarial discourse in political opposition: Prime Minister's questions and the British phone-hacking scandal' (2013) 3(2) *Language and Dialogue* 254.

67 Ibid.

68 John Bercow, n 19, p 7.

69 Ibid.

70 Peter Bull, n 66.

71 Peter Bull and Pam Wells, n 65.

72 Stephen R. Bates, Peter Kerr, Christopher Byrne and Liam Stanley, 'Questions to the Prime Minister: A Comparative Study of PMQs from Thatcher to Cameron' (2014) 67 *Parliamentary Affairs* 228, p 243.

73 R. K. Alderman, 'Prime Minister's Questions in the British House of Commons' (1996) 77(3) *Parliamentarian* 29.

74 David Cameroon coined the phrase in 2005 as the Leader of the Conservative party. Punch and Judy is a traditional popular British puppet show, which features

the PMQT's potential to deliver accountability in substance was in question by the 2000s.

In 2002, a Liaison Committee comprising all the Chairmen of different select committees urged the Prime Minister to appear before it twice a year. After showing an initial disinterest, Prime Minister Tony Blair ultimately agreed to appear the Liaison Committee and answer a wide variety of questions from different committee chairs. Though the Liaison Committee style of cross-examining the Primer twice a year is seen as a huge accountability development, the need for reform in the weekly parliamentary episode is no less emphasised either.[75] It has been suggested that the spectacular show of PMQT could be reformed through some procedural reforms without killing the spectacle itself.[76] Some of the recommendations include extending PMQT by quarter or half an hour, reducing the number of LO questions and ensuring a considerable number of backbench questions. Interestingly the present Speaker of the House of Commons seems to apply all these techniques out of his own initiative.

3.2. Modalities and Problems of PMQT in Bangladesh

As mentioned at the beginning, Bangladesh followed the suit of UK styled PMQT in 1997 when the Prime Minister offered a unilateral gesture to face the parliament every Wednesday for thirty minutes of question answer session. The offer is seen as having a great 'symbolic value'.[77] Still the yield of the process so far is meagre. Unlike the UK's Liaison Committee styled cross-examination of the Prime Minister, Bangladeshi PMQT represents a theatrical and political monologue.

---

domestic strife and violence between the two central characters, Mr. Punch and his wife Judy (6 December 2005). See: Dr. Mark Shephard, Ending 'Punch and Judy' Politics? The State of Questions and Counter-Questioning during PMQs at Westminster', paper presented in *the Twelfth Workshop of Parliamentary Scholars and Parliamentarians* (Wroxton College, Wroxton, Oxfordshire, UK, 25-26 July 2015).

75 John Bercow, n 19, p 8.

76 Stephen R. Bates, n 72, p 276.

77 Nizam Ahmed, 'Reforming the Parliament in Bangladesh: Structural constraints and political dilemmas'. (1998) 36(1) *Commonwealth & Comparative Politics* 68, 76-77.

3.2.1. *Procedural Issues*

First of all, questions to the Prime Minister are selected through an unclear process. Instead of prescribing any clear rule for the conduct of PMQT, the RoP excludes the general rules of PQT balloting, etc from its ambit.[78] The admissibility or non-admissibility of Prime Minister Questions is rather put at the personal disposal of the Prime Minister herself. S/he may select or de-select questions at her will.[79] This latitude to select the questions personally, rather than through balloting is inherently defective. Study reveals that among the questions submitted in the seventh parliament (February 1997 to May 1999), slightly more than 10% have been accepted and answered.[80] Rejection on procedural grounds is alarmingly highly. Around 53.9, 44.5 and 58 per cent of questions were rejected by the Speaker on procedural grounds in the seventh, eighth and ninth parliaments (up to December 2010) respectively.[81]

3.2.2. *Structural Issues*

Though the scope of supplementary question are there, element of surprise for the Prime Minister is missing. There is no scope of the Speaker of Bangladesh exercising discretion in the way the Speaker of the House of Commons would exercise. Also, the Leader of Opposition is not treated in the way this/her UK counterpart is treated. Hence there is no possibility of any direct exchange between the Prime Minister and the Leader of the Opposition. Nor does the Leader of the Opposition try to question the Prime Minister through regular ballot process. In fact, never ever in the history of PMQT in Bangladesh did the Leader of Opposition and Prime Minister faced each other.[82] The opposition party of the seventh parliament continuously boycotted the PMQT. Again, the

---

78 The Rules of Procedure of Jatya Sangsad, n 26, rule 48.

79 Nizam Ahmed, n 77, p 85.

80 Nizam Ahmed, n 3, p 34.

81 Rounaq Jahan and Amundsen, n 53, pp 53-56.

82 Nizam Ahmed, *Parliament of Bangladesh* (Springer, 2016) p 122.

governing party of the eighth parliament systematically refused the opposition party even an opportunity to table questions in PMQT.[83]

3.2.3. *Attitudinal Issues*

In Bangladesh, the quality of questions asked, and the responses made by the prime minister, are of doubtful efficacy in general. Until recently it was believed in the UK that there might be an illiberal process of 'syndication' in questioning.[84] Though we do not have any recorded evidence for such a practice in Bangladesh, the general trend of questioning in Bangladeshi PMQT is unfortunately akin to produce the same result as expected of a syndication process. Under the syndication process, party whips pass series of favourable questions to backbenchers who then would raise those in the floor. These types of questions are devoid of critical tune. Members merely seek information though open questions like how did a particular foreign tour go, what is the plea of the government on a certain issue, and most prominently, what is the plan or opinion about a particular stance of the opposition party, etc.[85] As per the data prepared by Nizam Ahmed, around 91 percent of the oral and supplementary questions asked to the Prime Minister of Bangladesh during seventh, eighth and ninth parliaments sought benefits for the constituencies, persons, party workers or mere information on the policy and programs of the government. Only 9.8 percent oral questions during this period involved requesting remedial actions for administrative or governmental lapses. Data also shows that 9.4 percent of the total supplementary questions asked during this period were mere blame shifting or vilifying the opposition under the guise of asking something to the Prime Minister.[86] Apart from the chances provided in the leading questions, successive Prime Ministers have taken their chance to utilize

---

83 All Answers Ltd, 'Balancing Power of President and Prime Minister' (Lawteacher.net, June 2019) <https://www.lawteacher.net/free-law-essays/constitutional-law/balancing-power-of-president-and-prime-minister-constitutional-law-essay.php?vref=1> accessed on 16 June 2019.

84 Philip Norton, 'Introduction: Parliament since 1960', in Mark Franklin and Philip Norton, (eds.), *Parliamentary Questions* (Oxford, 1993) pp 14-15.

85 Jalal Firoj, n 58, pp 117-119.

86 Nizam Ahmed, n 45, 229-231, Tables 6.16 and 6.17.

the PMQT as a platform to talk over the 'failures' of past government/s and the opposition rather than answering for the deficiencies of their own.[87]

4. Cross-country Experiences and Recommendations

See from a comprehensive point of view, the problems facing the Question Time in general, and Prime Minister's Question Time in particular, involves the following issues. It is suggested that lessons might be learnt from the practices of the UK Parliament and also from parliaments across the Commonwealth to address concerns.

The most fundamental concern has been the Speaker's non-partisanship and neutrality. Once elected, the House of Commons' Speakers have conventionally untied their political affiliation. This has yielded a miraculous statistic of only 4 percent parliamentary questions remaining unanswered in the UK,[88] while Bangladesh *Jatya Sangsad* offers a disturbing statistic of more than 50 percent questions remaining unanswered. Speaker's seriousness on PQT result in increasing question number, stopping "dorothy-dixers" or friendly questions[89] and encouraging supplementary questions. Further research need be done in relation to the Speaker's neutrality in Bangladesh. It also needs be seen what avenues are there, even within the current uneven field in Bangladesh, for the Speakers to assert greater discretion and autonomy in dealing with the session. Recent success of Speaker John Bercow in the British parliament has been pivotal in making the parliamentary question time livelier and more meaningful.

Another area to look at might be to allow questions without notice and instantly. In the Australian House of Representatives, parliamentary questions are asked without notice.[90] Party whips would provide a list of

---

87 Nizam Ahmed, n 77, pp 84-86.

88 Frances H. Ryan, n 1.

89 P Rasiah, *Does Question Time Fulfil its Role of Ensuring Accountability* (Democratic Audit of Australia, Canberra, 2006) 5.

90 I Harris, (ed.), *House of Representatives Practice* (Department of the House of Representatives, Canberra, 2005).

members asking questions and the Speaker would alternate the floor between the government and opposition.[91] Since the questions are asked instantly and without notice, the Speaker may not permit supplementary questions.[92] While Ministers and responsible in Bangladesh so far has parroted the written answer prepared by his/her ministries, it does not make any sense except utter disregard for the Parliament why a Minister or Prime Minister would not be able to answer instantaneous question over the department or ministry within his/her concern. The argument is more pertinent when we consider the already prevailing scope of asking supplementary questions over the pre-published questions. It will require a change in attitude and seriousness with which the ministers and members take the parliament itself.

Also, there are examples of conducting PQT in a partisan fabric elsewhere. Questions in the Canadian House of Commons are reserved exclusively for the opposition members. Participated by the major and secondary opposition parties, the question answer sessions in an such a partisan environment generate a confrontation tune and hence better accountability. Parties are given scopes based on the proportion of members they have the parliament.[93] An interesting feature is seen in the New Zealand parliament whose Standing Order 373(2) requires the members from different parties to ask questions in proportion to their strength in the parliament. Also, the government members are usually excluded, and the opposition parties are given more spaces.[94]

Compared to that Norway has taken a divided line of approach. Two different types of question sessions are designated there - Question Time and Question Hour. Question Time is based on individual member's independent preferences and without party control while Question Hour is more of front bench arena and conducted on a partisan basis with the

---

91 John Bercow, n 19, p 7.

92 Ibid.

93 R Marleau and C Montpetit, (eds.), *House of Commons Procedure and Practice* (House of Commons, Ottawa, 2000) 422.

94 John Bercow, n 19, p 9.

party leadership taking active part in the session and beak benchers being side-lined.[95]

The very limited duration of the PMQT encourages a tendency of political propaganda resulting in a very scanty accountability impact. Speaker's inability or unwillingness to allow spontaneous questions or questions that have not been pre-scripted and vetted by the party leadership results in the denial of meaningful questioning to the government.

