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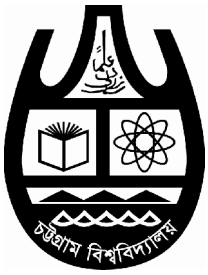

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Proliferation of International Forums for International Dispute Settlements: A Coherence or Contradiction in International Law?

Christine Richardson[©] *and Md. Mostafa Hosain*[**]

"Entities should not be multiplied unnecessarily", William of Ockham (1258-1347)

Abstract

The number of international dispute settlement bodies to deal with disputes arising between and among States as well as between States and individuals has mushroomed. This sharp rate of proliferation of such bodies has developed on two aspects. One is the subject-based dispute settlement bodies, for instance, ITLOS under UNCLOS, International Criminal Court under the Rome Statute, WTO dispute settlement under the Marrakesh Agreement etc. The other is based on regionalism such as ECJ and ECtHR for Europe, the Inter-American Court of Human Rights under 1969 American Convention on Human Rights and the African Court of Human Rights for Africa. The number of disputes settled by all such bodies is immense and it would not be possible for any single forum to do so. This is the advantage of proliferation. Moreover, international law has been interpreted, developed and enriched through all these forums by their dealings with issues of international law on given occasions. The significant issue is whether interpretation of international law through these forums maintains coherence or creates contradiction in the application and development of international law. The study will be an attempt to mainly examine the effects of proliferation in international law.

1. Introduction

The Preamble of the United Nations Charter (hereafter UN Charter) requires international disputes to be settled by peaceful means under the principles of justice and international law. The same principle has been articulated in Article 279 of the United Nations Convention on the Law of the Sea, 1982 (hereafter UNCLOS).[1] Following the Preamble, Article 2(3) of the UN Charter confers obligation upon members to settle their disputes in a peaceful manner so that international peace and justice is not endangered. For such purpose, the International Court of Justice (hereafter ICJ) was substituted for Permanent Court of International Justice (PCIJ).[2] Due to the limitation of ICJ, other international dispute settlement bodies had been established based on specific subjects of international law or regions or in some cases both.[3] The numbers of such bodies have mushroomed mostly and immediately after ending the cold war. In 1990s "alone, nine international judicial tribunals and nine quasi-judicial bodies" were created.[4] Such includes the World Trade Organization (WTO), the International Tribunal for the Law of the Sea (ITLOS) and the creation of an International Criminal Court (ICC) under the Rome Statute.[5] Such proliferation of international dispute settlement institutions has posed the significant challenge that whether due to interpretation and application of international law by different bodies maintain coherence or creates

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[1] However, there is no legal obligation for states to seek peaceful settlement of disputes. *See* Richard B. Bilder, *An Overview of International Dispute Settlement*, *in* International Dispute Settlement 3, 9 (Mary Ellen O'Connell ed., 2003) [hereinafter *Overview*]. Whether every dispute is required to be resolved is a mute point.
[2] The ICJ is one of the six organs of UN. Its head quarters is in the Hague, Netherlands. For further about the ICJ, follow the link below, < http://www.icj-cij.org/homepage/ > accessed on 15 April 2013.
[3] In case of both subject matter and regional bodies, European Court of Human Rights, Inter American Court of Human Rights, African Court of Human and People's Rights are best examples.
[4] Shane Spelliscy, The Proliferation of International Tribunals: A Chink in the Armor, 40 *Columbia Journal of Transnational Law*. pp. 143, 144 (2001).
[5] The Rome Statute has been adopted in 1998 and the ICC was established in 2002 with the ratification of sixtieth State. For further about the ICC, follow the link < http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx >, accessed on 20 May, 2013.

contradictory norms and principles in international law.[6] After an introduction in Part I, the study will mention about various dispute settlement bodies established under different conventions in Part II. Part III will focus on the advantages and disadvantages of proliferation of such bodies. Finally, the study will offer a conclusion.

2. Dispute Settlement Bodies under Various Conventions

The urge for creation of various dispute settlement bodies has been indicated in Article 33 of the UN Charter by providing couple of modes of dispute settlement mechanism.[7] Although Article 92 of the Charter recognizes ICJ as the principle judicial organ of UN, Article 95 of the Charter does not prevent parties to seek solutions from other existing tribunals. Therefore, the creation of different bodies for peaceful settlement of disputes is in compliance with the mandate of UN Charter.

2.1. Dispute Settlement under UNCLOS

Article 287(1) of the UNCLOS offers the choice of four forums in order to settle disputes. Such includes the ITLOS established in accordance with Annex VI, the ICJ, an arbitral tribunal constituted in accordance with Annex VII and a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein. Before the establishment of ITLOS, many disputes concerning maritime boundary were settled by ICJ. The Permanent Court of Arbitration (PCA) is another forum for settling maritime disputes under UNCLOS.

2.2 Forums under International Criminal law

Nuremberg Tribunal is regarded as the first forum in the field of international criminal law in contemporary history. The Tribunal was formed for the purpose of trying Nazi officers who committed heinous crimes in World War II. Following Nuremberg, the Tokyo Tribunal for the Far East was immediately created to try Japanese involved in the commission of serious crimes. It has taken almost half a century to further form any court or tribunal of such kind. The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) by the Security Council of UN was a successful forum in order to try perpetrators of most serious crimes. Immediately after ICTY, the Security Council again formed the International Criminal Tribunal for Rwanda (ICTR) in order to try and prosecute perpetrators of ethnic conflict in Rwanda. The establishment of Special Courts for Sierra Leone, Extraordinary Chamber in the Courts of Cambodia, Special Courts for East Timor and Special Tribunal for Lebanon are forums dealing with questions of international criminal law. One of the most significant developments in this field is the establishment of ICC. It has permanent seat and is not constrained to any single situation. The ICC has jurisdiction over persons accused of committing Genocide, war crime and crime against humanity.[8] ICC has already decided a case of the Democratic Republic of Congo namely *the Prosecutor v. Thomas Dailo Lubanga* in 2012. Unlike ICJ, the ICC has jurisdiction over individuals.

2.3 Dispute Settlement Bodies under International Trade Law

The dispute settlement mechanism of World Trade Organisation (WTO) is a distinguished example of the strengthened nature of dispute settlement forums. The DSB of WTO is an organ composed of representatives from all WTO members.[9] Under the dispute settlement system, two bodies are functioning namely the Panel and Appellate Body. The proceedings of dispute settlement initiates at the request of either party and after several other diplomatic options have been exhausted;[10] the Panel is composed in such a manner as to examine both questions of fact and law in given disputes. After the recommendation of the panel in their findings, the matter then shall be brought before the Appellate Body. The Appellate Body, conversely, has more pronounced judicial features. It is a standing organ that decides appeals

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[6] For details of proliferation and fragmentation, see Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion Of International Law, *Report of the Study Group of the International Law Commission*. Finalized by Martti Koskenniemi, *A/CN.4/L.682*, *Fifty-eighth session Geneva*, 1 May-9 June and 3 July-11 August 2006.

[7] Article 33 of the Charter provides many modes of settlement of dispute between parties i.e. negotiation, enquiry, mediation, conciliation, arbitration, judicial settlements, regional bodies and other methods.

[8] Although it is expected that the crime of aggression will enter into force after 2017 with the ratification of the 30 States. Till 15th July, only seven States have ratified the amendment of the Rome Statute relating to this crime.

[9] See Agreement Establishing the World Trade Organization art. IV.3, 33 I.L.M. 1263 (1994).

[10] Established by the General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 I.L.M. 1125 (1994) (Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes), at 1228 [hereinafter DSU].

against findings of panels[11] and is composed of seven persons, three of whom sit on any one case in rotation[12] and can hear only appeals relating to points of law covered in the report and legal interpretations developed by the panel.[13] Nonetheless, the outcome of the proceedings before the Panel and the Appellate Body is not binding in itself, but becomes binding only when adopted by the DSB. This would be sufficient to make the WTO's dispute settlement procedure fail the test of the binding nature of the decision, if it were not for the fact that the DSB can reject Panel and Appellate Body findings only by consensus, making such an event a mere theoretical possibility.[14]

2.4. Forums Established at Regional level

Proliferation of international judicial bodies with regional scope introduces a further element of diversity. Regional courts are much more influenced by local legal systems and practices than bodies with a universal scope.[15] There are many international regional bodies which have been established in different regions for settlement of disputes. The European Court of Human Rights, European Court of Justice, Inter-American Court of Human Rights and African Court of Human Rights are well functioning at regional level. Inter-American Court of Human Rights has jurisdiction over individuals' claims of the violation of the 1969 American Convention on Human Rights only insofar as these claims have been submitted by the Inter-American Commission on Human Rights.[16] Apart from human rights law, there are regional bodies formed to settle disputes of trade nature by regional trade organisations. The EFTA Court of Justice, the COMESA Court of Justice, the Common Court of Justice and Arbitration of the OHCLA, the NAFTA, the Court of Justice of the Andean Community and the Court of Justice of the Benelux Economic Union are of such kind.

3. Proliferation of International Dispute Settlement Forums

The existence of a standing international court of general jurisdiction is a creation of the twentieth century. The establishment of PCIJ after World War I and the replacement of such by ICJ after World War II are most significant development. Meanwhile, many ad hoc tribunals continued to provide forums for third-party settlement of international disputes, *albeit* with less frequency.[17] The proliferation has resulted mainly from the extension of international law into new areas previously subordinated to states' sovereignty. There are, in fact, several types of proliferation, and they all have an impact on the issue of competing jurisdictions. For the sake of clarity, one can distinguish the multiplication of forums (which can be named proliferation *ratione fori*) that encompasses the constellation of courts and tribunals, from the multiplication of actors (proliferation *ratione personae*) and the expansion both of specific areas of law (proliferation *ratione materiae*) and of special jurisdiction (proliferation *ratione loci*). They are all various facets of the same problem and are linked to one another.[18] One of the most argumentative issues is whether such proliferation has brought positive effects in international law or created complexity. To find out this paradox, the advantage and disadvantage of proliferation is required to be discussed.

3.1. Advantage of Proliferation

The jurisprudence developed by ICJ, ITLOS, ICC, ECJ, ECtHR, Inter-American Court of Human Rights, the dispute settlement forums of WTO, ad hoc tribunals established to decide disputes involving international law including ICTY, ICTR and several administrative tribunals of international organizations and different international tribunals of the late twentieth century do share relatively coherent views on doctrines of international law and their functioning does not appear to pose a threat to the coherence of

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[11] *Ibid* at p. 1235
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.
[15] Cesar P. R Romano; The Proliferation of International Judicial Bodies: the Pieces of the Puzzle: 31 *New York University Journal of International Law and Policy*, p. 709 (1998-1999).
[16] Established by the American Convention on Human Rights, signed in San José, Costa Rica, on November 22, 1969 [hereinafter American Convention]. See 1144 U.N.T.S. 123. art. 61.1
[17] Charney, I. Jonathan; "The Impact on the International Legal System of the Growth of International Courts and Tribunals", 31 *New York University Journal of International Law & Politics;* 697-98 (summer 1999).
[18] Bilder, B. Richard; "The Competing Jurisdictions of International Courts and Tribunals; By Yuval Shany", *98 American Journal of International Law,* pp. 622-23 (2004).

international legal system.[19] Although differences exist, these tribunals are clearly engaged in the same dialectic.

First, proliferation of forums is beneficial for international law in general, because the incumbent ICJ as a single institution with limited jurisdiction cannot deal with every international dispute efficiently and effectively. The reason is obvious. ICJ has limited jurisdiction subject to the acceptance by States and also limited to States in contentious cases and to States and some international organisations in advisory matters. Individuals have no place there. Higgins observed that ICJ is already experiencing a heavy workload and it lacks funding to process all adjudications.[20] Second, duration in the proceeding is a common question always posed to the ICJ. For ICJ's procedure, it typically takes two years to file an application, twenty to thirty months for oral hearing and four to five months for judgments to be issued. On the other hand, regional and subject based Courts and Tribunals have been disposing issues within the shortest possible time. For instance, the WTO provides a variety of options for the parties and the parties themselves can agree on a panel of three and the cases are to be decided in six months. Then the standing Appellate Body is available within the Dispute Settlement Body. In law of the sea, it took around ten years for ICJ to decide *the maritime delimitation between Qatar and Bahrain* whereas ITLOS took two years for the *case concerning delimitation of maritime boundaries between Bangladesh and Myanmar.* Third, some States are unwilling to utilize ICJ as examples of the Court's compulsory jurisdiction cases have been beset with non appearing defendants. For instance, the approach of Iceland in the *Fisheries Jurisdiction* cases,[21] France in the *Nuclear Tests Cases*[22], Turkey in the *Aegean Sea Continental Shelf* case,[23] Iran in the *Diplomatic and Consular Staff* case,[24] and United States in the merits phase of the *Military and Paramilitary Activities* case frustrates the international community to seek settlement of disputes before ICJ.[25] Fourth, States seem to be unwilling to accept the compulsory jurisdiction of the ICJ. For instance, as of 2001, only 63 of 189 States recognized such jurisdiction. In such circumstance, availability of other forums can be the only solution for settling all disputes in a peaceful manner. Fifth, availability of many forums serves States to avoid disputes. For instance, some forums may have compulsory jurisdiction over disputes which may not be within the jurisdiction of ICJ. In those situations, States know that if a dispute arises they could be forced to defend their actions before a tribunal and the dispute may be settled by an award or judgment based on international law. As a consequence, the multiplicity of dispute settlement forums increases the likelihood that disputes will be resolved in accordance with international law, with or without litigation.[26]

Moreover, new bodies have installed mechanisms to ensure some degree of coherence in international law. For example, by virtue of Article 282 of UNCLOS, existing compulsory procedures under other treaties prevail over ITLOS and even when the parties have accepted the jurisdiction of ITLOS under Article 287, they can still prefer other tribunals to resolve the dispute. Sixth, proliferation of forums provides a better mechanism for individuals and organisations because they can widely access various forums. In ICJ, individuals cannot be a party and State parties to the ICJ will not allow an individual to bring a case against the State. The ITLOS goes further and allows some limited access to individuals.[27] There are other international judicial bodies that grant access to individuals.[28] Seventh, proliferation has positive impacts on international law because new and evolving areas in international law need specialized expertise.[29] For example, trade disputes are often complex as they usually involve diverse economic and political factors. Also, the frequency and complexity of marine issues, such as conservation

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[19] See *Supra* note 15, at pp. 699-700
[20] Rosalyn Higgins, *Remedies and the International Court of Justice: An Introduction*, *in* Remedies in International Law: the Institutional Dilemma 1, 2-5 (Malcolm D. Evans ed., 1998) (describing problems that the ICJ experiences due to heavy workload).
[21] *Fisheries Jurisdiction Case* (*UK v Ice.; FRG v. Ice*.), Interim Protection, 1972 ICJ Rep. 12, 30 (Orders of Aug. 17); Jurisdiction of the Court, 1973 ICJ Rep. 3, 49 (Judgments of Feb. 2); Merits, 1974 ICJ Rep. 3, 175 (Judgments of July 24).
[22] *Nuclear Tests Case* (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ Rep. 253, 457 (Judgments of Dec. 20)
[23] *Aegean Sea Continental Shelf* (Greece v. Turk.), 1978 ICJ Rep. 3 (Judgment of Dec. 19).
[24] *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ Rep. 7 (Order of Dec. 15); 1980 ICJ Rep. 3 (Judgment of May 24).
[25] 1986 ICJ Rep. 14.
[26] See *Supra* note 15, at pp. 699-700
[27] UNCLOS, at Annex VI, art. 20.
[28] The European Court of Human Rights is an example.
[29] *Supra* note 4, at p. 149.

and management of living resources, exploration of mineral resources, and pollution are on the rise. The ITLOS intention to ensure special expertise is utilized in some complex areas, such as compulsory jurisdiction of ITLOS Seabed Disputes Chamber under the Part XI, Section 5, and Article 187 of the UNCLOS.[30] Issues of individual criminal responsibility under international law also require special knowledge and expertise. One of the most significant advantages of proliferation is that regional Courts and Tribunals are more flexible for the parties to submit their dispute. The proceedings and adjudication from regional bodies are more convenient for developing and least developed countries. Local tribunals may understand local requirements better than general tribunals.[31] For example, in the *Asylum case*,[32] the South American States complained that "the local tradition of asylum in an embassy was not properly understood by what was then a predominantly European" ICJ. One of the Judges of ECtHR in a dissenting opinion has described it as the "last resort protector of oppressed individuals.[33] Such rhetoric is backed up by a willingness to find for the individual against the State. Higgins has observed that "the effort at compliance with general international law of ECJ and ECtHR, even within the context of specialized institutional treaties, was striking".[34]

It is argued that proliferation could lead to a risk of fragmentation of international law. But advocates arguing for proliferation point out that there will be an implied understanding that the decisions of different tribunals will not be in complete opposition to each other, rather feed off each other and help international law in general to develop in a coherent way.[35] They mention that opinions of ICJ are respected by other tribunals.[36] For example, in the case on *EC Measures Concerning Meat and Meat Products (Hormones)*,[37] the Appellate Body of the WTO referred ICJ judgment of *Gobcikovo- Nagymaros Project Case*[38] while dealing with the issue of whether the precautionary principle constitutes a part of general international law.[39] Similarly, ITLOS applied equity principle in the case of *Delimitation of Maritime Boundary between Bangladesh and Myanmar* in 2012 which was initiated by ICJ in *North Sea Continental Shelf Case* of 1969.

There have been critical observations and dissenting views regarding proliferation of forums. For instance, the principle of "overall control" applied in *Tadic* case decided by ICTY,[40] is argued to be contrary to the principle of "effective control" decided in *Nicaragua case* of 1986. But such is not truly a disadvantage of proliferation for the simple reason that these two doctrines are not contrary to each other because of their difference in application. The triggering point in Nicaragua was of State responsibility whereas in *Tadic* it was individual liability. Both are found to be different. Furthermore, in the *Genocide Case*, ICJ has again applied the "effective control" test as it was of State responsibility.

Secondly, the establishment of ITLOS has not been welcomed rather cautioned by some scholars. Judge Oda observed that the establishment of ITLOS might lead to the destruction of the very foundation of international law. He further apprehended that ocean law might develop outside the general international law where it has historically belonged.[41] But in practice, the interpretation of international law by ITLOS has been found to be consistent with the principles and methods applied by the ICJ in its judgments. The recent judgment of ITLOS namely *The Delimitation of Maritime Boundary between Bangladesh and*

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[30] Article 187 of UNCLOS 1982.
[31] Nsongurua J. Udombana, An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication? 28 *Brooklyn Journal of International Law*. p. 814-816 (2003).
[32] *Asylum Case (Colom. v. Peru*), 1950 I.C.J. paras 266, 277 (Nov. 20).
[33] *Cossey v. United Kingdom*, 184 European Court of Human Rights, ser. A (1990)
[34] Higgins, Rosalyn; A Babel of Judicial Voices? Ruminations from the Bench, *55 International and Comparative law Quarterly*, (2006) at p. 797.
[35] Alan Boyle, *The Proliferation of International Jurisdictions and its Implications for the Court*, *in The International Court Of Justice: Process, Practice And Procedure*; at p. 130
[36] See *Supra* note 15.
[37] Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter EC Measures.
[38] *The Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), 1997 I.C.J. 7, 58-68 (Sept. 25).
[39] Pierre-Marie Dupuy, The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice, 31 *New York University Journal of International Law and Policy*. 791, 807 (1999).
[40] *Prosecutor v. Tadic, Case No. IT-94-1-A*, Judgment, 137 (July 15, 1999)
[41] Shigeru Oda, "The International Court of Justice Viewed from the Bench (1976-1993)", 244 *Recueil des Cours de l'Academie de Droit International* (1993), Vol. VII, 9-190, pp. 144-125.

Myanmar in the Bay of Bengal is evidence where the Tribunal followed the method of delimitation professed and developed by ICJ in previous cases.[42] In the *North Sea cases*[43], the Federal Republic of Germany specifically invoked the geographical situation of Bangladesh (then East Pakistan) to illustrate the effect of a concave coast on the equidistance line. This has been taken into consideration by ITLOS in delimiting the maritime boundary between Bangladesh and Myanmar.[44] Moreover, ITLOS has taken a precautionary approach, without using the term, in ordering Japan as well as Australia and New Zealand not to exceed their previously-agreed quotas in the *Southern Bluefin Tuna*[45] cases, although the significance of this as a general precedent depends on how far caution is thought to be peculiarly required in the provisional measures phase to ensure that there is no irrevocable prejudice to the rights of the parties before the final disposition of the case.

Creation of multiple bodies in any specific area sometimes causes overlapping jurisdiction. Such complex question was forwarded in the case concerning delimitation of maritime boundary between Bangladesh and Myanmar before ITLOS. It was argued that a number of bodies are established under UNCLOS namely UN Commission on the Limits of Continental Shelf, International Sea Bed Authority and the ITLOS. Therefore, the Tribunal should refrain from delimiting the area beyond 200nm due to the overlapping jurisdiction with the UN Commission. The Tribunal took such arguments into account and viewed to proceed in a better way in the situation of overlapping jurisdiction. It states

> "The Convention sets up an institutional framework with a number of bodies to implement its provisions, including the Commission, the International Sea Bed Authority and this Tribunal. Activities of these bodies are complementary to each other so as to ensure coherent and efficient implementation of the Convention. The same is true of other bodies referred to in the Convention."[46]

Finally, the Tribunal did not find any negativity in such circumstances and also confirmed that the exercise of jurisdiction by the Tribunal is not an encroachment on the functions of the Commission. It viewed that the settlement, through negotiations, of disputes between States regarding delimitation of the continental shelf beyond 200 nm is not seen as precluding examination by the Commission of the submissions made to it or hindering it from issuing appropriate recommendations."[47]

3.2. Disadvantage of Proliferation

Due to proliferation of international courts and tribunals in a mushroomed growth, "forum shopping," "parallel litigation," "lack of finality," "incompatible judgments," and "accelerated fragmentation of the law" are some critical points and potential risks.[48] There are numerous problems of proliferation of forums. The common problem is that the various international tribunals do, in fact, have their own specific agendas and for that reason, they were created to serve the interests of those States that cooperated in their establishment and also commitment to the particular treaty regimes that incorporate them may actually supersede their allegiance to the international legal system as a whole.[49] One of the significant disadvantages of proliferation is 'conflict of jurisdiction'. It is a situation where one party refers a case to one international judicial body and the other party refers the same to a different body.[50] The possibility of overlapping jurisdiction between the ICJ and ITLOS, or between different judicial bodies, may be significant, as the exact scope of disputes on the Law of the Sea is ambiguous.[51] For the ITLOS to adjudicate the case, it is sufficient for the dispute to relate to the wide purposes of UNCLOS provided in

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[42] International Tribunal for the Law of the Sea decided the case on 14thMarch2012. The basic documents, decisions, pleadings, transcripts, press releases, and other materials for this case and others are available on the Court's Web site, http://www.itlos.org/index. accessed date 10th May, 2013.
[43] *I.C.J. Pleadings, North Sea Continental Shelf, Vol. I*, p. 42.
[44] See *Supra* note 42 at para 292.
[45] *Southern Bluefin Tuna Cases* (N.Z. v. Japan; Austl. v. Japan) (order of Aug. 27, 1999) (visited Sept. 28, 1999) <http:// www.un.org/Depts/los/ITLOS/Order-tuna34.htm>. Accessed date 15 April 2013.
[46] *Supra* note 42, at para 373
[47] *Ibid* at para 393.
[48] See *Supra* note 18.
[49] *Ibid*.
[50] Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions,* (2001) pp. 13-203.
[51] Boyle, *Supra* note 4, at p. 127.

paragraph two of Article 288.[52] Also, under Article 293 of the UNCLOS, courts "with jurisdiction under the Convention are to apply both its terms and other rules of international law not incompatible with the Convention."[53] Hence, the ITLOS is capable of dealing not only with the law of the sea but also other rules of international law.[54] The ITLOS provides some safeguards against this concern. Article 287 of UNCLOS grants jurisdiction to an arbitral tribunal unless the parties agree on another forum, Articles 290 and 292 vest the ITLOS with residual compulsory jurisdiction with respect to provisional measures and prompt release cases.[55]

The second one is 'Forum shopping'. The state parties may indulge in forum shopping between different judicial bodies.[56] It may lead to excessive adjudications thereby incurring unnecessary waste of time and cost. However, some degree of forum shopping is common in transnational litigation, and it may be reasonably expected that the relevant tribunal would refuse to hear the case if the case has already been adjudicated by another tribunal or given significant weight to that particular tribunal's opinions.[57]

The third disadvantage to international law as a result of proliferation of judicial bodies is the fragmentation of international law with each judicial body issuing multiple interpretations on the same legal point.[58] The problem lies in the fact that proliferation has occurred without any structure guiding the relationship between these entities.[59] Each tribunal exists formally distinct from each other without any hierarchy or form of relationship.[60] Hence, if each tribunal interprets or enunciates the law differently from each other, the very essence of a normative and coherent system of law may be lost. For example, under Article 293 of UNCLOS, "it seems that the parties could agree to ask [the ITLOS] to decide a case on the basis of customary international law,"[61] and a WTO instrument expressly states that the Dispute Settlement Body is to follow customary international law.[62] Therefore, there may be a serious risk of other judicial bodies finding and interpreting customary international law differently from that of the ICJ. There are two cases that support the existence of this particular risk. The first case, *Loizidou v. Turkey*,[63] deals with a jurisdictional point, where the Strasbourg Court of Human Rights, examining the optional clause in the relevant Convention based on Article 36(2) of the Statute of the ICJ, reached a conclusion opposite from the ICJ on the issue of the possibility of severance of a reservation made by the State parties.

The second example is the *Tadic Case* by the Appeals Chamber of ICTY. [64] The Tribunal explicitly held that ICJ was wrong about the law of State responsibility in *Nicaragua Case*.[65] The ICTY "replaced the standard of 'effective control' as the rule governing the accountability of foreign States over [actions] . . . in civil war with the wider standard of 'overall control'".[66] In doing so, the Tribunal sought to increase the chance of high officials of the relevant State being prosecuted and punished for crimes committed by their

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[52] *See* article 288 of UNCLOS, 1982.
[53] *See* David Anderson, The International Tribunal for the Law of the Sea, *in Remedies In International Law: The Institutional Dilemma* 75 (Malcolm D. Evans ed., 1998) (identifying the close relationship between the UN and the ITLOS).
[54] *Ibid*.
[55] *See* John E. Noyes, The International Tribunal for the Law of the Sea, 32 *Cornell International Law Journal*, p. 177 (1998) (explaining possible functions of the ITLOS).
[56] Marianne P. Gaertner, The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea, 19 *San Diego Law Review*, pp. 577, 593 (1982).
[57] Donald R. Rothwell, Building on the Strengths and Addressing the Challenges:The Role of Law of the Sea Institutions, 35 *Ocean Development and International Law,* pp. 131, 147 (2004) (suggesting the institution of a international forum non convenience concept against international forum shopping).
[58] *See* Martti Koskenniemi, Harvard Presentation on Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought, 6-7, (March 5, 2005), *available at* <http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf> accessed date 25 February, 2013 (discussing three types of fragmentation of international law).
[59] Shane Spelliscy, The Proliferation of International Tribunals: A Chink in the Armor, 40 *Columbia Journal of Transnational law*. at p. 143 (2001).
[60] *Id*. at pp. 144-45.
[61] *See* Alan Boyle, The Proliferation of International Jurisdictions and its Implications for the Court, *in The International Court Of Justice: Process, Practice And Procedure* at p. 127.
[62] Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, Final Act Embodying the Results of the ruguay Round of Multilateral Trade Negotiations, art. 3.2, Annex 2, MTN/FA II-A2.
[63] *Loizidou v. Turkey*, 310 European Court of Human Rights. (ser. A) 99 (1995).
[64] See, *Supra* note 40.
[65] *Case concerning Military and Paramilitary Activities* (Nicaragua. v. U.S.), 1986 I.C.J. 14, 172-210 (June 27); Spelliscy, *Supra* note 6, at 159-70. *See* Martti Koskenniemi, *What is International Law For?*, *in* INTERNATIONAL LAW 109 (Malcolm D. Evans ed., 2003).
[66] See *Supra* note 58.

government during a civil war. These two cases reveal that some tribunals value improvement in the law as more important than the need for consistency with other tribunals' views on the law. The further problem with regional courts and tribunals is that a local court may be prejudicial and less objective in its approach to the case. For example, in the *Beagle Channel case*,[67] the counsel from both sides agreed that no judge or arbitrator should be from Latin America because the subject of the case was well-known locally and had been debated for more than eighty years between Chile and Argentina.

4. Conclusion

International society is decentralizing and to cope with this challenging situation, the monotonous role and procedure of dispute settlement will not be properly able to provide and maintain a better international legal order. Therefore, in our opinion, there should be choice of forum and diverse institutions available for international dispute settlement. Availability of options to choose forums for settling disputes encourages parties to resort to peaceful settlement of disputes. Interpretation and application of international law by different bodies in a large scale will enhance and strengthen international legal framework. One strength of multiplicity of international tribunals is that it permits a degree of experimentation and exploration, which can lead to improvements in international law. The lack of a strictly hierarchical system provides international tribunals with the opportunity to contribute collectively ideas that might be incorporated into general international law.[68] Though some argue forum shopping as negative to the proliferation of international law, it may not necessarily have a negative impact in a horizontal system of international law as long as the relevant judicial bodies keep their views on law coherent and intact.

In future, given the need to strengthen the coherence of international legal system, new methods ought to be explored in order to unify further the international judiciary. Moreover, to alleviate procedural problems associated with jurisdictional overlaps, introducing additional jurisdiction-regulating rules capable of providing greater levels of co-ordination and harmonization to the relations between various international courts and tribunals is required.[69] Unlike domestic courts and tribunals, though there is no hierarchy in the international judicial settlement bodies, ICJ being the principle judicial organ of UN and world court, should play a central role. It may not be possible to have a strict hierarchy but it is expectable that all other judicial bodies will comply and not contradict with principles developed by the World Court. Charney, Dupuy, George Abi-Saab and several others view that whatever the hazards of non-hierarchical proliferation is found, it has been the only way, and perhaps a very good way, to increase third-party settlement of international disputes through law-based forums.[70] Abi-Saab urges that the ICJ has a special role to play in unifying the international legal system, but argues that it is for the ICJ to act so as to earn a place as the higher court in a non-hierarchical order, seizing opportunities to assert control over other bodies and to provide an authoritative interpretation of general international law rather than basing decisions on narrow or fact-specific grounds.[71] Our finding is that due to the proliferation of international institutions, international law has developed and strengthened in various aspects. In future, though it is predicted that international law will overlap some aspects of domestic jurisdiction if proliferation continues, this will certainly be fruitful and will strengthen the nature and content of international law keeping in mind that such encroachment of international law into the domestic system will not be influenced by some particular legal systems over others.

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[67] <http://untreaty.un.org/cod/riaa/cases/vol_XXI/53-264.pdf> access date 20/06/2012

[68] See *Supra* note 15, at pp. 699-700

[69] Shany, Yuval; *The Competing Jurisdictions Of International Courts And Tribunals*: Oxford University Press, 2003; at p. 127

[70] Kingsbury, Benedict; "Is the Proliferation of International Courts and Tribunals a Systemic Problem?", 31 *New York University Journal of International Law & Politics;* 686 (summer 1999)

[71] Id at p. 693

The Role of Human Rights Institutions in Protection of Human Rights: An Evaluation

Asma Bint Shafiq[©]

Abstract

Following World War II the human rights institutions have grown tremendously with the hope of codifying universal values of human rights. They were supposed to assist every human being to live a life of dignity. But since their inception these institutions have become the subject of immense criticism. Their weak implementation mechanism and the state parties' reluctance to the treaty obligation rises the question how far do these institutions play a successful role in implementing human rights law. This paper highlights this issue. It involves a brief discussion of the functioning of human rights institutions along with the hindrances they face in working. It attempts to show why these institutions should exist despite the weakness.

1. Introduction

The implementation mechanisms of human rights are divided into three groups: national, regional and international. National institutions play the most important role as regards the protection of human rights. But a good number of human rights institutions are found at both international and regional level. International human rights law, which is a rather late addition to the body of international law, emerged with considerable force following World War II.[1] These institutions have come into being to monitor the implementation of human rights law at international and regional level. The United Nations (UN) Charter and international and regional human rights treaties establish particular bodies to monitor the implementation of the human rights provisions of these instruments.[2] These institutions are mainly categorized in two groups: Charter based bodies and treaty based bodies. Through ratification of international human rights treaties the Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties and send report to the treaty bodies accordingly.

Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.[3] The Human Rights Council (HRC) is a forum under the Charter which is empowered to prevent abuses, inequity and discrimination and to protect the most vulnerable. It also observes special procedures to address either specific country situations or thematic issues in all parts of the world. They are sometimes the only mechanism that will alert the international community on certain human rights issues.[4]

Though the human rights institutions emerge to ensure that world community observe their obligation of implementing human rights law, they lack the power of sanction against the state which fails to comply with its obligation. States assume obligations and duties under international law to respect, to protect and

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[1] The concern for the protection of human rights at international level has been grown tremendously after World War II with the establishment of the UN (1945) and the adoption of the Universal Declaration of Human Rights (UDHR) (1948) and other human rights treaties. The UDHR, the International Covenant on Civil and Political Rights (ICCPR) (1966), its two Optional Protocols and International Covenant on Economic Social and Cultural Rights (ICESCR) constitute International Bill of Rights. Formerly human rights law was a matter of domestic jurisdiction. See more in Bantekas Ilias and Oette Lutz, *International human rights law and Practice* , Cambridge University Press, United States, (2013) Pp. 11, 12.

[2] Human rights provisions of the UN Charter along with the treaties adopted at international and regional level for the protection of human rights and customary international law dealing with human rights norms constitute international human rights law.

[3] International Human Rights Law, Office of the High Commissioner for Human Rights, United Nations Human Rights, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx [Accessed on 27 February, 2015]

[4] Human Rights Bodies, Office of the High Commissioner for Human Rights, United Nations Human Rights, available at http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx [Accessed on 27 February, 2015]

to fulfill human rights, by becoming parties to international treaties. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.[5] Further human rights institutions do not have any authority to compel the states to fulfill their obligation under international human rights law. Hence the functions of these bodies have been subjected to criticism since their formation.

Leaving the human rights institutions' incapacity to address the states' non observance of the human rights obligation, these bodies face problem as regards procedural and *Infra*structural matters. All these problems related to the human rights institutions naturally raises some question (i) What is the utility of these institutions, (ii) how far are they successful in protecting human rights law, (iii) do they play any vital role in this regard,(iv) if not, how could these institutions be made more efficient. This paper attempts to evaluate the role of human rights institution in protection of human rights in the light of these questions. It involves a discussion on the global and regional human rights mechanism for the protection of human right law along with the hindrances, which restrain the smooth functioning of these institutions.

2. Protection of Human Rights through Human Rights Institutions

As mentioned above Charter based and treaty based bodies monitor states' compliance with human rights obligation. International and regional treaties and their interpretation by the treaty bodies bring certainty and a uniform standard for achievement by the people of the world community. The treaties codify universal values and establish procedures to enable every human being to live a life of dignity. By accepting them, States voluntarily open themselves to a periodic public review by bodies of independent experts.[6] A brief discussion of the working methods of the human rights bodies is required to assess their role in human rights protection. It facilitates to determine how far the institutions contribute to the protection of rights.

2.1. Protection of Human Rights at International Level

At international level two mechanisms have been developed for the protection of human rights law. The first mechanism is the Charter based system, which derive legitimacy and mandate from human rights related provisions of the UN Charter. It embraces organs and procedures dealing directly with human rights in the framework of the United Nations.[7] The other mechanism for the protection of human rights is the treaty based mechanism which includes human rights treaties, protocols to them and monitoring bodies. It establishes international supervision of the implementation of treaties, intends to make state accountable to international authorities for domestic acts affecting human rights and sets the benchmark for assessment of their compliance by the states.[8]

2.1.1. Charter-based Bodies

Within the UN system the Human Rights Council (HRC) holds the main responsibility of promotion and protection of human rights all over the world through the Universal Periodic Review (UPR), Special Procedure and Complaint procedures.[9] The UPR is the only universal mechanism through which the HRC examines the reports submitted by the UN member states as regards the actions taken by them to

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[5] *Supra* Note 3
[6] Pillay Navanethem, Strengthening the United Nations human rights treaty body system, UN Doc. A/66/860 (2012), P. 139 available at http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx [Accessed on 27 February, 2015]
[7] Abdullah Al Faruque, *International Human Rights Law: protection Mechanisms and Contemporary Issues* , Dhaka (2012), p. 75
[8] *Ibid* p. 93
[9] United Nations Human Rights Council, Office of the High Commissioner for Human Rights, United Nations Human Rights, available at http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx [Accessed on 27 February, 2015]

perform their human rights obligations and to improve the human rights situations in their countries. It calls upon states to ensure the complete realization of human rights and fundamental freedom.[10]

The HRC appoints an individual, a special rapporteur or independent experts or working group with mandates to report and advise on human rights from a thematic perspective or specific situation of a country. In October 2013, for example, the numbers of mandates were 37 and 14 in respect of thematic and country perspective respectively. This system of special procedure involves sending report to the HRC annually prepared on the basis of country visit, communication sent to the state or others addressing the violation, and thematic studies conducted and expert consultation convened. This process contributes to the advancement of human rights law to the extent that it raises public awareness, and advises for technical cooperation.[11]The complaint procedure[12] allows the individuals, groups, or non-governmental organizations who have been the victims of human rights violation and or have reliable and direct knowledge of such violation to complain to the HRC for human rights violation upon the fulfillment of certain conditions.

2.1.2. Treaty- based Bodies

Human rights treaties, protocols to them and the monitoring bodies are the most significant component of international human rights law. There are ten human rights treaty bodies that monitor implementation of the core international human rights treaties.[13] They consist of experts to monitor the state's compliance with its obligation under the treaty. The human rights treaty bodies monitor such compliance through reporting, individual and inter-state complaint procedures; the last method seldom used.

2.1.2.1. Protection of Human Rights by the Treaty Bodies

To meet their reporting obligation under the human rights treaties States parties submit report periodically, usually every four or five years to the treaty bodies describing how they are implementing treaty provision at national level. The bodies examine the report and upon a review of the legislation and policies of the states recommend the ways which the states would follow to comply its human rights obligations in a more effective way.[14] Leaving the Subcommittee on Prevention of Torture (SPT) other treaty bodies are the Human Rights Committee (HR Committee) (ICCPR) Committee on Economic, Social and Cultural Rights (ICESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), Committee on the Rights of the Child (CRC), Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED) examine the states reports.[15]

The six treaty bodies (HRCttee, CAT, CERD, CEDAW, CRPD, CED) examine the complaints of violation of the rights made by the individuals directly to them subject to the fulfillment of the conditions required by the concerned Convention.[16] The other three treaty bodies (CMW, CESCR, CRC) though in principle may

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[10] Universal Periodic Review, Office of the High Commissioner for Human Rights, United Nations Human Rights, available at http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx[Accessed on 27 February, 2015]

[11] Special Procedures of the Human Rights Council, Office of the High Commissioner for Human Rights, United Nations Human Rights, available at http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx [Accessed on 27 February, 2015]

[12] Human Rights Council Complaint Procedure, Office of the High Commissioner for Human Rights, United Nations Human Rights, available at http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx [Accessed on 27 February, 2015]

[13] *Supra* Note 6, P. 23

[14] *Ibid*

[15] *Ibid*

[16] The usual conditions of entertaining individual communication under the human rights instruments are that the accused state party has signed the treaty concerned, the rights alleged to have been violated come within the relevant Convention and the individual has exhausted all domestic remedies.

deal with the individual communication do not do so as the respective procedure has not yet been come into force. The SPT does not have the mandate in regard to this mechanism.[17]

2.2. Regional Mechanism for the Protection of Human Rights

With a view to highlight specific human rights problem of different region and to provide relief more efficiently than the international mechanisms the regional human right system has been developed in Europe, America and Africa. Every system adopts a foundational human rights instrument and sets up human rights bodies to monitor state parties' compliance with their treaty obligation.[18] The European Convention on Human Rights (1950) (ECHR) is the fundamental document of the European system. The Organization of American States (OAS) Charter and the American Declaration of the Rights and Duties of Man, 1948 constituted the normative framework of human rights protection under the Inter-American System of Human Rights. Like global system the regional systems also recognize periodic report, individual complaint and inter-state complaint. As regards the periodic report both the European and American system recognize state's obligation to submit report in respect of economic social and cultural rights. The African system contains vague provision on this issue as well as individual complaint.

2.2.1. Protection of Human Rights by Regional Bodies

The regional system represents the presence of court and commission empowered to protect human rights. Unlike the global system the regional mechanisms establish judicial body to strengthen the human rights protection. Within the UN system the International Court of Justice (ICJ) is the only judicial body. But it is not purely a human rights institution. However many human rights treaties confer ICJ jurisdiction of settlement of disputes relating to their interpretation or application when these cannot be settled by other means.[19] The European Court of Human Rights (ECtHR) and Inter-American Court of Human Rights (IACtHR) are two judicial bodies under the European and Inter-American system respectively.

European system is advance as compared to other system. The most significant factor which distinguishes European system from the other two is that the national courts consistently apply and refer to the ECHR, which ensures better protection of human rights.[20] The Inter –American Commission on Human Rights refers individual complaint to the court when it fails to reach a friendly settlement. If the court finds that a violation of the right under the Convention has been occurred, it shall rule to remedy the situation and order for compensation to the injured party.[21] The court may also provide advisory opinion on the interpretation of ACHR and other human rights treaties concerning the protection of human rights in American States.[22]

3. Weakness of Global and Regional Human Rights Protection Mechanism

Being a part of international law human rights institutions suffer from the problem of implementation. As it mostly depends upon the states' will and sovereignty the human rights institutions find it difficult in implementing human rights provisions of the UN Charter and the international and regional treaties.

3.1. Limitation of Charter- based Bodies

The charter based system suffers from several difficulties with enforcement mechanism: (a) the UN agencies cannot interfere with the matters which are exclusively of domestic jurisdiction[23] (b) the UN agencies have no real sanction to enforce their verdict, (c) giving individuals the right to address

[17] *Supra* Note 6, Pp.23, 24
[18] *Supra* Note 1, P.219
[19] *Supra* Note 7, P. 82
[20] *Supra* Note 1 P.232
[21] Article 63, ACHR
[22] Article 64, ACHR
[23] Article 2(7) of the UN Charter

themselves directly to an international agency would make them subject of international law-a proposition all states are most reluctant to grant.[24]

3.2. Flaws of Treaty- based System

Low compliance or non compliance of treaty obligation by the state parties, over burdened monitoring bodies with lack of resources and expertise, non cooperation by the states in submitting comments on individual complaints are responsible for making the bodies ineffective.[25]

3.2.1. Non-compliance by States with Obligation under the Treaties

The numbers of periodic report submitted by the State parities are few. One of the major factors behind this is that a state that becomes party to numerous treaties at the same time has to submit a number of reports under all the treaties between every four and five years which imposes huge burdens upon the states. As a result the states' compliance with their treaty obligation of submitting report is not satisfactory. A report of 2010-2011 reveals that among the states parties only 16% report on time.[26] Further the states reluctance to cooperate with the treaty bodies in submitting their comments on individual complaints hampers the function of the bodies.[27]

3.2.2. Backlogs in Treaty Bodies

Though the level of compliance is low the treaty bodies are found to face a growing backlog of reports to a great extent pending consideration. In March 2012 for example, the number of reports awaiting consideration amounted to 281.[28] As regards the individual communications also the treaty bodies face similar situation which results delay in the procedure. In 2011 for example an average of 480 individual communications were pending.