With a face-to-face debate between the Prime Minister and Leader of the Opposition missing, Leader of the Opposition's service to the nation as the Prime Minister in waiting is compromised. Subjected to continuous weekly assessment of governmental performance, Prime Minister on the other hand would have kept her colleagues on their toes and thereby retain a better grip over the administration.[96]Such a reform would of course involve a risk of hyper-sensitising the day-to-day political differences and the rise of a UK-styled face threatening speeches. Still a weekly Prime Minister vs. Leader of the Opposition episode would help bring the *Jatya Sangsad* to the centre of public gaze and increase its institutional worth. It must be emphasised that Prime Minister's face off with the Leader of the Opposition is not suggested as a cure to all the ailments of our parliamentary process. While two persons facing each other does not in itself guarantee a dramatic increase in the accountability process, our purpose is rather modest in suggesting the course. What we can expect of the process is an immediate increase in public attention to the parliament and in preventing the PMQT from being a mere ruling party monologue. This scenic change in the landscape in its turn would pave ways for channelling our political rivalries into the parliamentary channels and reduction of violent opposition in the street. Given our experience with last 40 years of political violence and destruction, this is not a negligible input in any

---

[95] Bjørn Erik Rasch, 'Behavioural Consequences of Restrictions on Plenary Access: Parliamentary Questions in the Norwegian *Storting*' (2011) 17(3) *The Journal of Legislative Studies* 382, p 388.

[96] Nizam Ahmed, n 77, p 86.

sense. The process as stood in 1997 has not faced any significant demand for modernisation so far.[97] Time for the call seems ripe now.

5. Conclusion

Analysis on the procedural, structural and psychological aspects of Parliamentary Questions in general, and Prime Minister Questions in particular, suggest that they have a very strong potential in delivering democratic accountability. The loopholes and inherent constraints within the Rules of Procedure of the *Jatya Sangsad*, however, prevent much of its potential from being realised. Addressing those loopholes would primarily require increased awareness and willingness on the part of the Speaker of his/her discretion and partisan neutrality. Minor adaptations in the rules of balloting and timing of questions, permitting maximum leeway for instantaneous supplementary questions and also a meaningful policy of following up the progress of implementation of the commitments and words given during the question answer time. From an attitudinal perspective, members of the parliament must show a visible commitment to ask critical questions and the government must show seriousness in dealing with the concerns of the peoples' representatives. It is however not expected that all of the attitudinal, structural and procedural changes will happen overnight. Yet, some of the minor adjustments suggested in the previous part have the potential at least of opening the door of long-term reform.

[97] Ibid, p 77.

THE IRRELEVANCE OF THE DICHOTOMY BETWEEN INTERNATIONAL ARMED CONFLICTS AND NON-INTERNATIONAL ARMED CONFLICTS

KMS Tareq*

Abstract

The International Armed Conflicts (IACs) and Non-International Armed Conflict (NIACs) are two basic types of armed conflicts under the International Humanitarian Law (IHL) and the law is applied in accordance with the nature of an armed conflict. The diversity of armed conflicts in recent time, however, does not always fit with the traditional framework for IACs and NIACs. Again, in many cases the rules and principles of IACs are being applied to NIACs, and as such, sometimes it also becomes impossible to classify an armed conflict. Under these backdrops, this paper has investigated the internationalisation and development of customary IHL. The study has exposed the age-old dichotomy between IACs and NIACs is increasingly becoming blurred under the contemporary framework of IHL. The paper has concluded that the difference between IACs and NIACs are irrelevant in the contemporary framework of IHL.

1. Introduction

The International Humanitarian Law (IHL) is based on a number of distinctions including distinctions between state and non-state actors, combatants and civilians, and the military and private security military companies.[1] The key one of these distinctions is the dichotomy between

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

1 Jed Odermatt, 'Between Law and Reality: New Wars and Internationalised Armed Conflict' (2013) 5 Amsterdam LF 19.

International Armed Conflicts (IACs) and Non-International Armed Conflicts (NIACs) because the IHL is applied according to the nature of armed conflicts.[2] The diversity of armed conflicts in recent time, however, does not always fit with the traditional framework for IACs and NIACs.[3] Again, in many cases the rules and principles of IACs are being applied to NIACs.[4] The age-old dichotomy between IACs and NIACs is, therefore, increasingly becoming blurred and irrelevant under the contemporary framework of IHL.

The objective of the research is to emphasise the distinction between IACs and NIACs is irrelevance in the contemporary world. The study, consequently, argues that the diversity of armed conflicts and development of customary IHL have exposed the worthlessness of the difference between IACs and NIACs. The study follows the doctrinal research methodology analysing the international treaties and relevant judgments as primary sources. Moreover, the paper also investigates journal articles, books and online resources as secondary sources. It is worth noting the research does not suggest a design of a single regime for the governance of all armed conflicts.

In developing arguments, this paper is divided into three main sections. Firstly, an explanation as to the notion and category of armed conflicts is presented. Then, the internationalisation of armed conflicts, transnational armed conflicts and the development of customary IHL are analysed to highlight the irrelevance of the disparity between NIACs and IACs. Finally, the third section exemplifies the insignificance of such difference in the light of Syrian and Libyan armed conflicts.

---

2 Robert Kolb and Katherine Del Mar, 'Treaties for Armed Conflict' in Andrew Clapham, Paola Gaeta and Tom Haeck (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2015) 51.

3 Rogier Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts' (2009) 91(873) Intn'l Rev Red Cross 35.

4 Deidre Willmott, 'Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court' (2004) 5 Melb J Int'l L 19.

2. Concept and Traditional Categories of Armed Conflicts: Setting the Scene

The laws of armed conflicts are applicable conditionally on the character of the conflict.[5] However, the Conventional regime of IHL falls short to provide an unambiguous definition and category of armed conflicts.[6] Notably, the ICTY for the first time enumerates that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.[7] According to the common Article 2(1), the 1949 Geneva Conventions apply to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.[8] The situations are conflicts between States. The conflicts might take place between a state and rebel group or between rebel groups.

Traditionally, armed conflicts are divided into IACs and NIACs depending on the nature of participants. The treaty laws relating to IACs are the four 1949 Geneva Conventions[9] and Additional Protocol I (API) of 1977.[10] Common Article 2 of the Conventions defines IACs as armed conflicts between two or more of the High Contracting Parties.[11] Since only the states can be a party to the Conventions, the conflicts between more than one states are IACs. The API further extends the scope of IACs stipulating that the exercise of right of self-determination against the colonial dominations, alien occupation or racial regimes will also be amounted to IACs.[12] The IACS become blurred when they are compared with NIACs.

---

5 Ian Whitelaw, 'Internationalisation of Non-International Armed Conflict' (2016) 1 Perth ILJ 30, p 34.

6 Sylvain Vite, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91(873) Int'l Rev Red Cross 69.

7 *Prosecutor v Tadic* (Judgment in Sentencing Appeals) (2000) 39 ILM 635, para 84

8 The Four Geneva Conventions 1949 (Geneva Conventions or Conventions) art 2.

9 The Four Geneva Conventions 1949 (Geneva Conventions or Conventions) art 2.

10 The Additional Protocol I 1977 (AP I).

11 The Conventions, n 8, Common art 2.

12 The Additional Protocol II 1977 (APII), art 1(4).

The treaty texts relevant to the second type of armed conflicts, NIACs, are Common Article 3 of the Conventions and the Additional Protocol II (APII) of 1977.[13] However, in the name of creating a second type of armed conflicts, the provision simply negates IACs by stating 'armed conflicts not of international character'.[14] Although the treaty is silent as to the identity of the participants in NIACs, it is assumed as a conflict between government forces and rebel groups or between rebel groups.[15] Basically, NIACs are placed between national disturbances and IACs since NIACs are more intense than the former and less than the latter.[16]

In summary, a conflict between states is known as IACs and a conflict between government forces of a state and rebel groups or between rebel groups is identified as NIACs. However, the rise of internationalised and transnational armed conflicts casts doubt upon the relevance of the difference between IACs and NIACs.

3. Irrelevance of the Dichotomy between IACs and NIACs

It is argued that the framework of IHL is increasingly developed to blur various types of armed conflicts highlighting the classification as extraneous. This section is, therefore, divided into three sub-sections focusing respectively on the internationalisation of armed conflicts, transnational armed conflicts and the development of customary IHL.

3.1. Internationalisation of Armed Conflicts

The key argument to underscore the irrelevance of the distinction between IACs and NIACs is the case of internationalisation of armed conflicts. The internationalisation of an armed conflict arises through foreign intervention, and such an intervention causes the transformation of NIACs into IACs.[17] However, 'not all forms of intervention on the

---

13 Ibid.

14 Geneva Conventions, n 8, Common art 3.

15 Eric David, 'Internal (Non-International) Armed Conflict' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2013) 353.