3.2.3. Lack of Resources

Resources for the treaty bodies lag behind the expansion and increasing workload of treaty bodies. They depend on the UN for funding, staff and logistic support as they do not have their own resource to conduct the activities. The Office of High Commissioner for the Human Rights (OHCHR) through its Human Rights Treaties Division (HRTD) provides the support of staff to the treaty bodies and as regards financial support to these bodies it involves two sources: the United Nations regular budget and voluntary contributions. In fact the treaty body system is surviving because of the dedication of the experts, who are unpaid volunteers. Thus the absence of a self sufficient mechanism and complete dependency on the UN do not enable the treaty bodies to function smoothly and efficiently.[29]

3.2.4. Lack of Sanction

The treaty bodies decide whether the states have breached their treaty obligation but in most of the cases they lack the power of directing sanction for the breach which is considered as the one of the major weaknesses of international human rights law. Against this ineffective institutional structure unilateral sanction and the use of force in the form of humanitarian intervention are often proposed. But these are politically motivated and found to attempt establishing regional and international hegemonies.[30]

3.2.5. Reservation

While acceding to the treaties the states often limit their obligations to specific provisions through reservation, which exempts them from applying those provisions. Reservation is allowed mainly to respect

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[24] *Supra* Note 7, P. 92
[25] *Supra* Note 6 Pp. 13,32,33
[26] *Ibid*, p. 13
[27] *Ibid* Pp. 32, 33
[28] *Ibid*, p. 13
[29] *Ibid*
[30] *Supra* Note 1, P.87

the states' sovereignty and to ensure wider participation of the states to the treaties. But sometimes it frustrates the very purpose and object of the treaty which makes the existence of the treaty meaningless.[31] Thus the reservations made by the states to the Convention on Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) not to implement the provisions relating to the equality of men and women and other provisions which conflict with the principles of Islamic law undermines the very rational of the treaty.[32]

3.2.6. Derogation

All human rights treaties allow states parties to derogate from certain rights on the grounds of emergency, war, rights of others, public order, public morals. Thus the qualified rights face complex interpretation as regards the scope of putting restriction upon them. The restriction should be proportionate to the circumstances of public emergency. But the proportionality of measures may often be influenced by the special circumstances such as emergency.[33]

4. Evaluation of the Functioning of International and Regional Human Rights Institutions

It reveals from the above discussion on the functioning of the international and regional human rights instruments that no mechanism has binding effect and its implementation depends upon the will of the state. Consequently the state can escape its obligation under the UN Charter and the international and regional treaties whenever they wish. Accordingly the non binding nature of the human rights institutions gives rise the question what are the purposes of these institution and whether these institutions should exists or not. But an analysis of the formation and functioning of these institutions shows that despite the weakness the human rights institutions bring some positive impact in human rights protection.

4.1. Psychological Pressure by the Existence of Human Rights Institutions

The existence of the human rights institutions creates a psychological pressure upon the states who would hardly think to ignore the mandates of these institutions. Though they are not capable to give binding decisions human rights institutions make a state to think twice before violating the provisions of human rights law, which it would not have done if such bodies were absent. If the state goes against the decision of the human rights institutions the media, civil society, NGOs and above all the world community raise the issue in different forum. It would discourage the state from ignoring its obligation under human rights law. Though this mode of human rights protection is indirect, it has a strong impact in human rights protection at national, regional and international level.[34]

4.2. Contribution of Human Rights Institutions to the Protection of Human Rights through Interpretation

The institutions of human rights law face a lot of difficulties including effectiveness. But the weak implementation mechanism does not mean that it does not contribute to the protection of human rights. The General Comment of the HRC and decisions of EUtHR and IACHR on various arenas of human rights law have enriched international and regional jurisprudence, which could be treated as meaningful contribution of human rights institutions to the human rights law. Their interpretation to the right to life, for example, causes the states to adopt protocols to the international and regional instruments of human rights protection aiming to abolish death penalty. It strengthens the protection of the fundamental human rights.

4.3. National Human Rights Mechanisms as ancillary to the International and Regional Human Rights Institutions

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[31] *Ibid*, P.56
[32] *Ibid*, P.57
[33] *Ibid*, p.75
[34] Cassel Douglass, "Does International Human Rights Law Make a Difference?" *Scholarly Works* (2001). Available at: http://works.bepress.com/douglass_cassell/7 [Accessed on 27 February 2015]

The decisions of the human rights institutions encourage the stat parties to the human rights treaty to comply with their obligation under the treaties by adopting human rights based approaches in policy making at national level, which take the form of legislative, administrative, judicial or other measures. Thus the states ensure that their national law is consistent with the standard of treaty.[35] Though the human rights institutions play the role of protecting human rights at international and regional level through specific mechanisms at national level the national human rights institution particularly the judiciary plays the vital role in protecting human rights. The significant role of judiciary in ensuring the states' adherence to international obligation under the human rights treaties along with the other policies adopted by the states for protecting human rights law could be treated as ancillary function of the human rights institutions as the state report contains these issues and the treaty bodies comment on these.[36]

However the states' compliance with the comments of human rights institutions depends on whether the states hold positive attitude toward the comments or not. In the *Grootboom* case[37], for example, the South African Constitutional Court depending on international treaty obligation establishes a great example of giving protection to the right to housing, which being economic, social and cultural right is not judicially enforceable within the state territory.[38] Some courts on the contrary deny the binding nature of international treaty standard, even in respect of the civil and political rights, which is usually respected by the states in their domestic jurisdiction. In *Singarasa* case[39] the Sri Lankan Supreme Court rejects the binding force of the ICCPR within domestic law and refused to enforce the right to faire trial. Thus guaranteeing such international standards by the national courts depends upon some important factors among which independence of judiciary from the executive is fundamental.[40] The states' will along with the independent and impartial judiciary ensure implementation of international standard of human rights within the state. Though the human rights institutions have little to do with states' willingness to observe their obligation of human rights protection they are free to comment on the states' actions through General Comment. In addition to this, the UN can appoint special rapporteur to report on human rights situation of a country. As the member of world community a defaulting state cannot always ignore the comments. Thus the human rights institutions play an active role in human rights protection, though in an indirect way. Consequently it would be beneficial to assess the human rights institutions as an extended part of national human rights protection rather than citing it as an isolated system.

5. Utility of the Human Rights Institutions

It appears from the evaluation of the functioning of the human rights bodies that these institutions should continue to exist to ensure the human rights protection. The only problem lies with their effectiveness. The states should come forward to make these institutions effective and should give the human right protection priority over all other national interest. Cassel's observation on human rights institution deserves a significant importance in this connection. He considers all the important factors relating to the protection of human rights as a single system and says that all the mechanisms developed at national, regional and international level form the part of the same system, i.e. human rights protection. Citing the example of European system he attempts to show how European Court assists domestic court in regard to the protection of human rights.[41] Though the political reality of other region is different from Europe states attempt to observe the norms of human rights at national, regional and international level.

Incorporation of human rights norms in constitution and its articulation in domestic law, politics, press, civil society and national human rights institutions form a fundamental part of the indirect enforcement mechanism, which have been strengthened by the worldwide growth in human rights consciousness, human rights NGOs and communication and transportation technology.[42] This mutual reinforcement

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[35] *Supra Note* 1, Pp. 78,79
[36] *Ibid*, p. 80
[37] Government of the Republic of South Africa and Others Grootboom and Others (2000) (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)
[38] *Supra Note* 1, p. 81
[39] *Singarasa V. Attorney General* S.C. SPL (LA) no. 182/99 (2006)
[40] *Supra Note* 1, P. 281
[41] *Supra Note* 37, P. 123
[42] *Ibid,* pp.122, 124,125,

process provides common language of rights for all states, strengthens the concept of universality, recognizes claims of rights, indicates the perceived international will, provides judicial accuracy, increases expectation of compliance and encourages domestic judicial enforcement, which legitimize force to the human rights institution.[43] In Cassel's words, "*the institutions of international human rights law deserve our energetic support only to the extent they contribute meaningfully to protection of rights, or at least eventually to do so*."[44] Thus the institutions of international law to some extent as mentioned above contribute meaningfully to the protection of human rights and to a large extent their role is limited to the promise of protection. The promise of protection will discover the way of better protection of rights in future.

6. Conclusion

A brief evaluation of the functions of human rights institutions shows that these institutions suffer from both structural and functional weaknesses. The vital problem lies with the fact that they lack the power of sanction against the defaulting state. There is none to deny that human rights institutions are not as effective as domestic institutions in ensuring proper implementation of human rights. It is rightly said that it is the national protection system that is most important when it comes to human rights protection.[45] Thus human rights got effective protection at national level. But it does not mean that the establishment of international and regional human rights institution is of no use. These institutions give attention to the specific problems of human rights in different regions of the world. Further it would not be wise to always assess these institutions in the light of domestic mechanism. As the human rights institutions are part of international law their functions should be evaluated in accordance with the basic norms and principles of international law.

A question may be discussed here why states follow customary international law though there is no specific institution to enforce its implementation. A constant state practice coupled with *opinion juris* gives a particular rule the status of customary international law, which states usually respect. Thus the UDHR, the founding document of international human rights law is found to be cited in the national constitution by the states and enforced by the domestic court accordingly giving it the status of customary international law.[46] The non binding nature of the UDHR does not make any difference to the protection of human rights mentioned in it. In fact the states have developed a tendency of including the provisions of International Bill of Rights in their constitution from their inception.[47] It creates a logical hope that with the passage of time the states would deal with all other human rights treaties with same importance making the protection mechanisms of human rights stronger then it was ever before and making liberal interpretation of state sovereignty and political will, which do not allow human rights institutions to work effectively. Here lies the importance of promise of human rights institution to contribute meaningfully to the protection of human rights.

The presence of human rights institutions creates psychological pressure upon states that intend to violate law. Human rights institutions also play an active role in human rights protection through interpretation. In order to assess the functions of human rights institutions they should not be treated as isolated system rather they should be considered as the part of a single system, i.e. human rights protection. If national, regional and international human rights institutions are considered as the part of the same system and the world community develops the attitude of observing all equally human rights institution would be able to play their role in most effective way.

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[43] *Ibid*, pp. 126-129,131
[44] *Ibid*, p. 121
[45] *Supra Note* 7, p. 107
[46] *Supra Note* 1
[47] *Supra Note* 3

Standard-setting Process of International Labor Organization: An Evaluation

***Rakiba Nabi*©**

Abstract

The process of setting international labor standard through international labor law is a significant part in ILO activities, but ILO faces numerous challenges in the process of establishment of international labor standards. So long as the problems of standard-setting are not cured, the end of standard setting can never be achieved. This paper critically examines the standard-setting process of International Labor Conference (ILC). The paper argues that the present structure and decision-making process of ILC is detrimental to overall legitimacy of ILO. The long effect of a weak decision making process is ending up with a weak organization. Finally, the paper comes up with some suggestions to bring about positive changes in ILO.

1. Introduction

International Labor Organization (ILO) is a social justice institution that has been engaged with setting international labor standard (ILS) for about one hundred years. The process of setting international labor standard through international labor law is a significant part in ILO activities. More than 185 Conventions adopted by the organization so far played a major role in formulating national labor laws of 185 member countries. Due to very low ratification rates at the national level, labor standards are not uniform. Since ILO is the only international body to promote and establish ILS, the effectiveness of the institution is condemned on the ground of low ratification rate particularly in industrializing countries. For sure, there are reasons behind its poor impacts on the overall economy of member states. The colossal ILO engagement in establishing labor standard during the last two decades points out the loopholes as regards evasion of obligations at the national level. Starting with these queries, this research paper adresses the flaws in the process of standard setting and explores how social justice can be ensured for the workers of member countries.

ILO faces numerous challenges in the process of establishment of international labor standards: low representation of industrializing countries in the Governing Body (GB), lack of representation of workers' and employers' organizations in GB and International Labor Conference (ILC), lengthy, slow and cumbersome process, overburdened ILO Committees, low ratification rates particularly in industrializing countries, and a soft law approach. As long as the problems of standard setting are not cured, the end of standard setting can never be achieved.

Whereas ILO is looking for more legitimate governance structures, the roles of ILC and GB in terms of standard setting process have been widely questioned. The organization itself is seriously concerned with the defects in the existing decision making process: its method of working and difficulties encountered by the organs and committees established under it. Under a defective working process, to what extent these organs can take effective decisions remains a big question. In this research paper, we deal only with the standard setting process of ILC. We will argue that the present structure and decision-making process of ILC is detrimental to overall legitimacy of ILO. We will conclude that the long run effect of a weak decision-making process is ending up with a weak organization. Finally, we will come up with some suggestions to bring about positive changes in ILO.

2. Standard-setting Process of ILO

A proposal to adopt a Convention is raised and submitted by Governing Body (GB) at least three to four years before the final adoption at ILC.[1] The nature of the instrument, its subject-matter, and placing an item on the agenda depends on the GB who later on shifts the matter to International Labor Office (ILO) for extensive preparatory work.[2] After receiving feedback from countries' law and practice, the Office

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[1] Neville Rubin, *Code of International Labor Law, Practice and Jurisprudence*-Volume 1, Cambridge University Press, UK, p. 43.

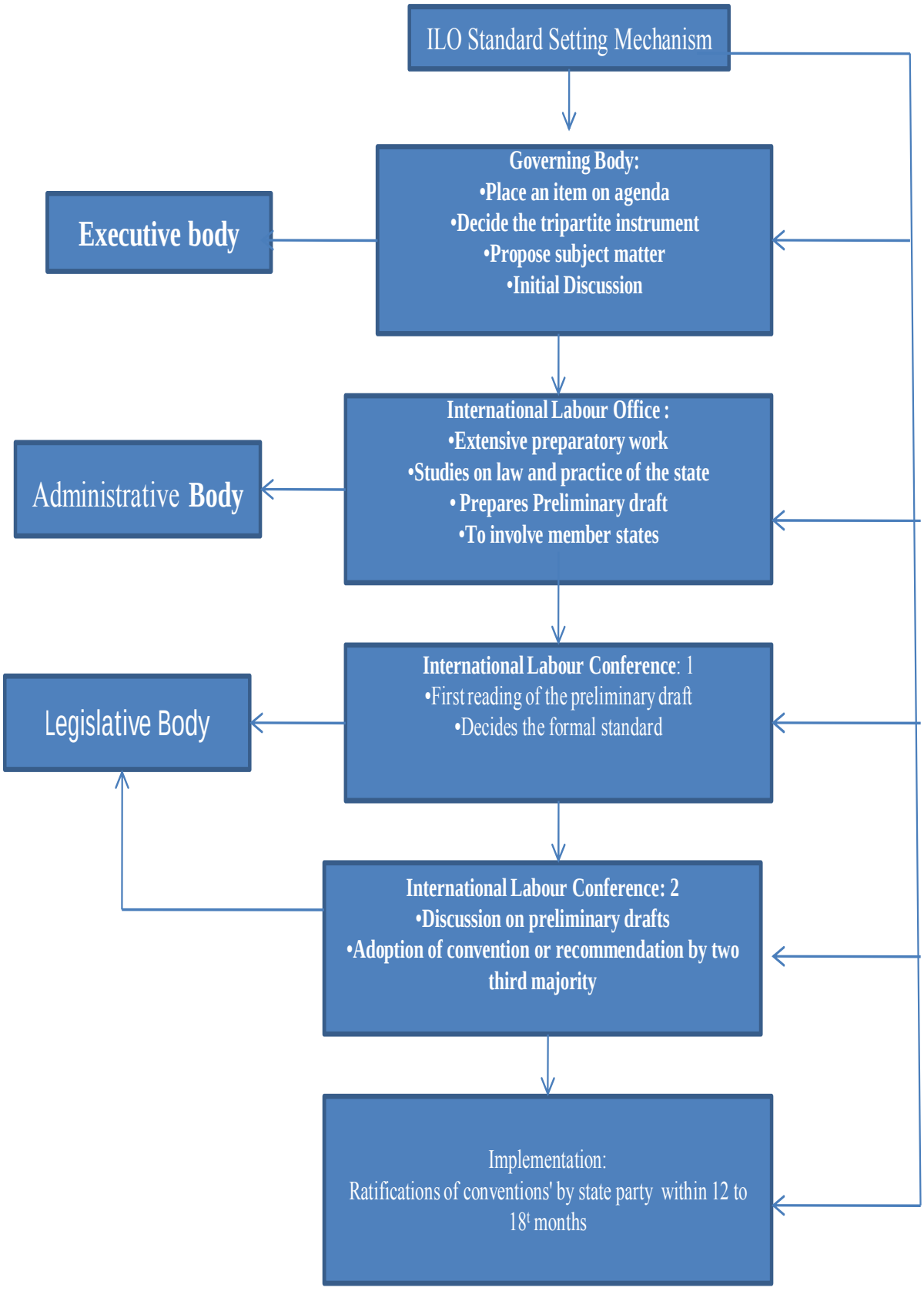
[2] HéctorBartolomei De La Cruz, Geraldo Von Potobsky and Lee Swepston, *The International Labor Organization: The International Standards Systems And Basic Human Rights*, West view Press, Colorado, USA and Oxford, UK, 2005, p. 37.

prepares a report with the help of technical department of International Labor Office and International Labor Standards Department.[3] The Office may also involve member countries at this stage to see how they would address the issue to be regulated. A first reading of the preliminary draft is placed during ILC meeting by a technical committee specially set up to consider agenda items. As the Committee prepares the formal standard in the form of either conventions or recommendations,[4]it places the agenda before ILC for adoption by way of two-third majority of the states present and voting as per Article 19 of ILO Constitution. States participate in the questionnaire survey prepared and conducted by the International Labor Office 18 months before the Conference, and the concerned state party will reply the same 11 months before the Conference.[5] So, the initiative of adoption of a new instrument essentially carries with it the detailed response of concerned governments in consultation with employers' and employees' representatives. ILO engages state parties during the process at all stages and ensures that they participate in the decision making in every possible ways.[6]And in each case, the burden of summarizing the responses lies in ILO Secretariat.

[3]Rubin ,Neville.2005. *Code of International Labor Law, Practice and Jurisprudence*, *Supra* note 1, p. 44
[4] Article 38 and 39 of the Standing Orders of International Labor Conference
[5]Rubin ,Neville .2005. *Code of International Labor Law, Practice and Jurisprudence, op. cit*., p. 45

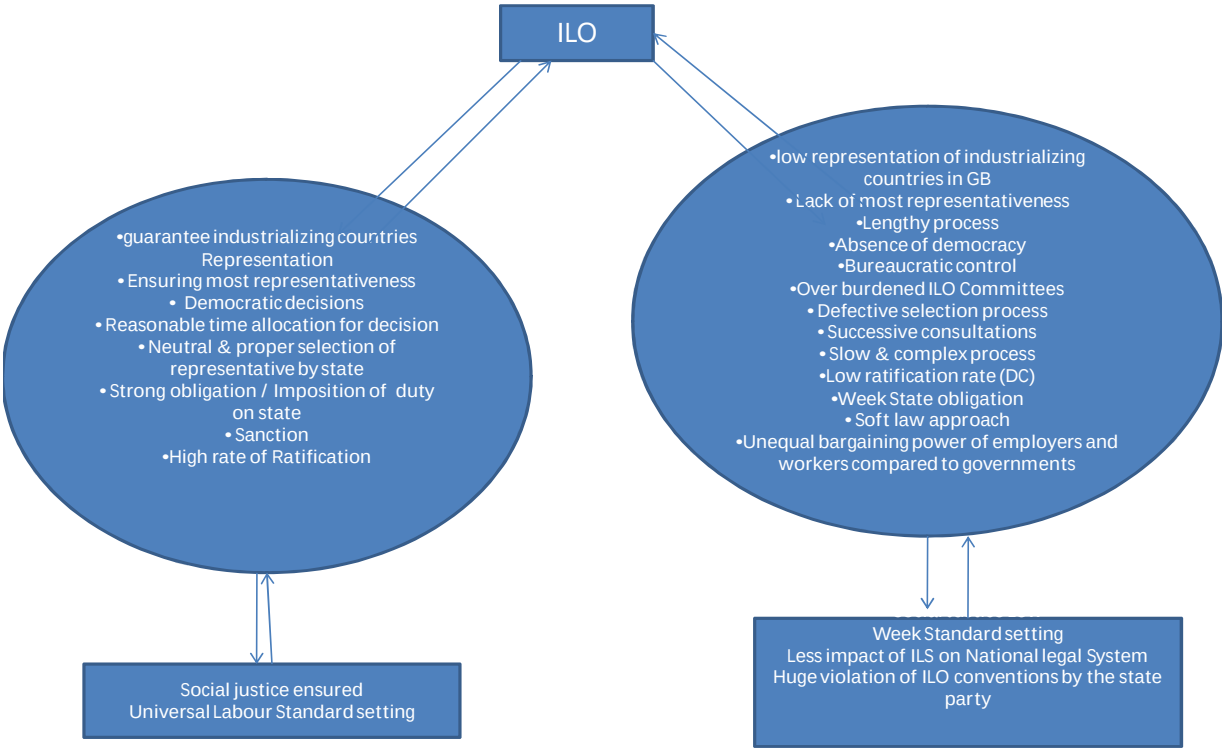
[6]Trebilcock, Anne.2010.Putting the Record Straight about International Labor Standard Setting,*Comparative Labor Law and Policy Journal* p. 554-555, visit http://international.westlaw.com.eproxy1.lib.hku.hk,

Fig:1: ILO Standard Setting Mechanism



3.0: Standard Setting Issues Influencing

Figure: 2: Model of ILO Standard Setting Analysis



The above mentioned model shows that ILO sets up its standard purely to guarantee social justice and universal labour standard setting if the identified requirments in the model are fullfilled. The model also identifies that if ILO fails to fulfil the criteria**,** that will create a gap in the process of standard setting with a probability in the result of low standard setting, lack of social justice and violations of ILO conventions.

4. Flaws of the Decision- making Process

4.1.Bureaucratic Control

The parties eligible to participate in the standard setting process are government representatives, workers' representatives and employers' representatives. It is the responsibility of the governments to select employers' and workers' from the most representative of employers and workplace organizations in their respective countries delegates in accordance with the provisions of Article 3(5). In the selection process, governments often are persuaded by their interests to have those representatives who will help them in the decision making process by voting in ILC in their favor. This attitude of governments sometimes results in picking up inappropriate representatives. That is one reason why the representatives often fail to exercise their bargaining power in an effective way.

In addressing selection bias, ILO took initiative to review the process of selection of representatives by governments. The decision of the state party was made subject to the consideration of the Credentials Committee of ILC, so that it could entertain objections to credentials. Since 2005, the Committee has been mandated to exercise control over government power in ensuring independence of delegates.[7]

[7]See Novitz, Tonia, Assessing legitimate structures for the making of transnational labour law: the durability of corporatism, *Industrial Law Journal*, 2006, pp.374-376, visit http://international.westlaw.com.eproxy1.lib.hku.hk/result/default.wl?