16 Ibid.

17 Whitelaw, n 5, p 35.

part of an outside state will transform a NIAC into an IAC'.[18] Although the identity of the conflict is essential since IHL applies depending upon its type,[19] it is not always easy to characterise an armed conflict as international or non-international, in particular, because of such internationalisation.[20] Although it is agreed that when there is an armed conflict, diverse opinions are found to describe the nature of the conflict. To illustrate, while Meyrowitz claimed that intervention in the Vietnam War transformed it into an IAC, others argued that it was still a NIAC even after the intervention.[21] This difference of opinion as to the effect of internationalisation lies in the question of the manner of intervention. Notably, the intervention to NIACs occurs through involvement of troops in the hostilities and/or control over the non-state armed group.[22]

Concerning the manner of intervention through involvement of troops, there are 'pairings' approach and 'complete internationalisation' approach to determine the nature of the armed conflicts after such intervention.[23] According to the pairings approach, a NIAC is internationalised when a third state intervenes in favour of the armed group.[24] Since the intervention on the side of government force still keeps the fight between a state and non-state armed group, internationalisation does not happen in this case.[25] The ICJ, in the *Nicaragua* case,[26] upheld the pairing approach identifying the conflict between government of Nicaragua and contras as NIACs, and the conflict between the US and Nicaragua as IACs.[27] Conversely, in accordance with the complete internationalisation approach, the intervention of a third state transforms the NIACs into IACs regardless of the side of intervention.[28] The Trial Chamber of the ICTY upheld this

---

18 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 105.

19 Whitelaw, n 5, p 30.

20 Emily Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts' (2007) 20 *LJIL* 441, p 442.

21 Whitelaw, n 5, p 34.

22 Ibid.

23 Sivakumaran, n 18, p 224.

24 Ibid, p 222.

25 Ibid, p 223.

26 *Nicaragua v United States of America*[1986] ICJ Rep 14 para 219.

27 Ibid.

28 Sivakumaran, n 18, p 223.

view in *Kordić and Čerkez* case.[29] Therefore, there prevails an uncertainty to identify an armed conflict as NIACs or IACs applying the paring and complete internationalisation approaches in the case of intervention of a third state.

Regarding the other manner of intervention through control over armed group, internatonalisation occurs when participants of conflicts are controlled by a third state.[30] There are 'effective control' and 'overall control' tests to measure the extent of such control. Although the ICJ applies effective control test to decide state responsibility in the *Nicaragua* case, and the ICTY applies overall control test to decide internationalisation in the *Tadic* case,[31] in both cases the nature of control of an armed group by government were assessed and the Courts have different opinions. To illustrate, in the *Nicaragua* case, the ICJ applies effective control test stating that the foreign state must have effective control upon the military or paramilitary group.[32] The Court confirms that the US had no effective control upon the activities of contras since the concerned violation could be committed by contras independently.[33] Conversely, the ICTY applies overall control test requiring the state to have 'a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group'.[34] However, the ICJ reiterated the effective control test overruling the overall control test.[35] It means characterising a NIAC as an IAC in case of intervention through the control of armed group is still obscure even before the highest courts of the universe.

To sum up, by way of internationalisation NIACs can be transformed into IACs. However, the disagreement is vivid among the international forums including the ICJ and ICTY to identify when and how the

---

29 *Prosecutor v Kordićand Čerkez* IT-95-14/2-T (2001) paras 108–09.
30 *Tadic*, n 7, para 84.
31 Ibid.
32 *Nicaragua*, n 26, p 115.
33 Ibid.
34 *Tadic*, n 7, para 137.
35 *Bosnia and Herzegovina v Serbia and Montenegro* (Judgment) ICJ Rep 2005 43 [404]-[405].

conversion happens for internationalisation of an armed conflict. This uncertainty continues in the case of transnational armed conflicts as well.

3.2. Transnational Armed Conflicts

Another key argument to expose the irrelevance of the dichotomy between IACs and NIACs is the rise of transnational armed conflicts (TACs). A TAC is understood as an armed conflict between a state and global non-state actors, 'at least in part, outside the territory of the state'.[36] While it is explained that the present IHL regime can encompass TACs, conversely it is argued that the nature of such armed conflicts hardly fits with the contemporary framework of the IHL.[37]

It is sometimes argued that the contemporary IHL regime is applicable to TACs treating the conflicts as NIACs or IACs.[38] Sometimes TACs are interpreted similar to NIACs since NIACs are defined as 'armed conflicts not of international character occurring within the territory of one of the High Contracting Parties'.[39] Although it is not clarified in the texts, NIACs are assumed as conflicts between the government forces and one or more armed groups or between armed groups.[40] It is further claimed that the phrase 'within the territory of the of the High Contracting party' means the territory of *any party* to the Conventions and the Protocols, and it is not limited to the territory of one country. [41] By way of example, the Supreme Court of the United States (US) categorically stated that 'the fight against Al Qaeda, which is not limited to Afghanistan or Iraq but conducted in essence outside the US, is covered by Common Article

---

36 Roy S Schondorf, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime' (2004) 37 NYU J Int'l L & Pol 1.

37 Marco Sassòli, 'Transnational Armed Groups and International Humanitarian Law' (2006) 6 Program on Humanitarian Policy and Conflict Research, Harvard, Occasional Paper Series 1-45.

38 Claus Kress, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15(2) J Con & Sec L 245.

39 Common art 3, n 8.

40 Louise Arimatsu and Mohbuba Choudhury, 'The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya' 2014 Chatham House 4.

41 Ibid.

3 that applies to NIACs'.[42]Furthermore, sometimes it is also claimed that the law of IACs are applicable to TACs. To illustrate, in 2001 Al Qaeda was supported by the Taliban as the *de facto* government of Afghanistan and therefore, laws of IACs were applicable to the armed conflict between the US and the Al Qaeda.[43] On the above, the identity as to the type of TACs is ambiguous as there are arguments to encompass them under the regime of either IACs or NIACs. Disclaiming these suggestions, it is conversely highlighted that TACs are different from IACs and NIACs.

A new regime for the governance of TACs is argued classifying them as the third type of armed conflicts calling it an 'extra-state armed conflict'.[44] It is hence emphasised that TACs cannot be treated as IACs since a transnational armed group is not a state and consequently cannot be a party to the Conventions.[45] Again, TACs cannot also be treated as NIACs since the legal regime for NIACs is designed to govern the armed conflict within the territory of one state.[46] To develop this argument, the meaning of 'within the territory of one of the High Contracting Party' is interpreted literally.[47]

To recap, there are rooms to categorise TACs as NIACs or IACs and conversely there are arguments that TACs fit neither with IACs nor NIACs, and under this uncertainty a third type of armed conflict is suggested to establish. Thus, TACs expose the irrelevance of the traditional dichotomies of armed conflicts. As the internationalised and transnational armed conflicts create apparent crisis as to the type of an armed conflict, the IHL regime is developing to eradicate the difference between IACs and NIACs.

---

42 *Hamdan v Rumsfeld* (United States Supreme Court) 548 US 557 (2006) 66–69.

43 Sassòli, n 37, p 4.

44 Schondorf, n 36, pp 5-6.

45 Sassòli, n 37, p 19.

46 Ibid 22; Schondorf, n 36, p 6.

47 Konstantinos Mastorodimos, 'The Character of the Conflict in Gaza: Another Argument towards Abolishing the Distinction between International and Non-International Armed Conflicts' (2010) 12(4) ICLR 437, p 444.

3.3. Development of Customary IHL

The development of customary IHL, treaty laws and various international judicial institutions asserts the difference between IACs and NIACs is irrelevant in modern times. However, this part will specifically analyse the respective development of customary IHL showing the tendency to remove the dichotomies of armed conflicts.

It is noteworthy that the legal regime of IHL considerably favours to the governance of IACs.[48] Originally the IHL framework including the 1864 Geneva Convention was applied to IACs only.[49] The IHL regime tends to govern the 'conduct of and damage caused by conflicts *between* rather than *within* states.[50] Stewart therefore terms this as the historical bias of IHL to IACs.[51] To illustrate, the contemporary IHL treaty regime contains almost 600 Articles in total.[52] However, only 29 Articles are applicable to NIACs; Common Article 3 of the Conventions and 28 Articles of AP II.[53] The Hague Laws on warfare (means and methods) are also not applicable to NIACs.[54] It is therefore submitted that IHL provides less rights and obligations to the parties involved in NIACs.[55] This historical favour to IACs ultimately encourages the customary IHL to disregard the classification of armed conflicts.

With regard to the development of customary IHL, it has 'evolved to fill in most of the lacunae in the law regulating NIACs'.[56] The most crucial principles of IACs including the principle of distinctions, prohibition on indiscriminate attacks, the principle of proportionality in attack, the principle of military necessity and prohibiting on causing unnecessary

---

48 James G Stewart, 'Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict' (2003) 85(850) IRRC313.
49 Kolb and Mar, n 2, p 50.
50 Stewart, n 48, p 316.
51 Ibid, p 319.
52 The Conventions and Protocols, n 8.
53 David, n 15, p 354.
54 Stewart, n 48, p 316.
55 Whitelaw, n 5, p 30.
56 Crawford, n 20, p 455.

suffering are now considered customary in NIACs.[57] Notably, both the elements of *opinio juris* and state practice are satisfied to constitute customary IHL in this respect. On the one hand, as the evidence of state practice, a good deal of the UN General Assembly (UNGA) and Security Council (UNSC) resolutions demonstrates the tendency to use IACs' rules and principles to NIACs. For example, the UNGA Resolution 2444 (XXIII) on Respect for Human Rights in Armed Conflict was the first resolution where 'the necessity of applying basic humanitarian principles in all armed conflicts' was adopted and recognised unanimously.[58] Later, a series of resolutions were accepted by the GA in this line making no difference between IACs and NIACs.[59] Again, UNSC in resolution 788, 794, 814, 972,993, 1001, 1083, 1193, 1213 were also adopted disregarding the dichotomies of armed conflicts.[60] Furthermore, the 1999 UN Secretary-General's Bulletin for Peacekeeping Forces does not require the forces to consider the distinction between IACs and NIACs in observing IHL.[61] It is therefore argued the relevance of the difference between IACs and NIACs is ignored overwhelmingly to apply IHL indiscriminately.