Though good in some respect, this kind of bureaucratic interference affects sovereignty of states, particularly in the selection process of representatives.

4.2.Democracy in Decision-making

Workers and employers group usually vote in a separate block implying that government needs the support of one or more of the delegates for adopt any measure.[8] Despite the fact that much weight is attached to delegates, the importance of governments outweighs votes of delegates.[9] Since delegates have no power to outvote governments, the status of government delegates outweighs that of workers and employers in terms of implementation of decisions in ILC and GB. ILO fills up the gap of this unequal position that exists between governments on the one hand and the workers and employers on the other.[10]At the same time, NGOs nowadays are entitled to attend and speak up at ILC though cannot exercise voting rights.[11] Having engaged with standard setting process they utilize their expertise to supplement the role of representatives and help them play their part appropriately.

Echoing the corporatist structure, ILO set the mechanism of veto power on behalf of employer associations and trade unions.[12] As regards to setting the agenda, GB is involved in the discussion and bargaining on topics of interest, and often results in deadlock. If it decides not to proceed with an agenda, the matter ends there. So, the central power of determining subject-matter for law-making depends on GB. In principle, a very important legislative function has been imposed on GB. I argue that when ILC formally discusses the agenda or standard setting, adoption of that matter as convention or recommendation turns into a mere formality or, a matter of public record due to its earlier consensus as to its value.[13] Hence the statement that ILC enacts conventions or set international labor standard in a democratic way through two-third majority in the Conference does not always give the impression of dominance and GB dictates all the way up to the passing of legislation.

4.3. Which of the Employers' and Workers' Organizations are "most representative"?

One of the main purposes of determining representatives of workers and employers is to give effective institutional voices to them for democratic decision-making made in ILO organs. Since its inception, so far more than 185 Conventions have been adopted; still a broad conceptual definition of 'worker' within Labor Law remains a far cry. Similarly, because of the diversity of organizations, i.e. typical workplaces to network-based forms of organizations to many other varieties, it is difficult to determine a uniform criterion to represent workplaces or employers mostly.[14] Especially the unionized structures of workplaces are still less prevalent, as a wide range of workers covering informal economy including home workers and agricultural workers are still beyond the basic structure of tripartism.[15] Similarly, the question remains, who are the most representative employer: transnational corporation, small enterprise, medium enterprise or self-employed person? The usual forms of collective representation have withered away and were replaced by externalization of either production or labor. In some African and Latin American countries various forms of decentralization like subcontracting and outsourcing have become common feature during the last two decades causing problems of representation.[16]

Due to this decentralized approach, the delegates are unable to participate in decision making in an equal bargaining position, and causing a bottleneck in the actual functioning of tripartism. Difference of delegates' knowledge and expertise on a subject matter of agenda is another big problem. Although ILO

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[8] Novitz, Tonia, *op. cit*., pp. 382-385

[9] See Hurd, Ian. 2011. *International Organizations: Politics, Law and Practice*, Cambridge University Press, Cambridge, UK, pp. 162-165.

[10] Novitz, Tonia, *op. cit*., pp. 382-385

[11] Novitz, Tonia, *op. cit*., pp. 382-385

[12] Baccaro, Lucio and Mele,Valentina, Pathology of Path Dependency? The ILO and Challenge of New Governance, *Industrial & Labor Relations Review*, 2012, pp.195-200, visit http://international.westlaw.com.eproxy1.lib.hku.hk/result/default.wl?

[13] Novitz, Tonia, *op. cit*., pp. 383-385

[14] Tekle, Tzehainesh, *Labor Law and Worker Protection in Developing Countries*, Hart Publishing, Oxford and International Labor Office, Geneva, 2010, pp.20-24

[15] Tekle, Tzehainesh.2010. *Labor Law and Worker Protection in Developing Countries*, *op. cit*., p.3-6, 12-15; see also Bronstein, Arturo .2009. *International and Comparative Labor Law (Current Challenges),* published by Palgrave Macmillan and International Labor Office, CH-1211, Geneva 22, Switzerland, pp.30-35

[16]Tekle,Tzehainesh.2010., *op. cit*. p. 22-23

equalizes the unequal bargaining power through providing assistance, attempt should be made to address the main issue of true representation. It will be the strategy of ILO to screen out the mechanism of selecting true representatives and reassess the constitutional provisions. The selection of delegates needs also to vary according to subject matter in order to reflect the true representative nature of workplaces and employers.

4.4. Low Representation of Industrializing Countries in GB

The composition of GB mainly representing 'countries of chief industrial importance' undermines the organization's fairness and legitimacy, because they are minority states in ILO's 185 members in total. The ILO today is dominated in numbers by over 140 developing countries. The reason for including 10 countries as industrially important is no longer justified as the regulations of relations between capital and labor (Article 393 of Treaty of Versailles) are not purely state centric anymore and the era of mass production is over whereas in the past, 'the rising of unionism, standardized employment relations and direct state involvement in a wide range of economic activities were prominent.'[17]Although a constitutional amendment was passed in ILC in 1986 regarding abolishment of permanent membership, it failed to come into effect due to lack of sufficient state consent.[18] As the body excludes fair geographical distribution especially to enhance Asian, Latin American and African representation, how the decisions passed by GB become democratic and reveal the voices of majority countries at ILO? Even the Committee of Experts appointed by the GB composed of 17 members is no more than a reflection of over representation of industrialized nations.[19] If the parent institution lacks proper representation, the proper representation in sub-organs established through it does not cure the situation.

Proper representation of industrializing countries in governing body is important for democratic decision-making, without which low rate of ratification will persist. Proper representation facilitates a favorable atmosphere to enact national labor law in the light of ILO Conventions and also promotes democratic culture of member countries. This representation would be maintained if industrializing and Least Developed Countries (LDC) are more focused on it. Like members of chief industrial importance, ten non-elective seats can be reserved for industrializing and least developed countries. They may come to GB on a rotation basis. Notably, members whose ratification rate is low can be selected as GB members so that their problem of non-ratification can be addressed in an effective way. The whole purpose of proper representation is to motivate industrializing and least developed countries to increase the high ratification rate. The total number of GB members should also be increased.

4.5. Slow and Lengthy Process

The whole process of ILO in case of standard setting is slow and lengthy, because it involves a cumbersome process of successive consultations.[20] In particular, the process tries to accommodate state party's involvement from the early initiation of proceedings of agenda setting so that it can later avoid technical difficulties or constitutional bottleneck in case of implementation of the said convention at the national level. But the state practice as regards implementing legislation faces with discouraging record of ratification that demonstrates the idea of incorporating states at this stage is not effective and it just adds to the burdens of states.[21] It is said that formal ratification is not the only indicator to measure the impact of ILO conventions, as it depends on factors such as the sectoralized nature of conventions, and inability

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[17] See Cooney, Sean. 1999. Testing Times for the ILO: Institutional Reform for the New International Political Economy, *Comparative Labor Law and Policy Journal*, pp.369-370
Visit http://international.westlaw.com.eproxy1.lib.hku.hk/result/default.wl?cfid=1&mt=WorldJournals&origin

[18] International Labour Office, *International Labour Conference Seventy-Second Session*, Record of Proceedings, 36/3-5 (1986).

[19] Current Committee members are Argentine, Belize, Brazil, US, South Africa, UK, Panama, Morocco, Sierra Leone, Germany, France, Russian Federation, Thailand, Australia, Spain, Cameron, Madagascar, and Japan.
Seehttp://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/WCMS_192093/lang--en/index.htm

[20] See MachelServais, Jean, *International Labor Law, Kluwer Law International*, PO Box 316, 2400 AH Alphen aan den Rijn, The Netherlands, 2009, pp. 46-49

[21] Baccaro, Lucio and Mele, Valentina.2012, Pathology of Path Dependency? The ILO and Challenge of New Governance, *op. cit.* p. 198-199

of developing countries to provide maximum protection to workers.[22] But it is a very important parameter to judge the legislative and administrative difficulties of member countries and assess the reasons that thwart countries to consult with conventions.

Specifically, the ratification record of developing countries is very low, as sometimes it is argued that those states are not capable to attain the standards maintained in the conventions.[23] Out of 189 Conventions, not more than twenty countries ratify eighty percent of total number of Conventions adopted by the ILC during the last twenty years.[24] As industrialized countries are concerned with political stability, democratization of political institutions, strong collective bargaining role of employers and workers organizations, and implementation of labor rights, these indicators incentivize industrialized countries to ratify Conventions. On the other hand, industrializing countries suffer from problems such as political turbulence, employers' demand, economic condition of employers, employees' role, and political culture. These countries allege that they gain no comparative benefit in the international economy from the ratification of ILO Conventions. Some countries emphasize national interest as a major reason for non ratification of conventions. For example, some countries justify child labor as it is cheap, easily accessible to employers in medium and small enterprises and because it helps fulfill the basic needs of laborers and thus help reduce poverty. That is why, among Conventions made during this decade, no convention receives more than 12 ratifications and the least number of ratifications are four.[25] Hence, the procedure of standard setting which demands a long period of three to four years for adoption ultimately comes to a standstill unless and until states take the responsibility to ratify the conventions. ILO's law-making activities ultimately are left to the sweet will of the state parties.[26] ILO should stress on lifting these disadvantages of developing countries to balance the circumstances that derive comparative advantages from ratification and thus facilitate to uphold ILS.

Recently, ILO's Legal Issues and International Labor Standards Section took initiative to promote fundamental and Governance Conventions, and tried to implement the plan of action through sending letters to 145 member countries in order to find out the obstacles to ratifications, and provided technical assistance in reviewing national legislation for its incompatibility with conventions.[27] To what extent these initiatives become successful is to be seen in future. These projects of plan of action, to be successful, need cooperation and coordination between ILO and member countries.

4.6. **Weak State Obligations**

ILO's main monitoring approach is reporting system.[28] Irrespective of ratification, a state is obliged to report to ILO as regards: a) conventions that have been ratified[29], b) conventions that have not been ratified[30], and c) newly adopted conventions to be given effect by way of implementing legislation.[31]Member states are obliged to report every two/three years in case of core ILO Conventions

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[22] See, Wet, Erika de. 2008. Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work, *German Law Journal*, Vol.9,no.11, p.1433, visit http:// www.germanlawjournal.com/pdfs/vol09no11PDF_vol_09_No_11_1429-1452_Articles_de%20Wet.pdf

[23] See, Cooney, Sean.1999.,*op. cit*. p.376-377

[24] Edward, E. Potter.2005. The Growing significance of International Labor Standard on the Global Economy,) pp. 245-247, *Suffolk Transnational Law Review*, visit http://international.westlaw.com.eproxy1.lib.hku.hk/result/default.wl?, see also, Hyde, Alan. 2009. The International Labor Organization in the Stag Hunt for Global Labor Rights, *Journal of Law and Ethics of Human Rights*, p. 158, visit http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443978

[25] See, Cooney, Sean.1999.,*op. cit.* p.376-377

[26] Reporting system under ILO is a soft law approach and did not make the states considerate about their obligation to ratify conventions.

[27] See, 316th Session, Geneva, 1–16 November 2012, Governing Body, Ratification and promotion of fundamental and governance Conventions and implementation of the plan of action for the governance Conventions.

[28] See, Blanpain, Roger. 2001. *Labor Law, Human Rights and Social Justice*, Kluwer Law International, The Hague, The Netherlands, p. 88-89.

[29] ILO Constitution, art.22, and International Labour Office, Handbook of Procedures Relating to International Labour Conventions and Recommendations, Chapter IV, GB.258/6/19 (Appendix I). See, De la Cruz, *Supra* note 2, at 67-70. States also must file reports on application of conventions in non-metropolitan territories: art. 35.

[30] ILO Constitution, arts. 19(5)(e) and 19(6)(d), and International Labour Office, Handbook of Procedures Relating to International Labour Conventions and Recommendations, Chapter V. See also, De la Cruz, *Supra* note 2, at 70-71.

[31] ILO Constitution, arts. 19(5)(c), (d) and 19(6)(d). See, De la Cruz, *Supra note* 2, at 71-72. States must also file reports with respect to non-metropolitan territories.

and priority (governance) Conventions, and every five years regarding other conventions.[32] Reporting system alone, even of ratified conventions, cannot be overestimated if the discrepancy between countries' laws and the conventions remains unresolved. Of course, reporting record is getting better than before. In 2012, out of 3013 reports (under Article 22 and 35 of the ILO Constitution) which were requested from the member countries by the Committee of Experts, 2084 reports were sent to the Labor Office, amounting to 69.1% of the reports requested.[33]

Recently, the Committee has started to follow up cases of serious failure to comply with reporting obligations. This step of the Committee ensures reporting obligation of member states though not the proper implementation of ILS at the national level.[34] So the organization oversees not only states' legal obligation under specified conventions, but also difficulties which debar them from implementing those conventions. The failure to report timely has the sanction of clarifying their position before Conference Committee on the Application of Standards. The Committee may conclude that a state has fallen short of their obligations. The problem is that the reporting system does not entail any hard sanction being limited to only moral persuasion and dialogue with the recalcitrant states. Sometimes, the Committee is not satisfied with the reports of member countries. In such a case, the Committee may directly observe those states on a secondary basis.[35]

4.7. Over-burdened ILO Committees

The Committee of Experts is authorized to evaluate the reports passed on to it by the Conference within two weeks before meeting in Geneva.[36] The seventeen experts of the Committee are supposed to see near 1500 reports every year within this short period of time. Again, the Committee's reports are subsequently reviewed by the Conference Committee on the Application of Conventions and Recommendations. This review process involves much resource for relatively less benefit. The reason is that the Committee does not emphasize on the grounds for legislative non-compliance. Even it does not examine critically whether a country has actually abided by the conventions substantially, and if not, what are the reasons behind it? The function of the Committee is limited to see if the elements of a said Convention have been established or not, irrespective of the social and economic conditions that prevail in a country. There is some scope for derogation for the member states, but there is no scope of reservation so far as a convention is concerned. As a result, the requirements are almost similar for both the industrialized and the industrializing countries.[37]

4.8. Soft Law Approach

The complaint mechanism as discussed in Article 26 of the ILO Constitution can be applied by a member state against another member state that is supposed to violate a convention. The condition precedent for the institution of proceedings is that the said convention must be ratified by both states. The allegation against the state can be the non-observance of the convention provisions. Even though the procedure has been developed since the inception of the ILO Constitution, it is exceptionally followed by member states. ILO as an international organization could also utilize its legal personality in bringing complaints against non-complying member states.[38] In addition, workers' or employers' organization whether national or international might make representation before the Committee of Experts on the ground that a member state has failed to comply with a convention. The recalcitrant state could be subjected to vigorous criticism at the international forum. But at the present set up, violation of conventions by member

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[32] See Report of the Committee of Experts on the Application of Conventions and Recommendations, Third item on the agenda: Information and reports on the application of Conventions and Recommendations, Report III (Part 1A), at p.12, visit http://www.ilo.org/ilc/ILCSessions/101stSession/reports/reports-submitted/WCMS_174843/lang--en/index.htm, see Gerry Rodgers, Eddy Lee, Lee Swepston, Jasmien Van Daele (2009), The International Labor Organization and the Quest for Social Justice (1919-2009), Cornell University Press, USA, p. 20-21

[33] *Ibid*

[34] *Ibid*, pp. 11-13

[35] *Ibid*, p. 14

[36] Héctor Bartolomei De La Cruz, Geraldo Von Potobsky and Lee Swepston.1996.*The International Labor Organization: The International Standards Systems and Basic Human Rights*, West View Press, Colorado, USA and Oxford, UK,p.76.

[37] Labour Office, *International Labour Conference Sixty-Third Session,* Record of Proceedings, Report III (Part 1A), para.31 (1977), reaffirmed in 1987 Report, paras.19-24, and 1999 Report para. 8.

[38] Although Governing Body itself can make complaints against non-complying state, it is not widely practiced. Article 24, 26, 33 of ILO Constitution deals with the rules to enforce conventions.

countries are not met with any strong sanctions keeping leeway for member states to avoid implementation of conventions at the national level.[39]

One reason for considering ILS as soft law pertains to its universality. The way policies are made for every country irrespective their economic level is flawed, since it does not allow strict procedure for industrialized countries allowing comparative flexibility for the industrializing states.[40] Sometimes employers fail to consider the impact of ILS in terms of equity or distributional issues. Even the concept that strict application of ILS involves much labor cost does not always prove the correlation, because implementation of standards often corresponds with high motivation of workers, less exhaustion, less mistakes and hence higher productivity. So, application of standards necessarily carries with it the positive effects to economic, social and political dividends and it is consistent with recent findings from empirical research.[41] It was found that ILS are commensurate with enhanced 'productivity, GDP growth, trade, foreign direct investment and employment.'[42]

Moreover, it is said that labor standards contribute to informalization of economies due to the applicability of the implementation procedure only to formal economy. Since there exists a lot of obstacles like 'inadequate governance, unemployment in the formal economy, under employment and poverty, higher wages in the formal economy and the absence, or ineffective implementation, of appropriate legislation and social protection',[43] informal economy is significant in every country. Leaving informal economy beyond the implementation process keeps the ILS softer.[44] We think that making ILS applicable for the informal economy is necessary. In addition, cultural relativism cannot be a ground for non application of ILS as it is not a matter of clash of civilization, rather a matter of human rights to ensure social justice. So the best way to put into operation ILS is to devise appropriate strong sanctions on states.

The approach of ILO to international labor rights has undergone a transformation in when the 1998 ILO Declaration on Fundamental Principles and Rights at Work was enacted, which for the first time established a new normative hierarchy that focused on generally formulated principles instead of a set of well-articulated international treaties.[45] This Declaration in fact built the foundation for a decentralized system of labor standards implementation.[46] Hence, this approach of ILO reduces government responsibilities and encourages various actors like MNCs to play a pivotal role in defining as well as enforcing the said standards. Invoking Decent Work Agenda is another notable contribution of ILO to achieve social justice and it applauded going beyond adoption of ILO conventions.[47] The focus of ILO on decent work for ensuring social justice demonstrates that internationally agreed upon rights are not an end in itself, rather these rights must be enforced in practice at the national level.[48] In addition, the 2008 Declaration on Social Justice for a Fair Globalization sets up some procedural techniques as a means to implement them in practice by the organization and its members.[49] In order to address the challenges of globalization, ILO demarcates the regulatory actions as well as various constraints that states might face afterwards. Attainment of ILO's objectives are subject to the difficulties attached with regulatory actions such as conversion into domestic law, lack of teeth to enforce labor law, fractional guidance to attain objectives and emergence of new non-state actors that are unattended primarily.[50] Still the issue of soft

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[39] See, Craig, John D. R. and Lynk, S. Michael, *Globalization and The Future of Labor Law*, Cambridge University Press, New York, USA, 2006, pp. 332-333
[40] See, Craig ,John D. R. and Lynk, S. Michael. 2006. *op. cit*., p.336
[41] *Ibid*, p.339-340
[42] *Ibid*
[43] *Ibid,* pp. 342-343
[44] ILO adopted Convention on Domestic Workers in 2011. Only three countries ratified the Conventions so far. In order to address the whole economy, ILO needs to conceptualize the whole informal economy and frame conventions on that.
[45] See, Alston**,** Phillip**.** 2004**.** Core labour standards and the transformation of the international labor rights regime, *European Journal of International Law*, 15(3), **p.** 458-459, visit http://international.westlaw.com.eproxy1.lib.hku.hk
[46] *Ibid*, p. 460
[47] Janice R. Bellace.2011. Achieving Social Justice: The Nexus between the ILO's Fundamental Rights and Decent Work, *Employee Rights and Employment Policy Journal*, pp. 20-24, visit http://international.westlaw.com.eproxy1.lib.hku.hk,
[48] *Ibid*
[49] See Maupain, Francis. 2009. New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization, *European Journal of International Law*, pp. 823-825, visit http://international.westlaw.com.eproxy1.lib.hku.hk/
[50] *Ibid*, pp. 839-841

law remains a living agenda before the organization to deal with institutional capacity and state practices in a modernized way.

5. Concluding Remarks

ILO has been struggling with setting international labor standards for nearly a century. The contribution of this organization in enacting international labor standard is beyond measure but still its successes are shrouded with many setbacks and obstacles, both at the standard-setting stage and also at the national-level implementation stage. I argue that a soft law approach that ILO advocates is the epicenter of ILO's setbacks, and it requires reassessment. Imposing sanctions on states like, suspension of membership, cutting off several benefits and technical assistance can, arguably, facilitate the observance of ILS at the national level. Mainstreaming human rights perspective and recognizing human rights norms on a priority basis can bring states to stricter implementation mechanism. Prioritization of priority conventions, core conventions, and decent work agenda require attention on a primary basis. The assistance of ILO should be used by states in addressing national legislation, administrative difficulties or other technical problems. Moreover, those conventions that had lost their validity, wholly or partially, need an intensive revision. If ILO reviews all its existing conventions to screen out valid and up-to-date conventions and prioritize some conventions as obligatory, this approach will help to systematization and also procedural simplicity.

Democratization of GB and other committees are needs of the 21st century. Both the industrialized and the LDCs and other developing countries deserve an equal voice in all ILO forums. Reporting and other compliance mechanisms should be devised in line with fast, efficient and advanced technology. Equipped with sufficient knowledge and expertise, proper representation and equity, ILO has a chance to move towards realizing its high ideals. If the industry and labor are to succeed in a just world, ILO and its standard setting process are to survive the test of the time. Since we live in a more advanced and conscious world, we need improved and more advanced labor standards.

Conflicts of the SCM Agreement with LDC Interests over Renewable Energy Incentives: Proposals for Reform

***Zaker Ahmed*©**

Abstract

This article argues that climate change effects have sharpened the Least Developed Countries' need to move towards a green economy. As respective markets tend to grow, the LDCs would benefit if production of, and research in renewable energy, especially wind, and solar energy equipments and technologies are subsidized globally. Despite of existing policy room in other related international regulatory framework, the SCM Agreement of the WTO makes incentivizing renewable energy industries significantly difficult, if not impossible. It has been recommended that law reform, by way of incorporating special carve outs in the SCM Agreement is the path that would assist LDCs in a smoother transition to a greener future.

1. Introduction

The Least Developed Countries (LDCs)[1] is a cluster comprising of the poorest countries of the world. As the name signifies, these countries are at the pit of the overall development basket - marked by lack of good governance, corruption, and political instability, which again often mar their economic development efforts due to resultant misallocation of budgetary resources, and diversion foreign direct investments. The LDCs frequently experience different development bottlenecks due to their peculiar situations as well, e.g. high transport costs of the landlocked LDCs or resource constraint faced by the island domains. Over on top, LDCs also often find themselves bearing the brunt of many global environmental degradation issues, climate change being one of many.

The goal of the present article is to probe into the necessity to shift towards a renewable energy based power generation felt by the LDCs. It raises the question whether the existing renewable energy incentive schemes pursued by the nations worldwide are benefitting the LDC needs in any way in this quest. While doing so, it attempts to discover as to how the two important arms of international legal structure, i.e. international laws regarding environment and sustainable development, and the WTO laws, especially the Agreement on Subsidies and Countervailing Measures (SCM agreement), have identified and dealt with this issue.

2. Methodology of the Study

The study at hand adopts a combination of exploratory and analytical approach. Among the three major parts of the present paper, the initial one fathoms the depths of LDC energy crisis and explores the extent of international legal commitments in combating it. Main question here is whether and to what extent the international legal framework is open to incentivizing production and use of renewable energy globally. Second leg of the paper traces the types of incentive and international trade pattern involving renewable energy in the LDCs. Based on primary trade data gleaned from the United Nation's COMTRADE database, this section highlights the type of incentives and trade partners that are most important for the LDCs. The next section provides a legal analysis of the SCM agreement with a view to display the potential conflicts between the agreement and pro-LDC renewable energy incentives. The concluding section presents a few policy thoughts.

3. Climate Vulnerability and Need for Green Energy Solutions in LDC

Use of renewable energy sources for the purpose of electricity generation is a fast expanding phenomenon all around the world. According to the International Energy Agency (IEA) statistics, renewables accounted for almost 20% of global electricity generation in 2009. Areas like wind power and

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[1] According to the UN classification, 48 countries fall under this category. For a list of their names and a brief glance at their basic statistics, visit <http://data.worldbank.org/region/LDC>

solar photovoltaic (PV) have been growing at respective rates of 25% and 50% on an average annually for the last five years. Even in the least developed countries, the need for turning green in power generation is felt acutely. Following paragraphs outlines the relevance of LDCs shift towards green energy solutions and the recent international developments in this regard.

3.1 Snapshot of Energy Crisis in LDCs

LDC vulnerabilities in respect of climate change impact necessitate green growth. Climate change impact upon the least developed countries is well recorded. In the last decade, the number of people affected by extreme weather events (e.g. drought, flood, temperature extremes, etc.) in LDCs has almost doubled, compared to the seventies.[2] LDCs also bear the burden of highest percentage (34%) of global human deaths in relation to diseases sensitive to climate change (e.g. malaria).[3] Loss of annual agriculture output due to climate change induced disruption of cropping pattern would also hurt LDCs the most. Being categorically poor, these countries lack the endowments necessary to undertake adaptive activity to mitigate climate change, i.e. strong economic performance, good health care system, diverse product mix in export portfolio, higher access to technology etc.[4] Increased vulnerability to climate change itself has been identified as a criterion for classifying a country as least developed. Dependence on fossil fuel being one of the major contributors to worsening climate conditions, shift towards renewable resources based energy generation and is a need that is globally manifested clearly. LDCs are no different. Chronic poverty and weak performance in development indicators also justify support measures to be undertaken in attaining these countries' green goals.

Entrenched energy crisis in LDC economies is itself a good enough reason itself that marks the importance of their move towards renewable energy. Ensuring adequate availability of energy and providing access thereof remains one of the biggest challenges to the LDCs path towards development. According to ESCAP, total primary energy supply (TPES) of the LDCs in Asia and Pacific remains at less than 1 per cent of the total supply of the region.[5] Almost none of these countries are self sufficient regarding energy. Moreover, traditional energy sources like fuel wood, animal and vegetable wastes remain most important energy sources for these countries.[6]

The case for LDCs shift towards renewable energy powered economy is built on several reasons. LDCs have low carbon footprint, and less investment on polluting technology. Therefore, a shift towards clean energy can set the LDCs on a path to green growth from early on. They can, therefore, leapfrog towards sustainable development as desired in the IPoA.[7]

Box 1: Renewable Energy in Bangladesh

Renewable energy holds much hope for diversification of energy source in Bangladesh as the major (89%) power source, i.e. country's natural gas reserves dwindle towards depletion. Right now, excluding hydropower, only 2.5% of the total electricity generated in Bangladesh comes from renewable sources. According to the Power System Master Plan 2010, total demand for electricity would rise to 19,000 mega watt (MW) by 2021, 15% of which is to come from renewable and new energy sources. Solar, and wind energy are most important in this regard. Bangladesh is blessed with a daily average 4-6.5 KWh/m^2 solar radiation. The country also enjoys strong wind along its 724 km long coastline throughout the year. One survey has shown that a market as large as 6 million households exist for Solar Home Systems (SHS) on a fee-for-service basis in the off-grid areas of Bangladesh. There are 10,000 rural markets and commercial centers which still remain beyond the present 64% grid coverage. Some recent strides have been made in establishing both large scale grid-connected public renewable energy based power plants, and smaller private home based off-grid solutions. Financed by the Government owned IDCOL

[2] UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs,* Available online <http://www.unctad.org/en/docs/ldc2010_embargo_en.pdf>, 2010, at p. 31.
[3] DARA, *Climate Vulnerability Monitor,* Available online <http://daraint.org/wp-content/uploads/2010/12/CVM_Complete-1-August-2011.pdf>, 2010, at p. 16.
[4] UNFCCC, *Least Developed Countries: Reducing Vulnerability to Climate Change, Climate Variability and Extremes, Land Degradation and Loss of Biodiversity: Environmental and Developmental Challenges and Opportunity,* Available online <.http://unfccc.int/resource/docs/publications/ldc_reducingvulnerability.pdf>, 2011, at p. 16.
[5] ESCAP, *Energy Security and Sustainable Development in the Asia and the Pacific,* Available online <http://www.unescap.org/esd/publications/energy/theme_study/energy-security-ap.pdf>, at pp. 185-6.
[6] *Ibid*, pp. 188-191.
[7] Please refer to para 2.2., *Infra.*

(*Infra*structure Development Company Limited), the solar home systems have been installed in 3 million households in Bangladesh, satisfying up to 150 MW of individual power need. However, being an LDC, least cost generation technologies are still a priority in Bangladesh, in which respect renewable energy solutions cannot attain competitiveness yet. Reduction of renewable energy technologies, and also adoption of Governmental incentive schemes like feed-in-tariff (FiT) would therefore be highly welcome. *Source:* Ministry of Power, Energy and Mineral Resources (2014).

If the developing and the least developed countries go green, common concern of carbon leakage would be assuaged. As many renewable energy plants are small scale, it is also an attractive solution in poor countries where grid expansion is not immediately desired or financially possible. Better access to electricity would further positively ripple across other sectors, e.g. better education, income, and employment. These on the whole can also assist the LDCs in faster attainment of the millennium development goals.

3.2 UN's Green Goal for LDCs: the IPoA

The Istanbul Program of Action (IPoA)[8] adopted in the fourth United Nations Conference on Least Developed Countries (LDC IV) highlights enhancement of productive capacity for energy a priority area for action. According to the IPoA, LDCs should, *inter alia,* take steps to ensure energy sector budgetary allocation on a priority basis, improve efficiency in energy generation and sustainable use of energy resources, and also increase capacity especially for renewable energy based power generation.[9] In this regard, the development partners are put under obligation to provide financial and technical support regarding energy generation, transmission, and distribution, support LDCs' efficiency building in the same respect, and facilitation of appropriate and affordable technology under mutually agreed terms and conditions.[10]

The IPoA correctly identifies the disproportionate burden put upon the LDCs by climate change problem, as they had least contribution in its creation, while it looms as an enormous socio-economic developmental hurdle, also threatening to undo existing development gains achieved.[11] It has been highlighted that newer opportunities need to be explored in, *inter alia,* energy sector that can enable the LDCs to leapfrog onto a sustainable development path.[12] It has also been mentioned that the development partners should, apart from providing necessary financial and technical assistance, assist the LDCs in capacity enhancement of clean energy production, trade and distribution, including development of renewable energy.[13] This role of the development partners was again highlighted in the UN-OHRLLS[14] high level meeting on sustainable energy.[15] In this context, and with a view to substantially contribute to the IPoA objective, a sustainable energy for all (SE4All) was undertaken in the high level meeting, to ensure access to energy for all by 2030.[16]

3.3 RIO +20

The 2012 United Nations Conference on Sustainable Development (Rio+20)[17] throws clarifying light upon the interfaces between climate change, renewable energy, and the situation of the LDCs. While detailing the framework for future action in the Rio+20 outcome document, the necessity to ensure access to sustainable modern energy services for all, especially the poor, has been highlighted.[18] The need for mobilizing more investments to make such services economically viable in the developing countries has

[8] UN, *Program of Action for the Least Developed Countries for the Decade 2011-2020,* Fourth United Nations Conference on the Least Developed Countries, UN Document No. A/CONF.219/3/Rev.1, Istanbul, Turkey, 9-13 May, Distributed 23 May, 2011.
[9] *Ibid*, para 50, at p. 13.
[10] *Ibid*, at p. 14.
[11] IPoA, paras. 99-104, at pp. 32-34.
[12] *Ibid*.
[13] *Ibid*.
[14] UN-OHRLLS stands for UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States. (www.unohrlls.org)
[15] UN-OHRLLS, *Background note for the High-level Event on Sustainable Energy for LDCs,* 23 September New York, Available online <http://pubs.iied.org/pdfs/G03671.pdf >, (2013), at p. 4.
[16] *Ibid*, at p. 1.
[17] UN, *The Future We Want,* Rio+20 United Nations Conference on Sustainable Development, UN Document No. A/CONF.216/L.1, Rio de Janeiro, Brazil, 20-22 June, Distributed 19 June, 2012.
[18] *Ibid*, Para 126.

been underscored as well.[19] Particularly for the LDCs, the document contains an international commitment to effectively implement the IPoA, and to integrate the priority areas under the IPoA within the Rio+20 framework of action.[20]

In respect of climate change, the Rio+20 outcome document recalls the founding principles of equity and common but differentiated responsibility, endorses the ongoing work under the aegis of the United Nation Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, and calls upon the parties to fully implement their commitments and the decisions agreed upon.[21] More importantly, it emphasizes further financial mobilization from all possible sources to support mitigation actions and measures, technology development, transfer and capacity building in developing countries.[22]

While laying down the modes of implementation, the outcome document emphasizes the role that can be played by the international trade for sustained economic growth. The document also highlights the necessity to remove trade distorting subsidies, and facilitate trade in environmental goods and services.[23] Therefore, to conclude, the LDCs need to move towards a green economy through the process of adoption and promotion of renewable energy generation is beyond debate. From climate change, and sustainable development context, related framework of international laws have developed accommodating the principle of common but differentiated responsibility, which is manifested by reiterated references to the developed country obligations regarding financial and technological assistance in different forums. On the whole, the international community is very much accommodating, towards energy security and renewable requirements of the LDCs. It remains to be seen to what extent different renewable energy generation related incentive schemes pursued by the States can be beneficial for the least developed countries. To this question we devote the next section.

4. Renewable Energy Goods: Incentive, Trade and LDC Interest

Taking from above, it is of crucial importance for the least developed countries to develop green energy capacity. But the LDCs are economically the most downtrodden lot. From their perspective, for a shift to renewable energy to occur would require competitive pricing of related input goods (i.e. energy production equipments and inputs). This is only possible by increased incentives on renewable energy (RE) goods in developing and developed countries. Unless the LDCs are allowed to passively benefit from globally subsidized RE equipment prices, they would be unable to create an RE base. Global trade pattern also plays a role here, as incentives by the key LDC trade partners would have most effective price impacts in LDC markets.

This section seeks to highlight which RE incentives taken by which countries would be most beneficial for the LDCs. To do that, first different types of incentive patterns existing in the RE sector have been highlighted and LDC interest identified. Then the patter of import by LDCs in RE goods is investigated to find out the key suppliers and products involved.

4.1 Incentive Pattern

Incentive schemes to promote renewable energy generation differ in respect of design and impact. Following is a broad categorization of different schemes.[24]

Direct incentives: Direct incentive schemes are those that are straightforwardly targeted to the energy producers, suppliers or consumers to enhance RE usage. Tax breaks, loan programs, investment promotion schemes in the RE sector, various type of grants fall under this category. Such grants or facilities are also provided to stimulate R&D in this area.

Indirect incentives: Indirect incentive schemes are those where benefit of the scheme is reaped by those other than on which the regulation applies. In case of RE industry, upstream or downstream incentives

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[19] *Ibid*.
[20] *Ibid*, para 181.
[21] *Ibid*, paras. 190-192.
[22] *Ibid*.
[23] *Ibid*, para. 281.
[24] Generally see, S. Z. Bigdeli, 'Incentive schemes to promote renewables and the WTO law of subsidies', in: T. Cottier, O. Nartova, and S. Z. Bigdeli, (eds.), *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum.* Cambridge: Cambridge University Press, (2009), at pp. 163-172.

can influence the producer to produce more. For example, mechanisms that dampen the price of RE inputs, e.g. photovoltaic cells, feedstock for biofuel, wind turbines etc. are upstream subsidies. Whereas, incentivizing RE purchasers, e.g. fuel blenders, to move towards RE would be a downstream subsidy.
Regulatory incentives: Regulatory incentives comprise of modification of regulatory regime to facilitate RE generation and consumption. They differ from the direct and indirect incentives above in that they do not involve fiscal burden or foregoing of revenue by the government. Mandatory biofuel blending targets, minimum price for biofuels, minimum quota measures, easing regulatory bottlenecks in RE generation and transmission, streamlining RE controlling authority etc. are examples of regulatory incentives.

Despite global growth of the renewable energy sector over time, on quantitative terms, total amount of incentive going in this sector is still dwarfed compared to the same in fossil fuel sector. The most recent IEA estimation[25] indicated global renewable energy subsidies to be at $101 billion US dollars in 2012.[26] Whereas a year before, fossil fuel consumption subsidy amounted to a little over $400 billion USD.[27] If all remains same, while RE subsidies would cross $200 billion USD threshold by 2035, global fossil fuel subsidies would climb to a total of $660 billion dollars by 2020.[28]

4.2 Trade Pattern

The paper would now attempt to trace the trade pattern of LDCs in the renewable energy related products. As we are interested in capacity building of these countries in the renewable energy generation field, our focus here is upon the goods related to renewable energy plants. On 27 April, 2007, a handful of WTO members submitted a paper[29] to the WTO committee on trade and environment in special session (CTESS) containing a list of environmental goods with a view to facilitate a consensus on the ongoing work under the Doha ministerial declaration to reduce obstacles to trade in environmental goods and services. The list contains thirty Harmonized System based 06 digits classified products[30] under the heading of renewable energy plants. Most of these products also have found themselves in the 2012 APEC list of environmental goods.[31] In absence of a consensus in the WTO, we will use this list as that covering the essentials of renewable energy based electricity generation.

Following table shows total LDC imports of the renewable energy plant equipments during 2009-2011. If we look at the top ten imports, we will find parts and components for installing wind turbines and solar photo voltaic (PV) systems occupy a major portion of it. Therefore, it could be concluded that the least developed countries are most interested in building electricity generation capacity using wind and solar energy.

Top RE Products Imported by LDCs from World 2009-2011

(Figures in Millions of United States Dollars)

Product	Product Name	2009 Imports	2010 Imports	2011 Imports
730820	Towers & lattice masts of iron/steel. (Used to elevate and support a wind turbine for the generation of RE)	240.17	116.17	161.07

[25] World Energy Outlook, 2013.
[26] IEA, World Energy Outlook Factsheet, 2013, Available online <http://www.iea.org/media/files/WEO2013_factsheets.pdf>
[27] IEA analysis of fossil fuel subsidies, based on World Energy Outlook 2011. Available online <https://www.iea.org/media/weowebsite/energysubsidies/ff_subsidies_slides.pdf>
[28] *Ibid*.
[29] WTO Committee on Trade and Environment Special Session (CTESS), *Continued Work Under Paragraph 31(III) of the Doha Ministerial Declaration,* WTO Document No. JOB (07)/54, 27 April 2007. It was submitted jointly by Canada, the European Communities, Japan, Korea, New Zealand, Norway, Customs territory of Taiwan, Penghu, Kinmen and Matsu, Switzerland, and the United States of America.
[30] The list uses HS 2002 classification.
[31] APEC, *APEC List of Environmental Goods,* Annex C, 20th APEC Economic Leaders' Declaration, Vladivostok, Russia, Available online < http://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012_aelm/2012_aelm_annexC.aspx>, (2012).

850300	Parts suit. for use solely/princ. with the machines of 85.01/85.02. (Relevant parts include, e.g. nacelles and blades for wind turbines).	44.99	169.56	135.02
850440	Static converters. (used for converting solar energy into electricity)	96.07	86.85	99.73
853710	Boards, panels, consoles, desks, cabinets & oth. equipped with 2 or more app. of 85.35/85.36 for electrical control. (used to control solar PV systems)	64.40	117.57	87.38
850720	Electric accumulators, incl. separators thereof... (Solar battery. Used for energy storage in off-grid PV systems)	48.43	75.99	70.43
854140	Photosensitive semiconductor devices. i.e. PV cells, modules and panels. (basic component of a solar system)	42.18	44.46	71.08
850239	Electric generating sets n.e.s. in 85.02. (combined heat and power systems)	39.54	51.32	64.72
841090	Parts (incl. regulators) of the hydraulic turbines & water wheels. (used for hydroelectric power generation)	39.36	69.67	27.40
848340	Gears & gearing(excl. toothed wheels, chain sprockets & oth. transmission elements). (used for gearboxes of wind turbines)	47.07	45.55	42.96
850164	AC generators (alternators), of an output >750kVA. (used in conjunction with boilers and turbines in RE plants)	11.80	49.03	35.61
903289	Automatic regulating/controlling instr. & app., n.e.s. in 90.32	20.86	25.46	25.40
841869	Compression-type refrigerating, freezing equipment whose condensers are heat exchangers; (used for geothermal heat pump system)	17.68	21.28	23.39
841581	Air-conditioning machines incorp. a refrigerating unit & a valv...	11.05	22.78	26.81
850161	AC generators (alternators), of an output not >75kVA	16.48	21.35	18.52
841990	Parts of the plant & equip. of 8419.11-8419.89	19.13	10.12	10.81
850231	Wind-powered elec. generating sets	0.99	7.74	25.55

Source: COMTRADE via WITS 6-Digit.

To further substantiate the above conclusion; let us look at the import trend of these products over a greater period of time as shown in the following Figure A. General trend of import during the sampled nine years in RE plant products is quite suggestive of a growing interest of LDCs regarding RE.[32] This interest, though suffered slightly during 2008-09, possibly due to global financial crisis, remains unabated in subsequent years. Moreover equipments for solar energy generation (HS codes 853710, and 850440) attract the most import interest by the LDCs.

[32] Import growth of some of the products, e.g. iron or steel towers, HS 730820, can probably also be attributed to other usage to some extent.

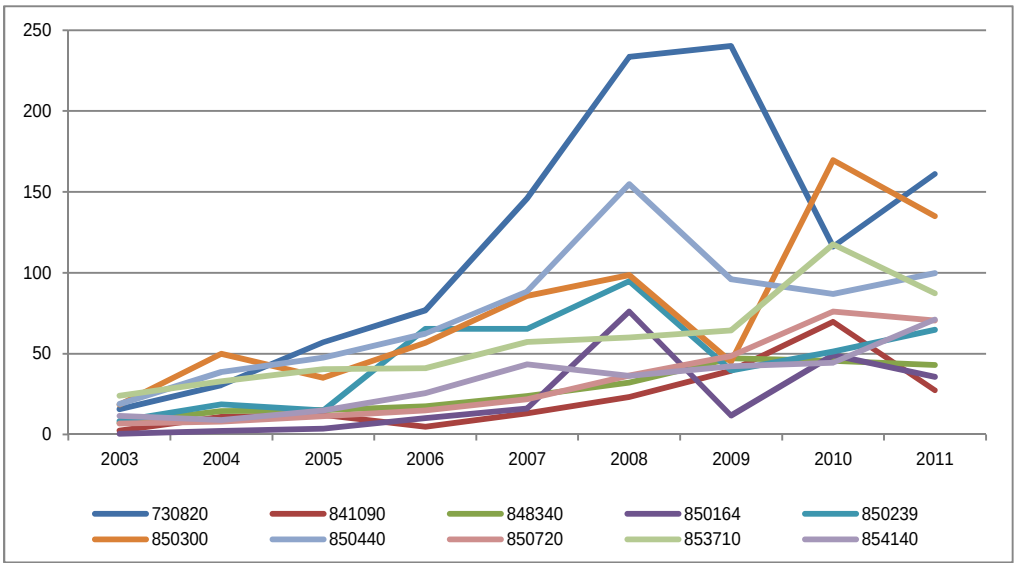

Chart A: Import trend of top renewable energy products by LDCs
Note: To retain clarity, products are designated by HS 6 digit codes in the chart. Description corresponding to each HS code is available at table 1 above.
Source: COMTRADE via WITS.

Again, using COMTRADE data, a supply side picture is shown in Figure B below. This figure shows the sources of the top ten RE plant related equipments imported by the LDCs. China appears to be the single leading supplier of RE plant equipments to the LDCs, which is commensurate with its profile of being a manufacturing leviathan. Two of the other BRICS economies, i.e. India and South Africa are also key suppliers in this market. Moreover, if considered a single entity, the EU would topple China and take the lead. Apparently the major economies have a stake in supplying RE plant equipments, meaning that in this global market where LDCs are customers, competition is fierce.