The growing tendency of IHL to disregard the classification of an armed conflict is further evidenced in the revolutionary study of the ICRC on the customary status of IHL.[62] To discover the customary IHL the report of ICRC examines both 'national and international demonstrative

---

57 Sivakumaran, n 18, p 105.

58 Emily Crawford, 'Blurring the Lines between International and Non-International Armed
Conflicts - The Evolution of Customary International Law Applicable in Internal Armed
Conflicts' (2008) 15 Austl Int'l LJ 29, p 49.

59 UNGA resolutions 2597, 2674, 2676, 2677, 2852, 2853, 3032, 3102, 3500, 31/19 and 31/44 cited in Crawford, n 56, p 50.

60 Crawford, n 58, p 50.

61 Observance by UN Forces of International Humanitarian Law, 6 August 1999, UNDoc.No.ST/SGB/1999/13 (1999) (bulletin of UN Secretary-General) cited in Crawford, n 18, p 455.

62 International Committee of the Red Cross (ICRC), 'IHL Database: Customary IHL' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha> accessed 10 April 2020.

sources'.[63] Assessing both elements of *opinio juris* and state practice, the ICRC has discovered 161 principles of the customary law under 44 titles relating to IHL.[64] Out of these, 144 rules are 'uniformly applicable to all armed conflicts',[65] 17 are exclusively applicable to IACs and only 5 rules are applicable to NIACs.[66] This evidence justifies that the customary IHL tends to merge the dichotomy between the IAC and NIAC.

In summary, since the distinction between IACs and NIACs has become extraneous in modern time owing to the internationalised and transnational armed conflicts, the customary IHL tends to use rules and principles to armed conflicts irrespective of their character as international or non-international. This tendency is evidenced by the UNGA and UNSC resolutions and the ICRC report. The irrelevance is further uncovered in the Syrian and Libyan armed conflicts discussed in the following section.

4. Exemplification of the Irrelevance of the Difference between IACs and NIACs: The Syrian and Libyan Armed Conflicts

The conflicts of Gaza, Lebanon and Yemen reveal the irrelevance of the dichotomy between IACs and NIACs in modern time.[67] However, this section analyses the armed conflicts of Syria and Libya to exemplify such irrelevance of the dichotomies of armed conflicts.

In Syria, the identity of the armed conflict has been changed over the period. Notably, it was firstly a conflict between government forces and rebel groups, and termed as national disturbance.[68] Later the government of Basher al-Assad, the President of Syria, was supported by a number of countries and rebel groups as well.[69] The 'key players' in the Syrian armed conflict are Russia, Iran, Israel, United States, United Kingdom,

63 Crawford, n 20, p 455.
64 ICRC, n 62.
65 Crawford, n 58, p 53.
66 Crawford, n 20, p 457.
67 Arimatsu and Choudhury (n 40) 1; Mastorodimos, n 47, p 437.
68 Tom Ruys, 'The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict' (2014) 50 Stan J Int'l L 247.
69 Odermatt, n 1, p 29.

France and Turkey.[70] That is to say that the armed conflict is directly or indirectly intervened by a range of foreign states; some are acting on the side of government and some are fighting on the side of rebel groups. At the same time, the war was spilled over into neighboring country, notably in Turkey.[71] Consequently, the nature of the armed conflict has become quite uncertain among IACs, NIACs and TACs. Whereas the ICRC identifies 'parts of the conflict' as of NIACs character,[72] the Commission of Syria generalises the whole conflict as a NIAC.[73]Conversely, it is also evidenced that in addition to the presence of a NIAC, there were a separate IAC as well as an internationalised armed conflicts.[74] As such, there prevails an obvious disagreement as to the nature of Syrian armed conflict among the opinions of international forums and scholars.

The Libyan armed conflict is the other example of such irrelevance of the difference between IACs and NIACs. To illustrate, in Libya, the crisis started 17 February 2011 and from a national tension it converts to an armed conflict by a couple of days.[75] By 17 March 2011, the armed conflict was intervened by the US and European forces as they started assisting the rebel groups following the UNSC Resolution 1973 requiring the member states to take 'necessary steps … to protect civilian and civilian populated areas under threat of attack of Libya'.[76] Sometimes it is mathematically counted that at the beginning it was a national tension

---

70 Julian Borger, 'Who are the Key Players in the Conflict?' <https://www.theguardian.com/world/2018/apr/14/syria-conflict-assad-putin-russia-iran-israel> accessed on 27 April 2020.

71 Ibid.

72 ICRC, 'Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting' (17 July 2012) 51 <http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm> accessed on 30 April 2020.

73 Independent International Commission of Inquiry on the Syrian Arab Republic, 'Report of Commission of Inquiry on Syria' (5 February 2013) <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx> accessed on 05 May 2020.

74 Arimatsu and Choudhury, n 40, pp 16-17.

75 Whitelaw, n 5, p 39.

76 UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

and it converted to a NIAC for the intensity, and finally, it turned into an IAC.[77] Whereas the ICJ and the ICTY have inconsistent opinions as to the internationalisation of NIACs through intervention, the uncertainty as to the type of the Syrian and Libyan armed conflict is apparent.

To summarise, while sometimes the Syrian and Libyan armed conflicts are identified as NIACs, others claim that they are IACs. The simultaneous existence of both IACs and NIACs is also suggested. Therefore, the irrelevance of the difference between IACs and NIACs is evident in identifying both Syrian and Libyan armed conflicts.

5. Conclusions

The conventional framework of the IHL is usually applied to armed conflicts according to their types as IACs and NIACs. However, the Conventions and the Protocols are apparently insufficient to categorise an armed conflict and to determine its scope as well. Again, historically, the IHL framework shows its bias to IACs. At the same time, the internationalisation of armed conflicts makes it more uncertain to identify armed conflicts as IACs or NIACs. Although it is agreed that internationalisation converts the NIACs into IACs, the courts are contradictory in deciding the effect of the manner of intervention. Furthermore, the transnational aspect of armed conflicts which spreads within the territory of more than one country has multiplied the complexity to detect a conflict. Whereas there are some grounds to interpret TACs either NIACs or IACs, there are many issues as to TACs unresolved under the contemporary framework of IHL and consequently, it is suggested to identify them as a third type of armed conflicts. It is, thus, submitted that the rise of internationalised and trans-nationalised armed conflicts has exposed the irrelevance between different types of armed conflicts. This irrelevance leads to eliminate the distinction tending to a single category of armed conflict. While the international judicial institutions like the ICTY or the ICJ contradicts with each other to identify an armed conflict even after years of conflicts, how it can be expected to identify the nature of the conflict during war time by the

[77] Arimatsu and Choudhury, n 40, pp 35-40.

parties involved to the conflict. Therefore, the contemporary development of customary IHL attempts to disregard the so-called variance of armed conflicts. For the sake of more clarity, and more certainty to prosecute the violators and protect the rights of victims of armed conflicts, it is underlined that the dichotomy between IACs and NIACs is irrelevant in the modern world.

THE TRIPLE DIVORCE JUDGEMENT AND THE UNPRECENDENTED PENAL LEGISLATION ON MUSLIM DIVORCE IN INDIA: A CRITICAL REVIEW

Noor Israth Jahan[*] and Mohammad Moin Uddin[**]

Abstract

On 22nd August, 2017, the Indian Supreme Court pronounced its now famous Shayara Bano judgment declaring Muslim husbands' instantaneous triple divorce unconstitutional and invalid. Following this judgment, the Indian Parliament passed the Muslim Women (Protection of Rights on Marriage) Act 2019, criminalizing pronouncement of triple divorce. The judgment was hailed by Muslims in general and Muslim women in particular, but the penal law mentioned above generated huge controversy in India.

Talaq-e-bidaat is a later day innovation in Islam, which is even considered sinful. Yet, the Hanafi School maintains that triple divorce is a valid form of divorce. Many countries, including Sub-continental, Arab, and African countries with considerable Muslim population, reformed their laws either banning or barring the practice of triple divorce in some form or other. Surprisingly, India took an unusual path: first disbanding triple talaq judicially, and then criminalizing it legislatively.

In this article, we have made an in-depth analysis of the Shayara Bano judgment and the follow-up penal law. We argue that while the Shayara Bano judgment outlawing triple talaq was praiseworthy, the Indian legislative action is unprecedented and totally uncalled for. In the end it suggests that Bangladeshi example could be followed by India in the matter of triple divorce.

[*] Lecturer, Department of Law, University of Chittagong.
[**] PhD, Associate Professor, Department of Law, University of Chittagong.

1. Introduction

On 22nd August, 2017, the Indian Supreme Court in a 3-2 majority judgment in *Shayara Bano v Union of India* (2017)[1] declared instantaneous triple divorce (*talaq-e-bidaat*) as unconstitutional and invalid. Following that judgment, the Indian parliament passed a law, namely The *Muslim Women (Protection of Rights on Marriage) Act* 2019, criminalizing pronouncement of triple divorce and punishing the husband with up to three years in prison. Large number of Muslim countries including a number of theocratic ones also banned *talaq-e-bidaat* or modified its practice. Even India's two sub-continental neighbours, Pakistan and Bangladesh, reformed law of divorce back in 1961 virtually banning triple divorce. Interestingly, with a sizeable Muslim population, India continued with the practice of triple divorce system till 2017. However, as India went for reforms, it did not just ban triple divorce, rather took the unprecedented and unparalleled step of criminalizing it.

The judgment and the legislation mentioned above generated mixed reactions among Muslims in India. Muslim women in general, and some feminists in particular, welcomed the judgment, while conservative women in general and progressive feminist writers in particular, saw the judgment as an effort of the state to snatch away the last vestiges of religion-based personal law. The latter group argues that reform of Muslim Personal Law must come "from within" the Muslim community, and not "top-down" from the state legislature, which is now controlled by right wing Bharatiya Janata Party (BJP). The enthusiasm of the BJP government in bringing the penal legislation against Muslim males made the whole issue of banning triple *talaq* more suspicious and controversial. Even those who supported judicial ban of triple *talaq* questioned the underlying motive behind the criminalizing law.

The Muslims of India have been carrying huge trauma since independence. Since independence in 1947 thousands of riots, mostly between Muslims and Hindus, happened in India. Various incidents of

[1] *Shayara Bano v Union of India,* (2017) 9 SCC 33.

lynching and hate crimes against Muslims have happened during the tenure of the current BJP-led government, let alone the questionable past of BJP when it comes to Muslims. The fact that the criminalizing law came from the legislature dominated by BJP added another layer of complexity to the issue of Personal law reform. However, it needs to be noted that bringing reforms to religion-based personal law is always difficult in the sub-continent. The unique context of India, with overwhelming Hindu population and a popular demand for uniform family code, made reforms of Muslim personal law even more difficult.

This article attempts to analyze the judicial position on triple talaq and the subsequent legislative action in the unique context of India. With this end, this article will dissect the *Shayara Bano* case extensively along with previous jurisprudence on this issue.

This article is divided into 5 parts. The first part discusses about the legal status of *talaq-e-bidaat* in Islam, especially explicating whether it is an "essential religious practice" or not. The second part analyzes the *Shayara Bano* judgment, and discusses as to how this judgment is different from *Shamim Ara* and other Indian judgments on the issue of talaq. The third part reflects on implications of the legislative action brought about by the Indian Government, and how such an action is unparalleled in talaq jurisprudence. The fifth and last part is the conclusion part which underscores problems of reforming personal laws in general and that of reforming a minority community's personal law in particular. It further summarizes the findings.

2. Institution of Divorce in Islam and the Status of *Talaq-e-Bidaat*

Marital ties, though expected to be permanent, are sometimes untied by divorce. Islam encourages marriage and disapproves divorce, allowing it only as a last resort. Prophet of Islam said, "Divorce is the most detested of all allowed things in Islam."[2] However, when it comes to the practice of divorce, there are different procedures of effectuating a Muslim

[2] Syed Khalid Rashid, *Muslim Law* (Eastern Book Company, Lucknow, 4th ed, 2004) P 99.

divorce. Among those procedures, some types of divorce are categorized as *talaq-al-sunna*, i.e. "approved forms." However, there is one notorious form of divorce which is categorized as *talaq-al-bidaat*, i.e. "disapproved form;" Instant triple divorce falls into this category.

This form of divorce consists of three pronouncements of talaq made at once—either during menstruation or during purity—either in one sentence e.g. "I divorce thee thrice" or in three sentences, e.g. "I divorce thee, I divorce thee, I divorce thee." Unlike the Sunna-forms, in this form of talaq, the wife is divorced instantly, irrevocably, and finally— without leaving any room for revocation or reconciliation. The instantaneous character of this form, haste and anger involved with it make it the most disapproved form of divorce. Furthermore, the couple cannot reconcile nor remarry after that very moment of divorce without an intervening marriage— popularly known as *nikahhalala* or hilla marriage.[3]Different Quranic verses and reliable Hadiths of the Prophet (Sm) show that slow and graduated forms of divorce, following sincere attempts of mitigation and followed by attempts of reconciliation, are preferable than instant triple divorce.

Talaq-e-bidaat literally means 'innovated form of talaq,' because it was not practiced during the time of the Prophet of Islam and the first Caliph Abu Bakar (R.). On one instance, Prophet of Islam disapproved a case of such divorce with strong words calling it "mockery upon the Book of Allah," because the book of Allah i.e. the Quran approves only Sunna-forms of divorce.

Talaq-e-bidaat was innovated during the caliphate of Umar (R.). During the caliphate of Hazrat Umar (R.), when the Muslims conquered remarkably, there was a huge preponderance of women captured in wars. As a result, many men started to divorce their wives a number of times and then revoking the divorces at their whims married those divorced wives again and again. This produced hardship and mental trauma among the womenfolk. In order to stop this practice, Umar (R.) gave a

---

3 Alamgir Muhammad Serajuddin, *Sharia Law and Society* (Asiatic Society of Bangladesh, Dhaka,1st ed, 1999) P 19.

ruling that if any person divorced his wife three times in one go, the divorce would take effect instantaneously and irrevocably, and the husband would not get back the wife after that, before his wife is married to a third person first, and duly divorced.[4] It is evident that Hazrat Umar's (R.) ruling was meant to tackle a special situation and was of a "temporary nature," and specific to the people of that time.[5] The end behind such ruling was that men of that time learned the consequences of their hasty actions in a hard way.[6]

However, the fact remains that despite being a temporary measure to combat special situations and in spite of its incongruence with the direct injunctions of the Quran and *Sunnah*, *talak-e-bidaat* became a universal practice throughout the world among the Hanafis and Shafiis. In the Indian sub-continent also, *talak-e-bidaat* was accepted as "good in law" for many centuries. Of course, it is a satisfying fact that quite a number of countries following Sunni schools have either banned the practice of instantaneous *talak-e-bidaat* or modified its effect.

3. Indian Judicial Verdicts on Triple Divorce till *Shayara Bano* Case (Triple Divorce Judgment)

Unlike other countries who took legislative action reforming triple divorce practice long ago, India did not introduce any such legislation till 2019. Before enacting the *Muslim Women (Protection of Rights on Marriage) Act* in 2019, the issue of *talaq-e-bidaat* in India was legally regulated by judicial verdicts.

---

4 Ibid, p 191.

5 MaulanaWahiduddin Khan, *Concerning Divorce* (Goodword Books, 2003) 30-31.

6 The exact Hadith is as follows: "Abdullahibn Abbas reported that the pronouncement of three divorces during the lifetime of Allah's Messenger (Sm) and that of Abu Bakkar and two years of the caliphate of Umar was treated as one. But Umar ibn al Khattab said, "Verily the people have begun to hasten in the matter in which they are required to observe respite. So if we had imposed upon them, [it would have deterred them from doing so!] and he imposed it upon them." Sahih Muslim 3491.

The first leading case on this issue is *Rashid Ahmad v Anisa Khatun*,[7] which was decided by the Privy Council in 1932. In this case, the validity of *talaq-e-bidaat* pronounced by one Ghiyasuddin was challenged by Anisa Khatun (both belonged to Hanafi School) on two grounds: first, that she was not present at the time of pronouncement of talaq; and second, even after the pronouncement of triple talaq, cohabitation continued and subsisted for further period of 15 years. Notably, during that 15-year period, five children were born. The Privy Council upheld the triple talaq as valid despite the absence of the wife during the pronouncement of talaq and subsequent resumption of cohabitation between husband and wife. Most striking is the fact that the court upheld the validity of the triple divorce in this case knowing well that the judgment could have adverse effect on the legitimacy of the five children who were born during the 15 years when the couple lived together after triple divorce.[8] In fact, as early as 1905, English judges came to conclusion that triple talaq is "good in law, though bad in theology."[9] This shows that before decolonization of the sub-continent, the English judges upheld the validity of triple divorce *ad nauseum*.

Justice Krishna Ayer was the first Indian judge to point out in an *obiter dictum* that instant irrevocable divorce is inconsistent with the spirit of Islam.[10] He made it abundantly clear that it was a "popular fallacy" thinking that a Muslim husband has an unfettered right to dissolve the

---

7 (1932) AIR PC 25.

8 After triple divorce, the husband and the wife cannot remarry without the wife going through the formality of *halala*—marrying a third person and getting duly divorced first. DF Mulla mentions this case as a classic precedent on legitimacy of children, that the acknowledged person must not be the offspring of *zina*—illicit intercourse. Zina occurs also when after triple divorce the couple remarries/ lives together without *halala.* Even acknowledgment of legitimacy of the children by the father (the husband who divorced) does not cure the defect of legitimacy caused by the want of *halala*. See Mulla above n 11, p 282.

9 Batchelor J of Bombay High Court authored of this famous line in *Sarabai v Rabiabai* (1905) ILR 30 Bombay 537 which was consistently maintained by other judges well after the independence.

10 Narendra Subramaniam, 'Legal Change and Gender Inequality: Changes in Muslim Family Law in India' (2008) 33(3) *Law and Social Inquiry* 631, p 650.

marriage under Shariah law. In his understanding of Shariah, instant triple divorce is not in consonance with the injunctions of the Shariah.[11]

After Justice Krishna Ayer, this line of reasoning on triple divorce was taken up by Justice Baharul Islam of Gauhati High Court (as he then was). In two Gauhati High Court cases, namely *Jiauddin Ahmed v Anwara Begum*[12] and *Must. Rukia Khatun v Abdul Khalique Laskar*,[13] Baharul Islam, J interrogated the earlier Indian jurisprudence on triple talaq. Relying on the direct Quranic injunctions in Sura IV: Verses 128-9 and Sura IV: Verses 229-232 and broader Islamic principles, he pointed out the inconsistency of triple talaq with Sharia, though he did not directly call triple talaq invalid.[14] He outlined four preconditions for a valid divorce: a good cause for divorce, presence of the wife during pronunciation of divorce, time gap between pronouncement of the divorce and its finality, and scope for arbitration. The third and the fourth requirements can never be fulfilled in case of instant triple talaq.