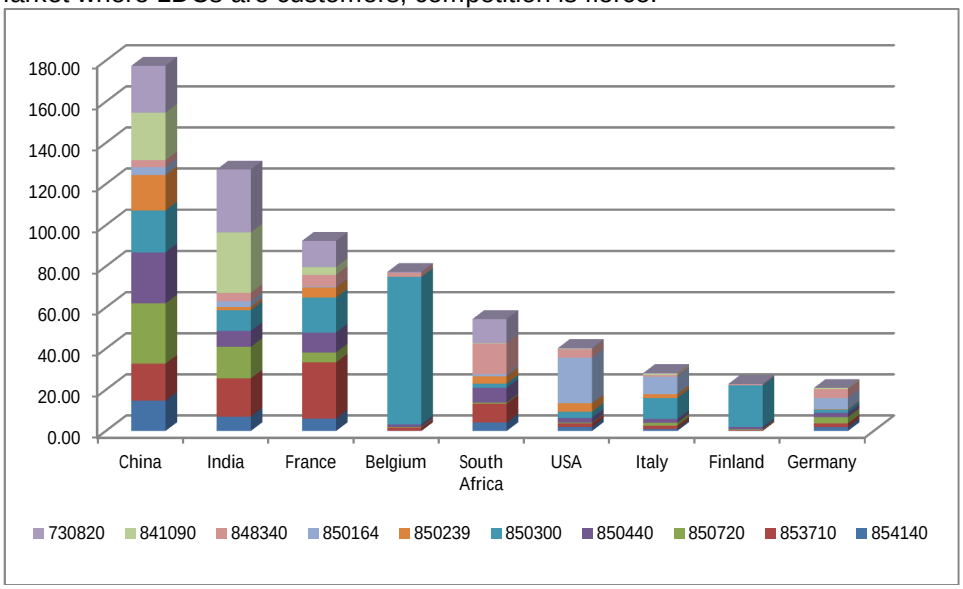

Chart B: Product composition of top exporters to LDCs.
Note: To retain clarity, products are designated by HS 6 digit codes in the chart. Description corresponding to each HS code is available at table 1 above.
Source: COMTRADE via WITS.

This section adequately underscores the fact that among various renewable energy sources and multitude of technologies, it is the wind and solar energy, and related power generation techniques are under the ones sectors LDCs are most interested. There could be various reasons for this, including availability, affordability, easy to adapt technologies, and geographical compatibility. It also appears that

in this growing market of renewable energy plant equipments in the LDCs, China, India, and the EU are biggest competitors, whereas the United States is struggling to get further market access.

Summing up, it is submitted that globally provided upstream incentives in manufacture wind and power energy production equipments would provide the most passive benefit to the least developed countries. Moreover, creation of adequate policy room to incentivize these sectors would be have a positive sum effect, as it would help green industry growth in developing countries, free excess capital in the LDCs as well as provide them with much needed electricity, reduce the unevenness of the energy market due to fossil fuel subsidies, and most of all play an important role regarding the global concern of carbon emission reduction. In this regard LDCs would reap most spillover benefit from the incentive programs adopted by the developing countries, notably India and China, and therefore would have a strong interest in unabated growth of the RE input industries therein.

5. Role played by the SCM Agreement

Though it appears from above that significant policy room is necessary and existent in terms of design and implementation of renewable energy incentive schemes that could benefit the LDCs, in reality, this policy room is dissipated, or gets much contorted once we factor in the relevant trade regulation. Facing the question of dispute settlement in WTO, States differential approach to fossil and non-fossil fuel based energy also contributes to tilting the level playing field in energy. This section contains a take on these issues.

5.1 Overview of the SCM Discipline

The SCM agreement owes its birth to the weak treatment of the subsidies and countervailing issue in Articles XVI and VI of GATT. Before the adoption of the SCM agreement, Article XVI only bound the contracting parties to notify certain subsidies, seek to avoid subsidizing primary commodities, and in some cases prohibited subsidizing non-primary products. Need for clarification and further framing of a comprehensive set of rules saw to the emergence of the Subsidies Code in the Tokyo Round of GATT, and also continued negotiation in the Uruguay Round.[33] The UR negotiations resulted into the SCM agreement.

The SCM agreement defines subsidy as a governmental financial contribution or an income or price support, resulting into benefit. For a subsidy to be actionable before the DSB, it has to be specific to a single or a group of enterprises or industries. In addition, the subsidy should also create adverse effect within the meaning of the SCM agreement.[34] Only certain types of subsidies, namely (i) import substitution subsidies, and (ii) export contingent subsidies are outright prohibited, meaning, once they are provided, violation of SCM agreement would be established *per se.*[35]

5.2 Analyzing Compliance

5.2.1. Incentives within coverage?

Reiterating the above, for an RE incentive scheme to fall under the SCM coverage, it needs to satisfy the twofold requirement of Article 1 of the agreement, i.e. (i) being a 'financial contribution', or an 'income or price support', and (ii) accrual of benefit as a result of the incentive.

Financial contribution: Financial contribution can occur in four broad ways, namely, (i) direct transfer of funds, whether actual or potential by the government, (ii) foregoing of government revenue that is otherwise due, (iii) government providing goods and services, and lastly, (iv) occurrence of any of the three aforementioned through a funding mechanism or a private body entrusted or directed by the government to that effect.[36] In contrast, hardly and jurisprudence has developed in case of 'income and price support'. We should focus on the question whether the RE incentives beneficial to the LDCs can come within the purview of 'financial contribution'.

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[33] P. Van den Bossche, *The Law and Policy of the World Trade Organization,* Cambridge: Cambridge University Press, 2nd edition, (2012), at pp. 559-60.

[34] Article 5, SCM Agreement.

[35] Article 3, *Ibid*.

[36] For a detailed overview, see, P. Low, G. Marceau, & J. Reinaud, *The Interface between the Trade and Climate Change Regimes: Scoping the Issues,* Staff Working Paper, Economic Research and Statistics Division, World Trade Organization, Available online <http://www.wto.org/english/res_e/reser_e/ersd201101_e.pdf> , (2011). at pp. 27-30.

Despite of being confined to four exhaustive criteria, the scope of financial contribution is very broad.[37] Till time, many different incentive schemes of the Members have been found to be within the scope of financial contribution, e.g. grants,[38] loans and loan guarantees,[39] tax credits,[40] transactions involving debt for equity swaps,[41] modification of loan repayment terms,[42] share transfer,[43] relinquishment of debt,[44] lumber stumpage agreements[45] etc. It follows that any RE related incentive schemes would fall under the category of financial contribution if it is of fiscal nature.

However, incentives in the form of tax breaks, or tax credits which could be termed as foregone government revenue 'otherwise due' under Article 1.1(a)(1)(ii) requires further attention. According to the Appellate Body (AB) decision in *US - FSC,* there must be some normative benchmark against which a comparison can be made between revenue raised in a case, and foregone revenue that should have been raised in the disputed situation.[46] Appellate body further agreed that the term 'otherwise due' "implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situation".[47] Following that line of argument, tax breaks on RE input equipment e.g. wind turbine would be considered as revenue foregone by comparing it with the tax regime on other goods. Only possible counter position against this conjecture would be to argue that an incentive scheme with an environmental objective is not comparable with other domestic tax systems. This type of argument, though compliant with the environmental law norms, potentially ventures into taking recourse of the 'aim and effect' test. The aim and effect test is not new in the WTO regime. In relation to Article III of GATT, the aim and effect test has given rise to much confusion and controversy.[48] The problem with the 'aim and effect' test is that paying deference to intention of a policy measure to pass GATT scrutiny promises to open door to protectionism. However the Appellate Body did not root out the importance of considering the objective of a policy measure. In *Japan - Alcohol II,* the AB decided to objectively look into the underlying criteria used a tax measure, its overall structure, and application.[49] A way out of this confusion would be to specifically account for environmental justification in the legal framework of subsidies.

Benefit: To result in subsidy, a financial contribution has to confer benefit to the recipient.[50] Determination of benefit is simple, which, according to the AB, need only to be concerned with the question whether a recipient is better off than s/he otherwise would have been in the absence of financial contribution.[51] Previously, Howse[52] has indicated that determination of benefit in the world of renewables could be difficult, given the already distorted market scenario due to heavy subsidization of fossil fuels worldwide. Following the AB reasoning in *Canada Lumber,* and *US privatization CVD,* he expressed that finding an appropriate benchmark to determine benefit could prove elusive. However, subsequent literature suggests that such concern was somewhat misplaced. For, as mentioned in the paragraph above, the real question is whether the subsidy puts the recipient in an advantageous position compared to earlier. As RE subsidies generally take form of tax credits, grants, or other financial incentives, it needs no difficult exercise to surmise existence of benefit at this stage.[53]

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[37] P. Van den Bossche, See note 33 above, at p. 564.
[38] Article 1, SCM Agreement.
[39] It was the subject matter of dispute in *Korea - Commercial Vessels.*
[40] Article 1, SCM Agreement
[41] *Ibid*
[42] *Ibid*
[43] It was the subject matter of dispute in *EC and certain member States - Large Civil Aircraft*
[44] *Ibid*.
[45] It was the subject matter of dispute in *US - Softwood Lumber IV*
[46] Appellate Body Report, *US-FSC*, para 90.
[47] *Ibid*.
[48] L. Rubini, 'Ain't Wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform', *Journal of International Economic Law,* Volume 15, Issue 2, (2012), pp. 525-579, at p. 534.
[49] Appellate Body Report, *Japan - Alcohol II,* para 29.
[50] Article 1, SCM Agreement
[51] Appellat Body Report, *Canada - Aircraft,* para 157.
[52] R. Howse, *Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis,* Manitoba:IISD, (2010), at p.06.
[53] Bigdeli, note 25 above, at p.162.

It doesn't mean though, that Howse's concern is unfounded. Determination of a market benchmark and exploration of whether the subsidy results in a competitive benefit is inseparable part of subsidy analysis. We will return to this issue later.

Specificity: Apart from the subsidies which fall under the prohibited category under Article 3,[54] determination of specificity remains an essential step for conformity analysis. Specificity, According to Article 2.1, requires that to be considered as 'specific', the subsidy must be granted to 'certain enterprises', meaning a single or a group of enterprise or industries within the jurisdiction of the authority granting the subsidy. In practice, the net of specificity determination is very widely cast, making finding of specificity an easy task. In *US - Cotton,* the Panel indicated that a subsidy that is not universally available could be considered as specific. Similarly, in *US - Lumbar IV,* the Panel indicated that subsidy given to a large industry (e.g. steel or coal) could also be considered as specific. Actually, no subsidy challenged before a WTO Panel has yet been found as non-specific.

Based on above, and considering the fact that renewable energy still forms a very small portion of energy production at any country, it can be concluded a WTO dispute settlement Panel would not find it difficult to consider renewable energy incentives as specific.

5.2.2. Availability of Justification

The built in justification provisions in the SCM agreement have already lapsed. Article 8 of the SCM agreement listed the so called 'green light' subsidies, which were kept as 'non-actionable'. The content of the non-actionable subsidies were agreed upon after much conflict and political to and fro.[55] Paragraph 2(c) of Article 8 protects environmental subsidies by defending "assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms". Wording of the provision itself indicates that an attempt to use it to safeguard renewable energy incentives would be a far fetching exercise. Due to the Members inability to come to a consensus regarding extension or modification of Article 8,[56] it lapsed in December 1999 as per Article 31 of the SCM Agreement.

In absence of availability of article 8 of the SCM agreement, a question arose in recent years as to whether the Article XX of GATT could be invoked as an affirmative defense of a subsidy measure that would otherwise be in contravention of the provisions of SCM regulation. Opinions are largely divided on this point, and a clear solution is still beyond reach.

Those in opposition to taking recourse to Article XX do it for several reasons. Applicability of the Article XX could destroy the balance of rights and obligations in the SCM agreement. As the SCM agreement already contained an exception article that was allowed to lapse, suggests the intention of the Members of not having one. Moreover, there is also the common 'floodgate' argument that opening the door to take Article XX shelter would mean allowing a new barrage of disputes that would claim the same in respect of other covered agreements, relegating the free trade objective of the WTO to a myth. Had there been a need to take recourse of Article XX, it would've been made clear in the provisions of the SCM agreement, as has been made in the SPS agreement.[57] Lastly, the chapeau of Article XX, containing the words "[...] nothing in *this Agreement* shall be construed [...]"[58] specifically contains the scope of application of the Article within GATT.

Multiple arguments go in favor of allowing an Article XX justification as well. The GATT, and so does the Article XX therein, has a *lex generalis* stature among the covered agreements, which is evidenced by the general interpretative note to Annex 1A. Therefore, Article XX must have a broader import than the GATT only. The SCM agreement, as mentioned above,[59] has a distinct relationship with the GATT, as it emerged out of its GATT cocoon of Articles VI, and XVI. The *lex specialis* nature of Article 8 of the SCM

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[54] Prohibited subsidies are automatically deemed as specific according to Article 2.3 of the SCM Agreement.

[55] For a discussion on the negotiating history, political context, emergence and lapse of Article 8 of the SCM Agreement, see S. Z. Bigdeli, 'Resurrecting the Dead? The Expired Non-Actionable Subsidies and the Lingering Question of 'Green Space', *Manchester Journal of International Economic Law,* Volume 8, Issue 2, pp. 2-37, (2011), at pp. 4-10.

[56] *Ibid*.

[57] Preamble and Article 2.4 of the SPS agreement specifically refer to GATT Article XX(b) and the *chapeau* thereof.

[58] Emphasis supplied.

[59] See section 3.1 above.

agreement cannot take away the *lex generalis* position of Article XX. Howse has further mentioned that denying Article XX shelter would result in a reality where more trade restrictive measures like quantitative restrictions would go scot free, whereas lesser ones get caught in the net, despite of their promise to create positive externalities.[60]

The Appellate Body has, on two previous occasions examined the extent to which a non GATT provision can be brought under the GATT general exceptions coverage. In *China - Audiovisuals*, the Appellate Body considered that as the specific legal provision of China's Protocol of Accession contains a broad reference to its right to regulate trade in a manner consistent with the WTO Agreement, any measure adopted under that provision would also find coverage under Article XX of GATT.[61] For, according to the Appellate Body, regulating trade according to the WTO Agreement also comprises taking of any exception measure justified by the same.[62] In contrast, in China - Raw Materials, the Appellate Body denied China's right to have recourse to Article XX as the specific legal provision concerned did not contain any reference to the WTO Agreement or Article XX.[63] In this circumstances, if we consider that Article 32.1 of the SCM Agreement provides a general reference to GATT preventing any GATT inconsistent action to be taken against a Member's subsidy, it could be concluded that there is a reasonable leeway to gain access to Article XX.

5.2.3. Recent Dispute Settlement Trend

Recent trend in WTO dispute settlement shows increased activity among Members regarding taking others RE incentive programs to task. Although nothing similar is happening in the fossil fuel sector, the RE sector has seen these developments because of RE incentive schemes' attraction to Governments as industrial policy tool in a budding sector. Since the Appellate Body decision in *Canada - Renewable Energy,* where the feed in tariff system of Ontario was found to be in violation of GATT Article III, several other requests for consultation have been made.[64] US consultation request with China on December 2010 regarding Chinese subsidization of wind power related equipments resulted in China's removal of questioned subsidies.[65] However, by 2013 the United States has taken antidumping and countervailing measure against Chinese and Vietnamese imports of wind towers.[66] On February 2013, the United States submitted a request for consultation to India in respect of one of its solar energy program,[67] to which India responded by questioning several US renewable energy programs in WTO.[68] European Union is not far behind as well. On November 2012, the EC undertook a countervailing investigation against Chinese solar panels. China in response alleged that renewable energy measures of EU, especially those of Italy and Greece are in violation of GATT.[69]

The legal analysis of this section broadly suggests that although renewable energy incentives in third countries can play an encouraging role in LDCs green growth, the SCM agreement stands on the way. The net cast by the SCM could potentially attract any market distorting incentives in the energy sector. But the recent increase of renewable energy related disputes in the WTO suggests Members' blind eye to the fossil fuel subsidies (which again could be the effect of enormous lobbying power of the industry) on one hand, and resulting increased practical disparity in treatment accorded to renewable energy related equipments in the market. These reasons necessitate drawing up of specific carve outs in the SCM agreement regarding renewable energy.

6. Conclusion and Policy Implication

Given the distorted nature of the energy market, and instances of renewable energy subsidies being used for industrial policy, perhaps the most sensible solution from an economic point of view would be to move

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[60] Howse, note 52 above, at p. 17.
[61] Appellate Body Report, *China - Audiovisuals,* para. 233.
[62] *Ibid*., paras. 220 - 223.
[63] Appellate Body Report, *China - Raw Materials,* para. 293.
[64] T. Meyer, 'Energy Subsidies and the World Trade Organization', *ASIL insights,* Volume 17, Issue 22, (2013). Available online <http://www.asil.org/sites/default/files/insight130910.pdf>
[65] Request for consultation, *China - Measures Concerning Wind Power Equipment,* WT/DS419/1.
[66] Request for consultation, *India - Certain Measures Relating to Solar Cells and Solar Modules,* WT/DS456/1.
[67] Meyer, note 64 above.
[68] *Ibid*.
[69] *Ibid*.

for removal of distortive subsidization of conventional energy production.[70] But there are certain caveats to this approach. First, from a political economic point of view, removal of fossil fuel subsidies would probably be equal to committing political suicide for the leaders of any country, except few. Again, it is the industrial policy that makes the renewable energy related regulations more palatable to the producers and the public, who would otherwise have little personal interest in going greener. Moreover, as we are looking at this issue from an LDC perspective, it needs to be remembered that removal of overall support from the energy sector would result in increase of energy inputs and technology, resulting into removal of these countries further away from access to energy related services. Therefore, the only open avenue is to reformulate international trade rules in a way that does not create obstacles in the patch of renewable energy incentive schemes.

Various ideas could be explored in this regard, e.g. revival of non-actionable subsidies, including exception clauses like GATT Article XX in the SCM, or a peace clause. Any such attempt would put an indelible mark of international community's effort regarding tangible implementation of the common but differentiated responsibility principle, financial support and technology transfer to the LDCs.
A revival of Article 8 of the SCM agreement as it stands would not be the optimum solution to the current renewable energy incentive crisis for several reasons. First and foremost, scholars have highlighted that Article 8 was not drafted keeping in mind the need for safeguarding renewable energy incentives.[71] Howse has also noted that the detailed criteria laid down in Article 8 to ensure legitimacy of the policy objective of non-actionable subsidies are often arbitrary and rather puzzling.[72]

To create a new group of non-actionable subsidies would first and foremost require the Member's consensus on a group of most deserving environmental goods and services that would require such incentive. Long ongoing on a common list of environmental goods and services for the purpose of tariff and non-tariff barriers reduction in the committee on trade and environment in the WTO can be of real importance in this regard.[73] Regrettably, this part of the Doha deal could not make it to the ninth WTO ministerial conference in Bali. As the focus of the trade world now is largely upon mega regionals, it would be quite some time before the Members can devote themselves back at the multilateral forum. Of important note in this regard is the reasoned suggestion made by Rubini to integrate requirements of transparency and public disclosure in the carve outs planned to save renewable energy subsidies.[74]

Several other avenues remain that have not yet received much treatment in literature. It could be opportune to explore the possibility to incorporate GATT Article XX wording within the SCM. Article 2.1 of the TBT could be an example in this regard. Negotiation of a peace clause to protect renewable energy subsidies until expiry of climate change threat could be another option. A peace clause solution in the face of acute necessity to adopt WTO inconsistent measure is not new. Recently finished ninth WTO Ministerial Conference in Bali has seen a strong appreciation towards a peace clause from the food security context. Therefore, for energy security, demand of a peace clause in the SCM would not be irrelevant. Lastly, using the strong developmental dimension of the need to shift towards green energy, it could be claimed by the LDCs that protection of renewable energy subsidy schemes, especially those in the developing countries, be negotiated into the SCM Agreement as a part of the drive to generate tangible and implementable special and differential treatment provisions. The LDCs are sidelined player in the big game of subsidies. But they have a voice and a stake in all of it. Acting together, LDCs do have a formidable political and negotiating clout in the multilateral forums as WTO. An important role is there to be played by the LDCs that would assist in development of these countries as well as other and usher in a greener future.

[70] Bigdeli,supra note 55, at p. 28.
[71] Bigdeli, supra note 24, at pp. 189-191.
[72] For example, Howse finds the requirement of limiting the amount of environmental subsidies to 20 percent of the cost of adaptation in paragraph 20(c) of Article 8 arbitrary. See Howse, note 52 above, at pp 20-21.
[73] Howse has also highlighted its importance, See Howse, note 52 above, at p.22.
[74] Rubini, supra note 48, at pp. 570-574.

Legal Duties of Corporate Directors under Unitary Board System: A Study with Reference to Common Law Guidelines of the Regimes Belong to Anglo-American Model of Corporate Governance

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Abstract

The business of the company is managed by the directors who are expected to act collectively as a board although the articles of association may also provide for delegation of extensive powers to smaller companies or individual directors. A unitary board structure which is predominant in the countries following by and large the Anglo-American model of corporate governance such as the United States, the United Kingdom, Bangladesh, India, and most of the nations under the Commonwealth is characterized by one single board comprising both executive and non- executive directors. In contrast, a dual board system is comprised of a supervisory board and an executive board of management where there is a clear separation between functions of supervision (monitoring) and that of management. Under a unitary board system, both the executive directors (ED's) and non-executive directors (NED'S) are subject to the same legal duties although there is a material difference in time commitment and remuneration of the ED's and NED's. These differences sometimes led to poor supervision on part of NED's to oversee the functions delegated to senior executive managers. With this back drop, the objective of this paper is to make an inquiry into the adequacy of the Statues and Judicial pronouncements as to ensure the appointment of the right persons to the unitary board. The study uncovers that there is much Common Law Guidelines in respect of sketching a set legal duties of the corporate directors. More so, in some developed regimes, the duties of the directors are spelled out in the statue governing the joint stock companies. However, the study reveals that there is a lack of adequacy in the Companies Act of 1994 with regard to clarifying the statement of Directors Duties.