Despite these changes in the treatment of triple divorce by judges like Justice Krishna Iyer and Baharul Islam J in some High Courts of India, there were other High Court Judges in India who were maintaining *status quo* and were accepting the validity of triple divorce without any hesitation. In fact, verdicts accepting the validity outnumbered the verdicts questioning it.[15] This continued until the Supreme Court stepped in and toed the line of reasoning maintained by Justice Krishna Iyer and Justice Baharul Islam. The first landmark judgment of the Supreme Court of India on triple talak came in 2002 in the case of *Shamim Ara v State of UP*.[16]

---

11 *A. Yusuf Rowther v Sowramma,* (1971) AIR Kerala 261.

12 (1981) 1 Gau. LR 358.

13 (1981) 1 Gau.LR 375.

14 Jean-Philippe Dequen, 'Refelctions on the ShayaraBano Petition, a Symbol of the Indian Judiciary's own Evolution on the Issue of Triple Talak and the Place of Muslim Personal Law within the Indian Constitutional Frame?' in *Focus: Law in Context, South Asia Chronicle* [6/2016] 46.

15 Narendra Subramanian mentioned that a majority of judgment upheld triple divorce after Justice Krishna Iyer and Justice Baharul Islam started writing against instant triple divorce. Subramanian also mentioned that even a larger number of lower courts judges upheld the validity of triple divorce in lower courts. For a list of those High Court cases, See Subramanian, n 10, pp 631-672.

16 (2002) 7 SCC 518.

In *Shamim Ara*, the only question at issue was whether a husband can take a plea of earlier divorce for the first time in court through the written statement or affidavit to countenance wife's claim of maintenance. In India, usually as against wife's claim of maintenance, the husband claims in the court that he had already divorced the wife, and hence, there is no question of payment of maintenance. In *Shamim Ara*, the Supreme Court declared that a communication of divorce in written statement cannot be treated as pronouncement of talaq.[17]

There is a controversy as to whether *Shamim Ara* constituted a binding precedent on the legality of triple divorce or not. This is because the legality of triple divorce itself was not at issue in this case. It was a case for maintenance under Section 125 of the *Code of Criminal Procedure* 1973. However, the Court went on to lay down conditions for a valid divorce. By way of *obiter dictum*, the Supreme Court enumerated the correct procedure of Islamic divorce. According to their Lordships, a valid divorce would require "a reasonable cause" and "an attempt of arbitration" involving family members of both parties.[18] However, *Shamim Ara* was not followed by a number of High Courts later on while deciding on validity of triple divorce.[19]

4. Facts and Insights of the *Shayara Bano v Union of India* Case

Now famous as "Triple Talaq Judgment," *Shayara Bano v Union of India* is a historic landmark of the Supreme Court of India regarding triple talaq. The case was the first in taking a decisive position on triple talaq by banning it. The case not only sought to relieve the grievances of

---

17 Flavia Agnes, 'Triple Talaq-Gender Concerns and Minority Safeguards within a Communalized Polity: Can Conditional Talaqnama Offer a Solution' (2017) 10 *NUJS Law Review* 427, p 439.

18 Dequen, n 14, p 46.

19 There have been a number of cases in India in this regard. For example, *Parveen Akthar* v *Union of India* (2003) 1 LW 370;*Zamrud Begum* v *K Mohammad Haneef* (2003) 3 ALD 220;*Mustari Begum* v *Mirza Mustaque Baig II* (2005) DMC 94; *Shahzad* v *Anisa Bee II* (2006) DMC 229; *Gama Nisha* v *ChottuMian II* (2008) DMC 472 Jha; *Manzoor Ahmad Khan* v *Saja and others* (2010) (4) JKJ 380;*UmmerFarooque v Naeema* (2005) (4) KLT 565; *Masroor Ahmed* v *NCT of Delhi* (2008) (103) DRJ 137; *Nazeer* v *Shemeema* (2017) (1) KLT 300.

Shayara Bano, an individual, but also aimed to relieve Indian Muslim women in general from the vicissitude of triple divorce.

The judgment was the outcome of several writ petitions by Muslim women[20] including Shayara Bano and a *suo motu* reference to the Chief Justice of India by two Supreme Court judges. Notably, these two judges were hearing an appeal in *Prakash v Phulavati*[21] (in 2015) regarding rights of Hindu women over ancestral property, and during court proceedings one advocate commented that steps were necessary regarding similarly discriminatory practices among Muslims of India. In response, the judges made the reference to the Chief Justice to constitute a constitutional bench to examine whether the practice of polygamy and instant triple divorce violated fundamental rights of Muslim women.[22] The reference, now named *In Re Muslim Women's Quest for Equality*[23] was responded to by constituting a five-judge constitutional bench. With this reference, five writ petitions were attached to be considered together, most famous of which is that of Shayara Bano.[24]

4.1. Facts of the Case

Shayara Bano, a 36 year-old inhabitant of Uttarakhand, was abruptly divorced by her husband Rizwan Ahmad in 2015. After their marriage in 2002, in which considerable amount of dowry was paid, the husband continued demanding (further) huge amounts of dowry from in-laws, in default of which Shayara Bano was subjected to acts of cruelty. At one stage, Shayara Bano was sent back to her father's house, and later on Rizwan Ahmad divorced her using triple divorce.[25] Shayara Bano filed a writ petition before the court under Article 32 of the *Constitution of India*

---

20 Writ Petition (C) no. 288 of 2016 *Aafreen Rehman* v *Union of India and others* , Writ Petition (C) no. 327 of 2016; *Gulshan Parveen* v *Union of India and others*, Writ Petition (C) no. 665 of 2016; *Ishrat Jahan* v *Union of India and others,* Writ Petition (C) no. 43 of 2017.

21 *Prakash v Phulavati* (2016) 2 SCC 36.

22 Agnes, n 17, p 429.

23 *Re Muslim Women's Quest for Equality,* SMW(C) no. 2 of 2015.

24 Writ Petition (civil) no. 118 of 2016.

25 Dequen, n 14, 37.

challenging the constitutional legitimacy and religious validity of the instant triple divorce practice. She contended that triple divorce is not a part of the 'Shariat' and at the same time violative of the fundamental rights guaranteed to citizens in India by the Constitution under Article 14 (equality before law and equal protection of law), Article 15 (non-discrimination) and Article 21(right to life with dignity).

In her writ petition, Shayara Bano also raised her objection to polygamy and *nikahhalala* (Hilla Marriage) for being violative of the fundamental rights. However, the triple talaq judgment pronounced by the Supreme Court of India focused on the legal and religious sanctity of triple divorce practice only, leaving the remaining two issues to be resolved subsequently.[26]

On perusal of various lines of arguments advanced by the learned counsels of the petitioner, respondents and other interveners,[27] the Constitution Bench comprising of 5 judges belonging to five different faiths – Chief Justice Jagdish Singh Khehar, Justice Abdul Nazeer, Justice Rohinton Nariman, Justice Uday Lalit and Justice Kurian Joseph framed following questions for determination:

---

[26] The Court considering the factual aspects of the present case and the complicated questions arose therein and other connected cases decided to limit dealing with only triple talaq.

[27] In the *Shayara Bano* case, there involved a number of interveners which included *Bebaak Collective* (an umbrella group of a number of autonomous Muslim women's groups), *Bharatiya Muslim Mahila Andolon* (BMMA), Flavia Agnes (a feminist activist), Salman Khurshid (a senior advocate). They intervened mainly as social catalysts. Bebaak Collective argued against triple talak marking it as arbitrary and unequal in nature and sought complete state intervention in putting an end to triple talaq. The BMMA's position was that triple talaq had been effectively invalidated by the judgment given in the *Shamim Ara* case and this court only required to affirm the *ratio* of the *Shamim Ara*. Flavia Agnes concurred with BMMA but sought state intervention in moderate form, rather than absolute form unlike *Bebaak Collective*. Salman Khurshid opined that three pronouncements of talaq at one sitting amounted to one revocable talaq as per the judgment of the Delhi High Court in the *Masroor Ahmed* case (2008) (103) DRJ 13.

a) Whether the practice of triple divorce has legislative approval?

b) Whether Muslim Personal Law (Shariat) Application Act, 1937 confers statutory status to the subjects, including *talaq-e-bidaat*, it deals with?

c) Whether *talaq-e-bidaat* is a constituent of personal law (an essential religious practice or not) deserving the protection under Article 25 (right to religion)?

d) Whether *talaq-e-bidaat* is violative of Part III or fundamental rights of the Constitution?

Three lines reasoning flowed from the judgment. The 'minority' judgment was delivered by Chief Justice Khehar for himself and Justice Nazeer. On the other hand, Justice Nariman and Justice Lalit delivered their opinion which was diametrically opposed to minority judgment. The third line of reasoning came from Justice Joseph whose opinion, though a combination of divergence and convergence with the minority judgment, tilted towards the opinion delivered by justice Nariman and Justice Lalit, and thus contributing to the 'Majority' judgment.

4.2. Majority Judgment

As mentioned above, Justice Rohinton Fali Nariman, Justice Uday Umesh Lalit and Justice Kurian Joseph concurred themselves on judicial setting aside of the triple talaq practice and constituted majority. But the reasoning of Justice Kurian Joseph as expressed in a separate judgment showed a remarkable distinction from that of the joint judgment written by Justice Nariman and Justice Lalit.

A. Per Justice Kurian Joseph

One question that was of prime importance to Justice Joseph was: whether talaq-e-bidaat has any 'legal sanctity' or not?[28] In this regard, Justice Joseph relied heavily on Quranic injunctions to come to the

[28] *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 1 (per Justice Kurian Joseph).

conclusion that *talaq-e-bidaat* has no legal sanctity in Islam. Moreover, he thought that the question was already decided in *Shamimara v State of UP and another.*[29] In his view, *Shamim Ara* indirectly held that triple divorce is invalid.

Justice Joseph agreed with his majority colleagues that constitutionality of triple talaq practice could be tested on the ground of arbitrariness.[30] Even acknowledging constitutional protection of the freedom of religion, he alluded to the constitutional exceptions to that freedom. And specifically, he opined that triple divorce was not an 'integral part of the religious practice' and asserted that a practice could not get validity only because it continued for long time.[31] Finally "what is bad in theology is bad in law as well" is the bottom line of the judgment given by Justice Joseph.[32]

However, Justice Joseph did not agree with other two majority judges on the issue of the *Shariat Act* of 1937 being a statute "regulating" the enumerated topics of the Muslim personal law, which includes divorce, and perforce triple divorce. Rather he opined that the *Shariat Act* aimed solely to do away with 'unholy, oppressive and discriminatory customs and usages'.[33] The importance of this conclusion is vital. If he agree with other two majority judges on this issue, all matters covered by the Shariat Act would face the "consistency test" with fundamental rights chapter of the constitution.

B. Per Justice Rohinton Fali Nariman , Justice Uday Umesh Lalit

Justice Nariman and Justice Lalit took into account all the arguments and counter-arguments placed by petitioners and respondents and concurred in their reasoning in favor of striking down the practice of talaq-e-bidaat. However, the main disagreement with Justice Joseph was on the interpretation of the *Shariat Act* of 1937. They held that the *Shariat Act*

---

29 (2002) 7 SCC 518
30 *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 5 (per Justice Kurian Joseph).
31 *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 24 (per Justice Kurian Joseph).
32 *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 26 (per Justice Kurian Joseph).
33 *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 3 (per Justice Kurian Joseph).

of 1937 was a legislation regulating *inter alia* all forms of talaq which necessarily included triple divorce.[34] Since it is a "law in force" under Article 13(3) (b), all parts of the law needs to be consistent with part III of the constitution (fundamental rights) as per Article 13(1). Furthermore, the Judges in their judgment agreed that *Narasu Appa* judgment which dissociated personal law from the constitutionality test needs re-examination.[35]

Then, Justice Rohinton and Justice Lalit considered whether triple talaq is an essential part of the Islamic faith protected under Article 25 of the Constitution (freedom of religion) or not. Venturing into the question, the Judges discussed several decisions[36] and concluded that essential part of a religion means and includes the very founding pillars of a religion; it implies something 'core' or 'fundamental' to that religion. If absence or non-observance of a practice alters the nature of a religion, then only a practice can be said to constitute essential part of that religion.[37] Finally they came to the conclusion that triple talaq does not constitute an essential part of religion of Islam, and therefore, it does not deserve protection under Article 25 of the Constitution.

Then the two judges (Rohinton and Lalit JJ) examined the validity of the practice of triple divorce applying the test of 'arbitrariness' under Article 14 of the Constitution (equality before law and equal protection of law). Under this article, a law can be struck down on two grounds: one is arbitrariness and another is discrimination. By referring to *Sharma Transport v State of AP*[38], 'arbitrarily' was taken to mean 'in an

---

34 *Shayara Bano v Union of India,* (2017) 9 SCC 33, pp 16 & 18 (per Justice Rohinton and Lalit).

35 *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 22 (per Justice Rohinton and Lalit).

36 *Javed* v *State of Haryana* (2003) 8 SCC 369, *Commissioner of police* v *Acharya Jagdishwaranda Avadhuta* (2004) 12 SCC 770, etc. On this point, there are also few decisions from the Constitution Bench, i.e. *Commr. H. R.e.* v *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954) AIR SC 282, *Sardar Syedna Taher Saifuddin Saheb* v *State of Bombay* (1962) AIR SC 853, *Seshammal* v *State of T.N.* (1972) AIR SC 1586.

37 *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 24 (per Justice Rohinton and Justice Lalit).

38 (2002) 2 SCC 188.

unreasonable manner or something done capriciously or at pleasure, non-rational etc.'[39] In addition, the term 'arbitrary' means 'manifestly arbitrary'.[40]

According to Rohinton and Lalit JJ, the practice of *talaq-e-bidaat* does not represent 'the correct law of talaq' as enshrined in the Holy Quran, and is itself regarded as 'something innovative, irregular, and heretical'.[41] The law of talaq as emanated from the Holy Quran mandates that talaq must be for a reasonable cause and there must be a chance of reconciliation between the husband and wife by their respective arbiters. And if all attempts for reconciliation fail, then talaq is allowed as a last resort.[42]

The learned Judges (Rohinton and Lalit JJ) held that triple talaq is 'manifestly arbitrary' as it is 'instant and irrevocable' and leaves no chance of 'come back' from the earlier instant decision.[43] In other words, triple talaq results into untying the marital bond 'whimsically and capriciously'.[44] Thus, the Judges held that since triple talaq does not pass the 'arbitrariness test' of Article 14 of the Constitution, and since the *Shariat Act* of 1937 deals with it, the law is liable to be struck down to that extent for being violative of a fundamental right.[45]

4.3. Minority Judgment

Per Chief Justice Khehar and Justice Nazeer

Chief Justice Khehar and Justice Nazeer delivering minority judgment though agreed to the necessity of a 're-look' towards the stance taken by the Privy Council in the *Rashid Ahmed Case*[46] on triple divorce, still they

---

39 *Sharma Transport* v *State of AP*, (2002) 2 SCC 203-204, p 25.
40 *Sharma Transport* v *State of AP*, (2002) 2 SCC 203-204, p 25.
41 *Shayara Bano v Union of India*, (2017) 9 SCC 33, p 56 (per Justice Rohinton and Justice Lalit)
42 *Ara*, n 38, p 13.
43 *Shayara Bano v Union of India*, (2017) 9 SCC 33, p 57 (per Justice Rohinton and Justice Lalit).
44 *Shayara Bano v Union of India*, (2017) 9 SCC 33.
45 *Shayara Bano v Union of India*, (2017) 9 SCC 33.
46 *Ahmad*, n 7.

refused to accept the petitioner's arguments for judicial setting aside of triple talaq practice. The judges observed that only because triple talaq is not expressly approved by the Quran, one cannot conclude that it has no basis in Islam. They observed that all other approved forms of talaq among Muslims also do not find place in the Quran, rather they have their origin in hadiths and other sources of Muslim jurisprudence.[47]

The petitioner's another line of argument is that whatever is irregular and sinful cannot have the sanction of law and the court's attention was then drawn to similar 'patriarchal', 'irregular' and 'sinful' practices prevalent among Hindus i.e. '*Sati*', '*Devadasi,*' 'polygamy' etc. which were proscribed in due course of time. Khehar, CJ and Nazeer, J agreed in part with the petitioner's argument that the aforementioned practices were 'sinful', 'undesirable' and thus 'bad in theology' but pointed to the fact that those practices were scrapped by way of legislative action, and none of them was discontinued through court's intervention.[48]

Then the two Judges proceeded to find answer to another vital question, that is, whether the practice of *talaq-e-bidaat* is a matter of faith for Muslims, and if yes, whether it is a constituent of their personal law. The Judges considering the historical antiquity and widespread prevalence of the triple divorce practice came to the conclusion that the practice is 'integral' to the religious faith of the 'Sunnis' belonging to the Hanafi school. The judges were also of the view that the practice is essentially a part of their 'personal law'.[49]

Another point of constitutional assailablity of the triple talaq practice pertained to the status of the *Muslim Personal Law (Shariat) Application Act* 1937. The petitioners argued that what was once uncodified 'personal law' having no 'statutory tag' got the flavor of statutory law with the passing of the Act of 1937. That's why it was the contention of

---

47 *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 121 (Justice Jagdish Singh Khehar, CJ and Justice S. Abdul Nazeer),

48 *Shayara Bano v Union of India,* (2017) 9 SCC 33, pp 122-125 (Justice Jagdish Singh Khehar, CJ and Justice S. Abdul Nazeer).

49 *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 145 (Justice Jagdish Singh Khehar, CJ and Justice S. Abdul Nazeer).

the petitioner that like every statutory law, personal law (of which talaq is one of the constituents, and ergo, *talaq-e-bidaat* is too) must be tested in the crucible of "consistency with fundamental rights part" of the constitution, specifically with Articles 14, 15 and 21 of the constitution in this case.[50] However, Chief Justice Khehar and Justice Nazeer held that the *Shariat Act* of 1937 did not bestow statutory tag on all Muslim Personal law matters, and consequently, Muslim 'personal law' is not required to be tested in the touchstone of fundamental rights part of the constitution.[51]

Another question the minority judges tackled was: whether *talaq-e-bidaat* is a part of personal law (uncodified) and thereby gets the protection of Article 25. Petitioners contended that if the status of the Muslim 'Personal law' (Shariat) is not changed by the Shariat Act, 1937, then as a part of the uncodified personal law, Muslim Personal Law needs to satisfy the 'parameters' of Article 25 of the Constitution. Article 25 of the Indian Constitution mandates constitutional protection of freedom of religion to every person but subject to 'public order', 'health' and 'morality' and other provision of Part III of the Constitution. However, the arguments of the petitioners faced strong opposition from the respondents and the *ratio decidendi* of *Narasu Appa Mali* case was brought to the attention of the Bench. In the *Narasu Appa Mali* case, it was held that 'personal law' is not included in the expression 'laws in force' used in Article 13 (1), and therefore, personal law, unlike all laws in force as included in Article 372, is exempt from being in accord with the fundamental rights part of the constitution.