1. Problem Statement

Every company regardless of size has two organs. One is company in general meeting, that is, the shareholders; the other is the board of directors elected by the general meeting entrusted with the management of company. When examining the way in which these organs operate, it is important to bear in mind that there will be a considerable difference in practice in the way in which the division of power operates in a large public company and the small public company. In the small private company, a formal division of power in this way between the board and the general meeting is inappropriate and individual concerned typically act as shareholders and as directors without differentiating particularly between those capacities[1]. Increasingly the regulation of such companies recognizes this reality, for example, by allowing such companies to dispense with the holding of a general meeting and allowing shareholders to act by written resolution rather than through formal meetings. In their day to day activities, therefore, it can be said that these companies are untroubled by any formal division of responsibilities between the board and general meeting. However, even in such companies, it is important for the persons involved to appreciate their respective roles within the board and general meeting and consequences failing to act in the appropriate to the required capacity. In contrast, in the large public companies, there is a very distinct division of power and responsibility between the board and shareholders with all powers of management vested in the board and very little power retained by the shareholders. The board's role in practice will be supervisory rather than managerial with extensive powers delegated to individual directors and to professional executive managers, a group largely ignored by the legal structure. The role of the shareholders would be peripheral and limited to an interest in dividend income and capital growth and the attendance at an annual general meeting. The shareholders will be a remote dispersed group with individually little influence and collectively lacking a unified voice on matters of substance. The issue in

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[1] B. Hannigan, *Company Law*, Oxford University Press, UK, (2003), p.167.

companies at this end of the spectrum is one of ensuring that the general meeting is an effective counterbalance to the all powerful board.

The regulatory response to the division of power indicated above is to be found in a number of differentiating approaches, some internal to, others external to the company. Internally, the focus is in part on structures, such as the composition of board and the general meeting, and in part on the imposition of specific legal duties on directors coupled with the ability of the shareholders to seek legal redress in cases of wrong doing. Under Anglo- American model of corporate governance, the board of directors refers to a unitary board comprising of directors with executive responsibilities (executive directors) and non-executive directors having no specific management responsibilities. As far as the legal duties of directors are concerned, both types of directors are subject to the same set of legal duties although there is material difference in time commitment and remuneration of the executive and non-executive directors. While stating the legal duties of the directors, the Common Law Legal System which is followed in most of the countries practicing Anglo- American Model of Corporate Governance places equal emphasis on both judicial pronouncements and statues. The intellectual framework of Common Law Legal System comes from judge-made decisional law which gives precedential authority to prior court decisions on the principle that it is unfair to treat similar fact differently on different occasions. On the other hand, Civil Law is a legal system originating in Europe, intellectualized in the framework of Roman Law and whose most prevalent feature is that its core principles are codified into a referable system which serves as primary source of law[2]. Thus, in the context of countries following Common Law Legal System, apart from the statues, the judicial pronouncements have strong bearing on identifying the legal duties of a company director. Against that backdrop, the overall objective of the paper is to sketch the duties of the company directors under unitary board system as observed in countries following Anglo- American Model of Corporate Governance.

2. Relevant Literature Review

2.1Corporate Director Defined

'Director' is as such not defined either in the Companies Act, 1994 of Bangladesh or in the Companies Act, 2006 of the UK. However, a Common Law Pronouncement holds that 'a director' includes any person occupying the position of director, by whatever name called, so making it clear that the title is not the determining factor in deciding someone is a director[3]. It is possible, therefore, for someone to be a director though described as a manager or a governor. Equally, companies may describe employees as marketing and personnel directors without their occupying the position of director in law. Legally, there are three classes of directors which concern us, the De jure director, the De facto director, and the Shadow director.

A de jure director is someone formally and validly appointed in the board. As far as the appointment of de jure directors is concerned, the first directors are appointed by the subscribers to the memorandum and named as such in a statement delivered to the registrar of companies on incorporation[4]. Thereafter, the power to appoint directors is commonly vested by the articles in the company although the board has power to fill casual vacancies[5]. Such an appointment is held only until the next following general meeting when the appointee can be re-elected.

A de facto director is someone who has assumed the status and functions of a company director so as to make himself responsible as if he were a de jure director[6]. The question whether someone is a de facto director is likely to arise where a statute imposes an obligation or a liability on a director and an individual in a question attempts to evade the obligation or liability by relying on the fact that he is not a de jure director. The issue arises in some legal regimes like the UK where disqualification proceedings can be drawn against even de facto directors under the Company Directors Disqualification Act 1986. In determining whether a person has assumed the status and function of a company director, the court

[2] Washington Probate "Estate Planning and Probate Glossary" Washington State Probate s.v. Common Law, December, (2008).
[3] *Re Lo-Line Electric Motors Ltd.* 1988, Ch 477 at 488, 1988, 2 All ER 692 at 699
[4] S 91-a, the Companies Act of Bangladesh, 1994
[5] s 91-c, the Companies Act of Bangladesh, 1994)
[6] *Re Keytech International PLC, Secretary of State for Trade and Industry v Tjolle* 1998, 1 BCLC 333at 343-344)

takes into account all the relevant factors including at least; whether or not there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information, for example, management accounts to base decisions, and whether the individual had to make major decisions[7]. This list of factors to be considered is not exhaustive and there is no requirement for all of these elements to be present[8].

Shadow directors are defined by the statute as persons in accordance with whose directions or instructions the directors of a company are accustomed to act; however a person is not deemed to be a shadow director by reason only that the directors act on advice given by him in a professional capacity[9].
In practice, the issue as to whether someone is a shadow director is most likely to arise in the context of disqualification proceedings Under the CDDA 1986 of the UK brought against persons who, because they are bankrupts[10] or already the subject of a disqualification order or undertaking, have not sought (or can not seek) formal appointment to the board as a de jure director. The issue can also in the context of liability for wrongful trading under Insolvency Act of the UK, 1986, s 214 which applies to the directors and shadow directors.

The statutory definition of a 'shadow director' was considered in detail by the Court of Appeal in *Secretary of State for Trade and Industry v Deverell* where Morrit LJ set out the following prepositions:

(1) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used.
(2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the Company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities.
(3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as direction or instruction must be objectively ascertained by the court in the light of all the evidence. In that connection we do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Certainly, the label attached by either or both parties then or thereafter cannot be more than a factor considering whether communication came within the statutory description of direction or instruction.
(4) Non-Professional advice may come within the statutory description. The Provision excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover, the concept of 'direction; and 'instruction' do not exclude the concept of 'advice' for all three share the common feature of 'guidance'.
(5) It will, no doubt, be sufficient to show that in the face of "directions or instructions" from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But we do not consider that it is necessary to do so in all cases.....Such a requirement would be to put a gloss on the statutory requirement that the board are "accustomed to act in accordance with" such directions and instructions[11].

Finally, Morritt observes that 'lurking in the shadows may occur but it is not an essential ingredient to the recognition of a shadow director. [12]

2.2 Roles and Responsibilities of Corporate Directors: School of Thoughts

The Bangladesh Enterprise Institute (BEI) Report recognizes the board of directors as the central entity in functioning corporate governance system, since it is the governing body of any organization. The BEI in its report briefly identified the responsibilities of the board as under:

> "The board is accountable to shareholders and stakeholders of the organization. To meet its organizational objectives the board must provide strategic policy and direction to the

[7] *Secretary of Trade and Industry v Becker,* 2003, 1, BCLC 555
[8] *Re Keytech International PLC, Secretary of State for Trade and Industry v Kaczer 1999, 2* BCLC 351at 423-424
[9] The Companies Act of the UK, 1985, s. 741-2
[10] The Company Directors Disqualification Act of the UK 1986, s11
[11] *Secretary of State for Trade and Industry v Deverell,* 2000, 2, BCLC 133 at 144-145
[12] *Supra note* 11 at p.146

management, but should not be involved in day – to – day operational decisions. Management is accountable to board, and therefore information systems that provide relevant transparent and material information to the board are imperative"[13]

Although considerable amount of efforts have been given on studying the role of the governing boards, there is no single competent and integrative theory or model to explain the roles played by the boards. From a legal perspective, American Law Institute defines the functions of a governing board as follows:

"1. Select, regularly evaluate, fix the compensation of, and, where appropriate, replace the principal senior executives.

2. Oversee the conduct of the corporation's business to evaluate whether the business is being properly managed.

3. Review and where appropriate, approve the corporation's financial objectives and major corporate plans and actions.

4. Review and where appropriate, approve major changes in, and determination of, other major questions of choice in respect of the appropriate auditing and accounting principles and practices to be used in the preparation of the corporation's financial statements.

5. Perform such other functions as prescribed by the law, or assigned to the board by the charter of the corporation"[14].

The Australian Independent Working Party into Corporate Governance recommends the board's key role is to ensure that the corporate management is continuously and effectively striving for above-average performance, taking account of risk. The working party proposes that the functions of the board should cover: " 1) the appointment of the CEO and human resources issues; 2) formulation of strategies and policies; 3) budgeting and planning, 4) reporting to shareholders on regulatory compliance; and 5) ensuring the board's its own effectiveness" [15].

While making a comparison between the views of American Law Institute and Australian Working Party on the roles of the board, Hung comments that although both consider corporate performance as the ultimate responsibility of the board, the Australian Working Party's definition deserves more acceptability on the ground of presenting the board actions in a more specific and observable manner[16].

There are a number of scholars and academicians who identify the role of the board from different perspectives. From agency theory perspective, Fama and Jensen propose that the role of the governing boards is to act as a *ratifier* of the decision to be implemented and *controller* in monitoring the implementation and performance of the decisions[17]. According to Arm and Cowen, the primary role of the board of the directors is to be the *supporter* of the management in increasing the economic value of the firm[18]. Mills argues convincingly that the outcome of the corporate performance responsibility should include the corporation's impact on the society at large: the customers, the shareholders, and the creditors and the lenders[19]. Mintzberg provides a comprehensive overview on the issue by identifying seven (7) roles of the board[20]:

Role 1: Selecting the CEO

Role 2: Exercising direct control during the periods of crisis

Role 3: Reviewing managerial decisions and performance

Role 4: Co-opting external influences

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[13] BEI Report, "The Code of Corporate Governance for Bangladesh", Bangladesh Enterprise Institute, Dhaka, Bangladesh, (2004).

[14] American Law Institute, "Principles of Corporate Governance: Analysis and Recommendations", (1992)

[15] F.G. Himler, "Strictly Boardroom: Improving Governance to Enhance Company Performance", Report of the Independent Working Party into Corporate Governance, The Business Library (1993), p.176.

[16] H. Hung, "A Typology of Theories of the Roles of the Governing Boards", Scholarly Research and Theory Papers, Blackwell Publishers Ltd, Oxford, UK, Vol.6, No.2, (1998). pp.101-102.

[17] E.F. Fama, and M. Jensen "Separation of Ownership and Control", Journal of Law and Economics, Vol. 26. (1993).

[18] J.D.Aram, and S.S. Cowen, "The Directors Role in Planning: What Information Do They Need?", Vol.19, No.2, (1986), pp.117-124.

[19] D.Mills, , 1981 cited in Hung, H., "A Typology of Theories of the Roles of the Governing Boards", Scholarly Research and Theory Papers, Blackwell Publishers Ltd, Oxford, UK, Vol.6, No. 2. (1998)

[20] Mintberg, 1983 cited in Hung, H., "A Typology of Theories of the Roles of the Governing Boards", Scholarly Research and Theory Papers, Blackwell Publishers Ltd, Oxford, UK, Vol.6, No.2(1998)

Role 5: Establishing contacts (and raising funds) for the organization
Role 6: Enhancing organization's reputation
Role 7: Giving advice to the organization

The aforesaid descriptions suggest that as guardians of a company, the directors owe a particular duty to the company to see that its operation and management are being carried out properly by the executives to whom the board delegates the management power. An effective board of directors provides the central element in the internal control mechanism by providing leadership and monitoring in business. There may be three types of board: the board fully represented by the external members, the board consists of internal members only and the board includes both external and internal members.

In the Anglo-American system of corporate governance, a number of senior executives sit on the board along with some non executive directors (NEDs) who are part-timers and do not engage in day to day business of the company. In the UK, where independence and effectiveness of the board are the declared objectives, a consensus has been attained by the corporate governance committees that the boards be constituted with a balance of executive and non- executive directors, the NEDs not being less than one third of the directors and the majority of them being independent in the sense that apart from their director's fees and shareholdings, they should be independent of management and free from any bias and managerial link that could interfere with the exercise of their judgment[21].

The role the non-executive director is of particular importance for the development of corporate governance standards, although law does not prescribe any separate threshold of duty or liability for them. They perform two fold corporate governance functions- monitoring the executives and leading the business prosperity, one is supervisory and the other is strategic. Being independent, unbiased and detached from managerial links, NEDs are well – positioned to play the role of managerial watch-dog. By keeping a vigilant eye on the managerial activities in a conscientious manner, they reduce the agency cost of the firm. Moreover, they are the valuable resources or strategic guides for the management as these directors, coming from outside, may have the necessary caliber, experience and business links. By accomplishing their dual duties, NEDs may improve the overall performance of the board and may help minimizing the breaches of duties by the directors.

The approaches to appoint the non-executive directors in the boards to make them more performing and vigilant is not however free from defects. In this regard, the observation of Cheffins is that overly vigorous non-executive element in the boards might blunt the corporate competitive edge by diminishing the executives' vigor or might produce other negative side effects [22]. Moreover, in order to present the limitations of the NEDs, Kiarie, in a recent research paper, observes a number of problems that substantially impede the NEDs in performing their duties as director. These are: (i) NEDs might lose independence if they are appointed by the shareholders acting blindly on the basis of proposals of the Executive Directors (EDs); (ii) the EDs are in a position to affect the ability of the NEDs to secure quality, adequate and timely information for the purpose of taking informed decisions; (iii) less time commitment by the NEDs as compared to EDs although the both have a continuing duty to obtain and maintain sufficient knowledge and understanding about the affairs of the company; and (iv) less remuneration paid to the NEDs as compared to EDs (NEDs are usually excluded from share options and pension schemes) although both are subject to the same legal duties[23]. Despite these drawbacks, Mallin[24] still finds worth in the appointment of NEDs if such appointment is made on the basis of a number of attributes, such as, experience in industry, the city, the public life or other background, the functional expertise, reputation, the ability to bring insight into the board and to ask searching questions.

To make a board effective as to its performance, several reforms are found to take place. In such a case, some important reform preferences surrounding the board of directors are: size of the boards, different

[21] Hampel Report, "Report of the Committee on Corporate Governance", Initiated By Financial Reporting Council, UK, (1998), Para 3.14.
[22] B.R. Cheffins, "Company Law: Theory, Structure and Operation", Oxford, UK, (2000), pp.620-630.
[23] S. Kiarie, "Non-Executive Directors in UK Listed Companies: Are They Effective?" International Company and Commercial Law Review, UK, (2007), pp. 3-6.
[24] Mallin, C.A. (2007), "Corporate Governance", 2nd Edition, Oxford University Press, UK, p.134.

board committees to enforce internal control- prominent of them being audit and remuneration committees and split of the roles of executive head and the chairman of the board with a view to ensuring proper allocation of corporate powers among different constituencies. With respect to board size, a widely believed hypothesis is that a smaller board is more effective, because they are able to take quick decisions without encountering any complexity and discuss matters more candidly and are less easily controllable by the management than a larger, unwieldy group of directors. It is further seen that board may be two tiered or unitary where Germanic model of two-tier boards tendered attractiveness to some, but it is the unitary system of boards that has been prevailing overwhelmingly around the world. On the front of board committees, the standard practice is that the board typically constitutes different committees- audit, remuneration and nomination to effectively discharge its duties.

3. Objectives of the Study

The prime objective of the study is to sketch the duties of the company directors under unitary board system as observed in countries following Anglo- American Model of Corporate Governance. To attain this objective, the study has uncovered different types of duties owed by company directors, categorically:

(i) To assess a set of fiduciary duties, such as, directors' duties to act in good faith in the interests of the company and shareholders, the non-profit rule, and the no conflict disability to which company directors are the subjects;
(ii)To appraise the extent of company directors' duty of care and skills as per Common Law Guidelines;
(iii) To make some policy recommendations seeking legal reforms to spell out such duties in appropriate statutes or statutory instruments.

4. Scope and Methodology of the Study

In the light of the objective of the study, the study considers the nature and extent of duties owed by company directors under unitary board system. For the purpose, the paper focuses the on the directors duties owed by the corporate directors in the countries where there is an existence of Anglo-American Model of Corporate Governance. Thus, the study has made an extensive desk study with regard to different aspects of duties of company directors as instructed in statutes and judicial pronouncements of appropriate judicial authorities of the countries permitting unitary board system with special emphasis to the United Kingdom. The study has basically relied on secondary sources of information which necessarily include statues, statutory instruments, judicial pronouncements, and books and journals in the field company law and corporate governance. The information gathered later have been classified under different heads of duties owed by the corporate directors. Finally, after making a critical analysis of the set of duties, the study recognized some deficiencies in the statues of developing regimes as to explain sufficiently the duties owed by corporate directors.

5. Findings of the Study: Directors Duties as Per Common Law Guidelines

Having sanctioned the granting of practically unlimited management powers to the board of directors, the legal system must device some means of controlling the directors in the exercise of those powers. A balancing act is required: management must not be stiffed but neither can unfettered, unsupervised, absolute discretion be permitted[25]. The laws response has to categorize directors as fiduciaries and to apply strict principles to them which are designed to ensure certain minimum standards of behaviour from directors backed by potentially severe penalties in the event of breach[26]. This response by the legal system can be seen as the means by which the law fills in the otherwise standard contract is commonly adopted between directors and shareholders. These fiduciary and other duties as laid by the judicial pronouncements related to Company Law, of course, as only part of wider, and some would argue, more significant legal rules on business matters such as insolvency and tax laws, environmental requirements, employment rules and health and safety standards which may impact to a greater extent on day-to-day conduct of the company's business. However, while sketching the legal duties of the company directors as per common law, it is important to categorize the types of legal duties which essentially include the fiduciary duties of directors, the no conflict disability, and common law obligations of care and skill.

[25] *Supra Note* 1, p.189
[26] *Regal Hastings Ltd v Gulliver*, 1967, 2, AC 134n, 1942, All ER 378

5.1 Fiduciary Duties

A fiduciary was defined by Millett *in Bristol & West BS V Mothew* as someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which gives rise to a relationship of trust and confidence. Given that typically directors have all powers of management over the company and its assets, directors are indisputably fiduciaries[27] and while there is no single set of fiduciary duties which apply to all fiduciaries[28], the fiduciary duties applicable to company directors are well developed and revolve essentially around the core fiduciary obligation of loyalty. The fiduciary duties of which directors are subject are: a duty to act bona fide in the interests of the company and not for collateral (i.e. personal or sectional) purpose; and a duty not to profit secretly from their positions.

The directors are fiduciaries as the most common class of fiduciaries are trustees, it is common to describe directors as trustees, to describe breaches of duty by them as breaches of trust or fiduciary duty, and so to equate directors the trustees for the purpose of measuring their liability to make good losses caused by the breaches of fiduciary duty. The classic statement of the position is that of Lindley LJ in *Re Land Allotment Co*:

> "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been liable to make good moneys which they have misapplied upon the same footings as if they were trustees"[29].

A modern endorsement of that position can be found in the numerous cases with the following statement by Buckley LJ in *Belmont Finance Corporation V Williams Furniture Ltd (No 2)* being frequently cited:

> "A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust[30]*".*

So, if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they have come into hands of some stranger to the trust who receives them with knowledge of the breach, he can not conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee of the company of the misapplied funds[31].

5.1.1 Director's Duties to Act in the Interests of the Company and Shareholders*.*

One of the fiduciary duties as noted above is to act bona fide in the interest of the company in what they consider is in the interests of the company and not for any collateral purpose[32]. While defining the interests of the company, it is stated as an obligation to act in the interests of the shareholders and it is directors' subjective opinion to as to the interests of the corporators as a general body, balancing the short term interests of the present members against the long term interests of the future members in counts[33]. Shareholders' interests in turn would be defined primarily in terms enhancing shareholder value. The act that the decisions undertaken by the directors also benefit themselves as shareholders does not necessarily mean it is invalid for directors are not required to live in an unreal region of detached altruism[34].

Where there are different classes of shareholders so decisions may adversely affect the interests on one class and benefit another, the question is not so much one of the interests of the company as one of what is fair as between different classes of shareholders[35]. In deed, regardless of whether there are different classes as such, directors must act fairly as between different shareholders. The content of that duty to act fairly in any particular case will depend on the facts; however, fairness fair does not always require the

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[27] *Supra note* 26, at 395
[28] *Henderson v Merrett Syndications* 1977, Ch 1
[29] *Re Land Allotment Co,* 1894, 1, Ch 616)
[30] *Belmont Finance Corporation V Williams Furniture Ltd No2,* 1980, All ER 393, CA
[31] *Ibid*
[32] *Re Smith and Fawcett Ltd,* 1942, Ch 4, at 306, 1942, 1, All ER, 542 at 543, per Lord Greene
[33] *National Association of Mental Health*, 1971, Ch. 317 at 330, per Megarry J
[34] *Mills v Mills* 1938, 60 CLR 150 at 164, per Latham CJ
[35] *Ibid*, at 164

identity of the treatment. In *Mutual Life Insurance Company of New York v Rank Organization Limited* the company decided to make an issue of shares to its existing ordinary shareholders but excluding any ordinary shareholders from the US and Canada. The exclusion was imposed in order to avoid the onerous regulatory requirements of those jurisdictions. The excluded shareholders objected but the court concluded that directors exercised their powers in good faith in the interests of the company and they had exercised their powers fairly as between different shareholders. The exclusion of North American Shareholders did not affect their shares nor a right attached to them and was because of a difficulty resulting only from their personal situation[36]. In Re BSB Holdings Limited (No 2) the requirement to act fairly meant the directors when undertaking a complex financing agreement should have considered the effect of proposals on the different group of shareholders within the company[37].