Chief Justice Khehar and Justice Nazeer accepted the decision of the *Narasu Appa Mali* case as the 'declared position of law' because the decision has been upheld in Supreme Court cases: *Shri Krishna Singh* case[52] and the *Maharshi Avadhesh* case.[53] The learned two judges also

---

50 *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 149 (Justice Jagdish Singh Khehar, CJ and Justice S Abdul Nazeer).

51 *Shayara Bano v Union of India,* (2017) 9 SCC 33, pp 152-157 (Justice Jagdish Singh Khehar, CJ and Justice S. Abdul Nazeer).

52 (1981) 3 SCC 689.

53 (1994) Suppl. 1 SCC 713.

were of the view that there is no reason to strike down the practice of *talaq-e-bidaat* as impinging on public order, health and morality.[54] They also observed that the practice of *talaq-e-bidaat* as a matter of 'religious faith' of the Sunni Muslims of the Hanafi School is not subject to any state action and therefore no question of its being violative of the provisions of the Constitution of India arises.[55]

While coming to conclusion, Chief Justice Khehar and Justice Nazeer also took into account the legislative advancements brought in other countries with regard to triple talaq practice and pointed out that in those countries alterations, amendments or modifications in the personal law were made by way of legislative action. They failed to find out any single example of judicial intervention in those countries in this regard. Though the two Judges were against the judicial assailment of the practice of *talaq-e-bidaat*, they directed the legislature to bring necessary reforms regarding *talaq-e-bidaat*.[56]

5. Penal Legislation as a Follow-up of the *Shayara Bano* Judgment

Soon after the pronouncement of judgment of the Supreme Court of India striking down the practice of triple talaq, the Government of India led by Bharatiya Janata Party (BJP) hurried to introduce a law on triple talaq in response to the directions made by the learned Judges in the minority judgment of the triple talaq verdict. But to the surprise of many, the government instead of regulating the practice of triple talaq and prescribing a just and reasonable procedure initiated a law which aimed at criminalizing utterance of triple talaq by the husband. Though the BJP government had majority in the Lok Shabha (lower house) and hence the bill got passed at the first instance there in 2017, it was not approved by the Rajya Shabha (upper house) thanks to lack of BJP majority there. Consequently, on September 20, 2018, the government passed an

---

54 *Shayara Bano v Union of India,* (2017) 9 SCC 33, p 164 (Justice Jagdish Singh Khehar, CJ and S. Abdul Nazeer, J).

55 *Shayara Bano v Union of India,* (2017) 9 SCC 33, 165 (Justice Jagdish Singh Khehar, CJ and Justice S. Abdul Nazeer, J).

56 *Shayara Bano v Union of India,* (2017) 9 SCC 33, pp 199-200 (Justice Jagdish Singh Khehar, CJ and Justice S. Abdul Nazeer).

Ordinance via President of India called the *Muslim Women (Protection of Rights on Marriage) Ordinance* 2018.[57] Still the said Bill was being opposed by Muslim communities as well as other critics on various grounds including minority oppression in the name of gender justice. Yet, the government kept trying to pass the Bill in the upper house of parliament.[58] Pending its passage, the first ordinance came to its constitutional time-out, and the President of India signed another ordinance, named the *Muslim Women (Protection of Rights on Marriage) Second Ordinance* 2019. However, ultimately in 2019, as the BJP gained majority in both houses of parliament, the government succeeded in passing the bill. And with the assent of the President, the bill became a law called *The Muslim Women (Protection of Rights on Marriage) Act* 2019.[59] However, the law has been given retrospective effect from September 19, 2018.

The major features of the Act are as follows:

> The Act invalidates instant triple talaq and imposes the 'crime' label on the mere pronouncement of divorce in whatever mode it may be. In other words, pronounced verbally or in written form or even in electronic form, triple divorce is a crime, punishment for which is maximum three years' imprisonment and fine;
>
> The offence has been made cognizable (the accused can be arrested without warrant) as well as non-bailable;
>
> There is also a provision of compounding the offence if the aggrieved woman so requests the magistrate; and

---

57 Anushmi Jain and Mwirigi K. Charles, 'The Current Status of Instant Triple Talaq in India: Issues and Challenges' (Jan.-March 2019) 6:1 *International Journal of Research and Analytical Reviews* 593, 603.

58 Dr. Shirin Abbas, 'Triple Talaq Bill: Communalized Agenda in the Garb of Gender Concern' [2019] in Papers of *Canadian International Conference on Humanities & Social*121-127; Tanja Herklotz, 'Shayara Bano versus Union of India and Others: The Indian Supreme Court's Ban on Triple Talaq and the Debate around Muslim Personal Law and Gender Justice' (2017) 50 *Verfassung und Recht in Ubersee* 300-31.1

59 India Today. 30 July 2019. History Made: Triple Talaq Bill Passed by Parliament<https://www.indiatoday.in/india/story/triple-talaq-bill-passed-in-rajya-sabha-1575309-2019-07-30> accessed on 5 September 2021.

> The wife is entitled to subsistence allowance and can seek custody of her minor children.[60]

The Act generated multiple controversies and was severely criticized by the opponents. The opponents smelt 'anti-Muslim agenda' in the penal provisions of the Act.[61] Question also arose as to whether Muslim women are 'political subjects or victims' in the whole triple divorce saga.[62] Though the objects and reasons behind the Bill were touted to be 'gender justice,' involvement and enthusiasm of BJP in enacting the law put question marks on it. The dedication with which BJP pursued the enactment of the criminalizing law added fuel to the flame. With the BJP in power with their ultra-nationalist motto called '*Hindutva*,' where India is considered a Hindu homeland and Muslims are sometimes considered as "security threat," the whole issue of gender justice (for Muslims) was bound to be branded as a sham.[63] So was the case.

The law created mixed impressions among those who opposed the triple divorce practice. The *Bebak* Committee, a Muslim feminist group and a co-petitioner in the *Shayara Bano* case, condemned the criminal provisions of the new Act on the ground that the law instead of upgrading the position of Muslim women will deteriorate their financial position. According to this group, incarceration of husbands for mere pronouncement of triple talaq will make it difficult for the women in getting their post-divorce maintenance from their husband.[64] On the other hand, the BMMA (Bharatiya Muslim Mahila Andolon), (also a co-petitioner in the *Sayara Bano* case) welcomed the new law because according to them the Supreme Court's verdict on triple talaq alone

---

60 *The Muslim Women (Protection on Marriage) Act* 2019<http://egazette.nic.in/WriteReadData/2019/209473.pdf>accessed on 20 August 2021.

61 Justin Jones. September 16, 2019, India's Triple Talaq Law Has Divided Even Those Who Oppose the Practice <https://qz.com/india/1709560/will-criminalising-triple-talaq-help-indias-muslim-women/> accessed on 25August 2021.

62 Esita Sur, 'Triple Talaq Bill in India: Muslim Women as political Subjects or victims?' (2018) 5:3 *Space and Culture, India* 5-12

63 Ibid.

64 Ibid.

could not stop the practice of triple talaq.[65] They emphasized that to uproot malice of triple talaq, imposing penalties was inevitable.[66]

It is evident that the new law fails to prescribe an institutional framework to regulate the practice of triple talaq. Mere penal provisions cannot bring good news for Muslim married women if their socio-economic position and the overall security and interests are not protected. In spite of being a penal statute, the law was given retrospective operation which is a clear violation of constitutional protection against retrospecticity.[67]

6. Conclusion

The practice of *talaq-e-bidaat* has neither religious sanctity nor constitutional congruence, yet Hanafi school of Sunni sect maintains that it is a valid form of divorce. However, being alright in theology is not a guarantee for a practice to continue forever. Other Muslim countries, including Sub-continental, African and Arab countries, have changed their laws banning or barring the practice of triple divorce in some form or other. Most notably, Pakistan and Bangladesh, India's two sub-continental neighbors, have disbanded the practice of triple talaq by imposing statutory barriers, which have been in juristic operation since 1961 and 1971 respectively. India has followed a different path of dual strikes—judicial and statutory—in disbanding triple talaq first and then penalizing the practice.

Bringing changes in personal law is not easy in the Sub-continent—this is true in countries in which Muslims are majority and also in countries in which Muslims are minority. Reforms brought in Pakistan in 1961 were not easy either. While bringing change is a continuous process, criminalizing an age-old civil practice overnight is a drastic step. India could learn from history as to how the law and practice of Muslim

---

65 Ibid.

66 Ibid.

67 art 20(1) of the Constitution of India says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

divorce in Pakistan and Bangladesh were reformed in 1961. Done so, India could have achieved the goal of gender justice without straining social fabric of the country, and could avoid tormenting a minority community through an unnecessary penal law.

The verdict of the Indian Supreme Court in the famous *Shayara Bano case* invalidating arbitrary triple talaq practice is in consonance with the spirit in which other countries curbed triple divorce. Such a ban is also in keeping with principles of human rights, especially with the highly acclaimed right to equality and non-discrimination. But Indian legislative step of criminalizing triple divorce is unprecedented. The legislative initiatives in other countries which have either reformed or abolished *talaq-e-bidaat* were well-measured and well-calibrated, keeping in mind the objective of reducing the practice of triple talaq and keeping the door of reconciliation open. On the other hand, the Indian legislative policy of penalizing the divorcing husband has potential to make reconciliation impossible.

The *Shayara Bano* judgment of 2017 created a ray of hope in the minds of Muslim women folk. As a follow-up, a well-drafted and beneficent legislation was required to regulate the triple talaq practice. The *Muslim Women (Protection of Rights on Marriage) Act* 2019 has not met the demand of time. Criminalizing the act of pronouncing triple talaq has sent a wrong signal to the minority Muslim community, which sees the majority's action through the lens of painful history of "othering" in a Hindu majority country.