5.1.2 The Non- Profit Rule

The non-profit rule has its origin in the leading trust case *Keech v Sandford*[38] but the most famous application of the rule in company law is *Regal (Hastings) Ltd V Gulliver*[39]. The background of the case is stated below:

> "The company was the owner of a cinema and wished to acquire further two cinemas with a view to selling all three as a group. A subsidiary company was established to acquire the additional cinemas. The owner of those cinemas was willing to grant a lease to that subsidiary company only if the authorized share capital of the 5000 British Pound was fully paid up., or if the directors of the Regal would give personal guarantees in respect of rent. Regal was unable to raise more than 2000 British pound of the 5,000 required and the directors were unwilling to give personal guarantees. In the circumstances, it was decided at the board meeting that the directors themselves with some other investors would subscribe the remaining shares in the subsidiary. Eventually the sale of the cinemas was carried out by the means of sale of the shares in Regal and subsidiary and the directors personally made a profit of almost 3 British Pound per share on their shares and later, the new controllers of Regal successfully sued the former directors to recover those profits".

Another classic authority on non-profit rule is *Cook v Deeks* where three of the four directors of a Canadian Railway Company diverted a contract in which the company was interested to another company which they had formed. The Privy Council found that the opportunity to obtain this contract had come to the directors in their capacity and by the virtue of their position as directors of the company. While still retaining that position, while still acting as managers and with their duties to the company entirely unchanged, they had proceeded to negotiate in reality on their own behalf[40]. The contract was which in equity belonged to the company and they were bound to hold it on behalf of the company[41].

5.1.3 The No- Conflict Disability

In addition to those fiduciary obligations discussed above, directors are subject to equitable obligations with respect to conflicts of interest which require them to avoid situations where there is a conflict of interest between their personal interests and the company's interests. This obligation is framed in terms of a disability imposed on directors rather than a fiduciary duty. Liability of breach of the no-conflict disability, assuming there is no breach of any other duty to the company , is restricted to a liability to account in the event that the company avoids the conflicted transaction; if the company affirms the transaction , assuming no other breach of duty, then their is no liability to account. In practice, in addition to the breach of the no-conflict rules, there is likely to be a breach by a director of those obligations of loyalty noted above.

It is a long established principle of equity that a fiduciary, such as a director, is precluded from entering into engagements, in which he has, or he can have, a personal interest conflicting, or which possibly may

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[36] *Mutual Life Insurance Company of New York v Rank Organization Limited* 1985, BCLC 11
[37] *Re BSB Holdings Limited,* No 2, 1996, 1, BCLC 155 at 251
[38] *(Keech v Sandford* 1726, Sel Cas Ch 61
[39] *Regal Hastings Ltd V Gulliver*, 1967, 2, AC 134n, 1942, 1 All ER 378, HL
[40] *Cook v Deeks,* 1916, 1 AC 554, at 559-560
[41] *Cook v Deeks,* 1916, 1 AC 554, at 564

conflict, with the interest of those whom he is bound to protect[42]. Any resulting contract with the company is voidable and may be set aside at the instance of the company, without any enquiry as to the fairness and otherwise of the transaction,[43] and the company may hold the director to account for any profit he has made from the transaction[44].

The leading authority on conflicts of interest is *Abeerdeen Railway Company v Blaikie Bros* where a company was entitled to set aside a contract for the purchase of equipment entered into between it and a partnership when it transpired that the chairman of the board of directors was also the managing partner of the board. The conflict is obvious : the directors are obliged to act in the interests of the company, in this case to purchase goods on behalf of the company at the lowest possible price while, as a member of the partnership, he wishes to sell the goods at the highest price. Where such a conflict exists, the law recognized that the director, despite his best intentions, may be swayed by his own self-interest and so the contract is voidable and the director may be held to account for any profit which he made on the conflicted transaction[45].

The true nature of no-conflict principle was explained in *Movitex vBulfield*, where Vinelott J emphasized that this obligation is not a duty imposed on directors to avoid conflicts of interests but rather it is a disability to which all fiduciaries including the directors are subjects. Once the director is in a position in which his duty to the company conflicts with his personal interests or his duty to another, the court will intervene to set aside the contract without any inquiry as to whether there has been any breach of director's duty to the company[46]. To avoid the consequence, the director must make full disclosure of the nature and the extent of the conflict to the board directors provided that the company's article makes provision for waiver of the no-conflict rule by disclosure.

In *Movitex v Bulfield,* the company's articles did make provision for the waiver of the no-conflict principle by full disclosure of the conflicts to the board. With respect to one of the two transactions at issue, the court found that there had been full disclosure of conflict of interest of two of the company's three directors with the result that no-conflict principle was waived and the transactions was not voidable at the option of the company. Moreover, there was no issue as to the breach by the directors of any of their duties to the company as the transaction, in the courts view, was plainly in the interests of the company [47].

5.2 Common Law Obligation of Care and Skill

Directors are also subjects to a common law duty to exercise an appropriate degree of care and skill and a breach of this duty will give rise to an action for damages in negligence, subject all usual rules as to foresee ability and remoteness, though in practice it is extremely rare for directors to be sued for negligence.

Given the absence of any legislative initiative on this issue, the judicial initiative was seized by Hoffman LJ in two cases[48] where he indicated that the current standard of care and skill is accurately stated in Insolvency Act of the UK, 1986, s 214(4). The section is now stated below:

> "The facts which a director of a company ought to know or ascertain, the conclusion which he ought to reach and the steps which he ought to take are those which would be know or ascertained, or reached or taken, by a reasonably diligent person both----
>
> (a) The general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company. and
> (b) the general knowledge, skill and experience that the director has."

Section 214 imposes liability on company directors for wrongful trading. Liability arises where a company having gone into insolvent liquidation, a director is found to have continued trading after a point of time

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[42] *Abeerdeen Rly Co v Blaikie Bros.* 1854, 1 MACQ 461 at 471-472 per Lord Cranworth
[43] *Movitex vBulfield*, 1988, BCLC 104 at 123)
[44] *Boulting v Association of Cinematograph, Television and Allied Tecnicians*, 1963, 2 QB 606 at 635
[45] *Supra note* 42
[46] *Supra note* 43, at 120, per Vinelott J
[47] *Supra note* 436, at p.121
[48] *Re D'Jan of London Ltd, Copp v D'Jan* 1994, 1 BCLC 561 and *Norman v Theodore Goddard* 1991, BCLC 1028

when he knew or ought to have known that there was no reasonable prospect that the company would avoid going insolvent liquidation (S 214-4, Insolvency Act 1986 of the UK). The key provision for the purpose of duty of skill and care is s 214(4) which sets the standard expected as an objective minimum standard – the standard being that of a reasonably diligent person who has taken on the office of director, set in the context of the functions undertaken, with that objective minimum standard capable of being raised in the light of particular attributes of the director in question.

Flexibility in the application of the statutory standard is maintained by the obligation to have regard to functions carried out by the director in question in relation to the company in question. This point is emphasized by Jonathan Parker J in *Re Barings PLC (No 5), Secretary of Trade and Industry v Baker (No5)* where he stressed the competence of director must be assessed in the context of and by reference to the role of in the role in the management of the company which was assigned in fact assigned to him or which he in fact assumed and by preference to his duties and responsibilities in that role. He went on:

> "Thus the existence and extent of many particular duties will depend upon how the particular business is organized and upon what part in the management of the business the respondent could reasonably be expected to play; for example, where the respondent is an executive director, the court will assess his conduct by reference to his duties and responsibilities in that capacity"[49].

Therefore, if the director is an executive director, his conduct must be considered against what would be expected of a reasonably diligent person carrying out his duties and responsibilities as an executive director in that company; and under his contract of employment, he will be obliged, under normal contractual principles, to exercise reasonable care and skill in the performance of his duties[50]. Like wise, the duties and responsibilities of a non-executive director will be judged by what could be expected of reasonably diligent person carrying out his function as a non-executive director in that company. For example, a reasonably diligent director would not sign blank cheques[51] nor sign a simple insurance proposal without checking the accuracy of the contents[52]. If the director performs a special function, such as 'finance director' then the special skills is expected of a person in that capacity are to be expected of him[53].

As to the extent of director's function, of course, it is not the case that all directors must be involved in all of the company affairs. A director is not under any obligation to undertake a definitive part in the conduct of company's business and his role will vary according to the size and business of the particular company[54]. However it is equally clear that a director can not reduce his role to such an extent that he is in effect making no or only the most minimal contribution to the collective responsibility of the directors to manage the company[55]. This issue can arise in the context of family companies especially, where a spouse or offspring may take on a directorship without ever playing any role in the management of the company's affairs and may regard themselves as simply having a nominal or honorific title. The court will no longer accept that a director may have such a role. It is established that "one can not be a sleeping director; the function of directing on its own requires some consideration of the company's affairs to be exercised"[56].

In stressing the collective and individual responsibility of directors, Jonathan Parker J drew attention to the dictum of Lord Woolf MR in *Re Westmid Packing services Ltd, Secretary of state for trade and industry v Griffiths* where Lord Woolf stated:

> "The collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under English company law. The collegiate or collective responsibility must, however, be based on individual responsibility. Each individual director owes

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[49] *Re Barings PLC (No 5), Secretary of Trade and Industry v Baker (No5),* 1999, 1, BCLC 433
[50] *Lister v Romford Ice and Cold Storage Limited* 1957, AC 555, All ER 125
[51] *Dorchester Finance Co Ltd v Stebbing,* 1989, BCLC 498
[52] *D'Jan of London Ltd, Copp v D'Jan* 1994, 1, BCLC 561
[53] *Re Brian Pierson (Contractors) Ltd* 2001, 1, BCLC 275, at 309
[54] *Supra note* 49
[55] *Re Westmid Packing Services Limited, Secretary of Trade and Industry v Griffiths,* 1998, 2, BCLC, 305 at 354-355
[56] *Supra note* 53 at p.309

duties to the company to inform himself about its affairs and to join with the Co-directors in supervising and controlling them"[57].

This dictum has been endorsed by the courts on many subsequent occasions[58]. Against that backdrop of collective and individual responsibility, we turn now to consider the content of the obligations identified; (i) as to the knowledge and understanding of the company's business necessary to manage the affairs of the company and (ii) the ability to delegate subject to a residual duty of supervision.
Apart from the collective responsibilities, as far as the content of duty of individual directors is concerned, guidance as to the content can be found, however, in what is now the leading authority on the duty of care and skill, namely, the decision of Jonathan J Parker in *Re Barings plc, Secretary of State for trade and industry v Baker* which was endorsed by the court Appeal.

In the Barings case a number of senior directors of an investment bank were found to be unfit (though there was no question as to their honesty and integrity) and disqualified as a result of their failure to supervise a 'rogue trader' within the bank whose unauthorized trading resulted in losses of 827m pound and the collapse of the bank. Jonathan Parker J[59] summarized the duties of directors as follows (each of these elements is considered in greater detail below):
"

(i) Directors have both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.
(ii) While directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions.
(iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of company".

5.3 Statutory Statement of Directors Duties
Although the above mentioned judicial pronouncements on directors' duties made the domain of the duties quite crystal clear, the British Law Commission in its review of directors duties concluded that there should be a partial codification of directors' duties[60] . In its view, a legislative statement of the general duties of directors would be valuable reform. The Company Law Review accepted in general the Law Commission's proposals with respect to statutory statement of duties but went much further in terms of seeking full codification of directors' main duties replacing the corresponding equitable and common law rules[61]. In its final report, it recommended a legislative statement of the director's duties in order to provide a greater clarity in law on what is expected of the directors and to make the law more accessible. The recommendations were adopted in the newly enacted Companies Act, 2006 from section 170 through 177[62].

Section 170 spelled out the scope and nature of general duties of the directors; section 171 requires the directors to act within powers; section 172 obliges the directors to promote the success of the company; section 173 requires the directors to exercise independent judgment; section 174 requires the directors to maintain a reasonable care, skill, and diligence; section 175 obliges the directors to avoid conflict of interests; section 176 prohibits the directors to accept benefits from third parties; and finally, section 177

[57] *Supra note* 55, at p. 563
[58] *Supra note* 8, at 425
[59] *Supra note* 49
[60] Law Commission Report (1999), "Company Directors: Regulating Conflicts of Interests and Formulating Statement of Duties" , Para 4.48 and Para 4.30, Law Commission No 261, Cm 4436, UK.
[61] Company Law Review, Final Report, Vol. 1(2001), Para 3.9-3.10.
[62] The Companies Act, 2006 of the UK, Available in French, D. (2007), Blackstone's Statutes on Company Law", Oxford University Press, Oxford, UK

requires the directors to declare interest in proposed transaction or arrangement. Obviously, this statement of duties will make the company directors of the UK aware of the range of duties they owe to the company, shareholders, and other stakeholders. More so, the statement would guide the companies to exercise a reasonable degree of skill, care, and diligence while holding the office of the director. However, the developing regimes including Bangladesh yet to take legislative stance to spell out the duties of company directors. In the Companies Act, 1994 of Bangladesh, section 90 through 113 dealt with a range of issues in relation to directors, but none of them bear any word expressing the legal duties of a company director.[63]

6. Conclusion and Policy Implications

The range of duties the company directors owe to the company and shareholders include, the duty to act in the interests of company and shareholders, maintaining no-profit rule, upholding no conflict of interest with the company and exercising a reasonable care, skill, and diligence. The recent statement of duties as per the Companies Act 2006 reflected them all, but it places an emphasis on directors' duties to other constituents such as employees, suppliers, customers, community, and environment[64]. Despite these statutory guidelines, in many regimes, directors are found to be guided by own self-serving interests. To take an illustration, the directors of Enron (the energy giant collapsed in 2001) did not pay any regard to their duties. Lord Wakeham, a member of Enron's audit committee received annual consultancy fees of $72000 and John Mendelson, another member of the committee influenced Enron successfully to donate $ 1.6 million to a university of Texas medical centre, where he was the president. Moreover, the audit committee members were found to provide inadequate vigilance to monitor internal financial control system (one audit committee member sat on 16 corporate boards at one time), which ultimately produced fabricated financial reports hiding the real financial difficulties of the company in the near future[65] (Wearing, R., 2005, Pp. 70-72). In Bangladesh, the board of directors of Sonali Bank (the largest commercial bank of the country) failed to safeguard the assets of the bank when an ordinary client (became infamous when the scam came to daylight) like Hallmark Group misappropriated an amount not less than BDT 35,000 million. As per Common Law guidelines, the board of directors collectively and every individual director owed a duty to acquire and maintain knowledge of the affairs of the company, but out of ignorance, in respect of Hallmark, the board tried to shoulder the responsibility to the management board.

It is also evident that while prescribing directors' duty of care and skill, the Common Law guidelines ruled out the concept of appointing any sleeping director. Unfortunately, in the family owned companies of Bangladesh, and other regimes, the appointment of directors without any job description or role is no more a secret. Observing the prevalent situation of the country, Mintoo, a noted business tycoon of Bangladesh rightly opined, "One's academic background or appropriate training was considered irrelevant and the only qualification that mattered in choosing the members of the board was whose son or daughter or legitimate heir was the candidate to run the business"[66] (Mintoo, A.A., 2004). So, the appointment of directors without searching the academic background, expertise, and experience by the "Nomination Committee" led to permitting individuals with poor caliber to enter into the board room.

The aforesaid instances clearly reveal that although there are adequate statutory and common law guidelines in place in relation to legal duties of the directors, it is also equally apparent that directors in different legal regimes are being appointed on the basis of family, social class, and political consideration. In such a context, it is hardly possible to conclude that the existing legal framework of even developed regimes could ensure the appointment of the appropriate persons to the board. However, it is important to mention that for other distinguished professionals, namely, Chief Financial Officer (CFO), and Company Secretary, there are professional Institutes to provide rigorous training on these specialized fields. It is also to note that most of the public companies in elsewhere are considering these professional courses as a deterrent to recruit less qualified senior executive managers. For corporate directors the same approach may be a good strategy to eliminate appointments of amateurs to the board of directors.

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[63] Companies Act 1994, Available at, Zahir, M., "Company and Securities Law", The University Press Limited, Dhaka, Bangladesh. (2005).

[64] *Supra note* 62

[65] R.Wearing, *The Case of Corporate Governance*, Sage Publications, London, UK. (2005),

[66] A.A. Mintoo, "Corporate Governance and Other Issues", Bangladesh: An Anatomy of Change", the University Press Limited, Dhaka, Bangladesh, (2004)

Happily, it is evident that there are some institutes in some developed regimes that train up directors of the joint stock companies with a particular emphasis to the context of the business and industry. For instance, UK-based Institute of Directors (IOD) which was founded back in 1903 has been offering a wide range of courses, conferences, seminars, and development programs including: Chartered director, the certificate and diploma in board direction, board evaluation, board development, and executive coaching. IOD also provides unbiased and confidential advice to its around 35,000 members on legal, financial, marketing, human resources, and other areas related to running a business (Wikipedia on IOD). If the developing regimes can establish any institute like IOD, then there is a good possibility to have well trained and well groomed individuals in the boardroom.

Lon Fuller's Morality of Law: An Analysis

Sharmin Aktar[©]

Abstract

This article examines Lon L. Fuller's revolutionary philosophy and work 'the Morality of Law'. By this write-up procedural naturalism of Lon L. Fuller has been presented. On Fuller's view, human activity is necessarily purpose-oriented and therefore, particular human activities can be understood only in terms that make reference to their purposes or ends and this is known as the external morality of law. When people make law, they have a purpose to achieve certain ends but this purpose is subject to eight principles, namely, generality, promulgation, prospective effect, clear and concise, no contradiction, no impossibility, constancy and congruence; which are combindly known as the internal morality of law. Most of Fuller's eight principles double as moral ideals of fairness and as principles of efficacy. A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all. Like the classical naturalists, Fuller subscribes to the strongest form of overlap thesis, which makes him a conceptual naturalist. He gives emphasis not on the substantive aims of legal rules but on the ways in which a system of rules for governing human conduct must be construed and administered if it is to be efficacious and at the same time remain what it purports to be.

1. Introduction

At various times and places, jurists have made their approaches to study of law from different angles.[1] They have defined law, determined its sources and nature and discussed its purpose and ends.[2] For the sake of clarity and convenience in understanding their points of view, the jurists are divided into different schools on the basis of their approaches to law.[3] Schools of jurisprudence emerged on account of the difference of approach between jurists on the problem of definition and nature of law. These schools are helpful in understanding the evolution of legal philosophy. As a matter of fact, these schools enrich our knowledge of Jurisprudence and thereby help us to have a comprehensive view of the subject. There are different types of schools, namely, natural law school, positive school, analytical school, historical school, sociological school, socialist school, realistic school, philosophical school, functional school, comparative school etc.

However, there was and still is a debate between the above two schools among all the schools and the conflict of 'positivism' and 'natural law' is not merely of doctrinal concern.[4] Conceptually, this conflict develops in several stages; from a purely theoretical, jurisprudential stage, through an ethical-ideological stage, to a practical political stage, and each of these stages is marked by the evolution of certain ideas and ideals of democratic thought and action.[5] Concepts such as 'inherent rights', 'reasonableness' and 'equal protection' can be understood only in the light of this conflict and its potential revolution.[6] Whatever debate exists between the two, the present paper won't go to the quarrel, rather will elucidate the natural law school in the light of 'the Morality of Law' written by Lon Fuller

At present, natural law has formed an important weapon in political and legal ideology.[7] It is concerned with two vital contemporary problems, namely, the validity of unjust law and the abuse of liberty.[8] Natural law is the outcome of man's quest for an absolute standard of justice.[9] With changing social and political

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[1] Rigveda Dattatraya Amonkar, *Positivism with reference to American Realism*, paper submitted to the Kare College of Law, p. 6, also available at http://www.grkarelawlibrary.yolasite.com/resources/LLM-LT-1-Rigved.pdf.

[2] *Ibid*

[3] *Ibid*

[4] Helen Silving, The Twilight Zone of Positive and Natural Law, *California Law Review*, Vol. 43, Issue 3, 1955, p. 477

[5] *Ibid*

[6] *Ibid*

[7] Vidya Dhar Mahajan, *Jurisprudence and Legal Theory*, Eastern Book Company, Lucknow, 5th ed. 1987, p. 595.

[8] *Ibid*

[9] Natural Justice and Its Applications in Administrative Law, available at http:// works.bepress.com/mubashshir/2, last visited on 22.03.14.

conditions, the notions on natural law have changed. The only thing that has remained constant is the appeal to something higher than positive law.

Philosophical School may be called as Natural, Ethical or Metaphysical School. The followers of this school believe that nature is the source of Law. Man as a human being is going to struggle for happiness, comfort according to his conscience. So, they live according to the nature. What should be the moral object – this is the main purpose of this school.

Lon Luvois Fuller, Carter Professor of General Jurisprudence at the Harvard Law School, has long been known as a natural law theorist.[10] He has delivered a series of lectures on core jurisprudential issues in 1963 and as a revised edition those lectures were published as a book entitled 'The Morality of Law' published in 1969.[11] In fact those lectures were a great challenge to the English Legal system, which had been suffering from its colonial heritage with a kind of jurisprudential bankruptcy.[12] Fuller's text is a challenge to positivism and his work is often categorized as related to the 'natural law school', but it is difficult to categorize. His book looks more like the work of some positivists and American realists than it does traditional natural law theorizing. According to Fuller, law must be structured in a certain way. For Fuller, law must provide rules that humans are capable of fulfilling. And the force of this 'must' is a moral one. He is concerned with the day to day functioning of legal systems. When he talks about morality, it is a distinctive type of morality concerning the structuring of rules and how people can be governed through rules. This kind of morality is linked to duties rather than human potential or excellence. When he talks about justice and fairness these are treated as outside the normal work of lawyers and courts. But in Fuller's view norms of justice are built into our legal procedures. There are procedural principles, but according to fuller, they are not merely procedural-they do have a moral aspect. Fuller argues that there is not a sharp conceptual separation between law and morality. In doing so, he articulated a form of natural law theory that is very different from traditional versions of that theory.

Fuller proposes that a so-called law must pass a moral test if it is to be a law in the fullest sense (a genuine law). But Fuller's test is functional. A rule or set of rules that does not perform this function does not count as law. It is necessary to mention here that he does not claim that any system that includes these procedures is thereby perfectly moral. Rather, his view is that the procedures embodied in a legal system are morally important and determine whether a set of rules really count as a legal system. However, there are two basic approaches to "natural law", one oriented to its "substance", the other to the method of finding it.[13] In the Morality of Law Professor Fuller discussed his many-faceted character of the natural law theory from the viewpoint of substantive natural law and procedural natural law. Before going to the discussion of natural law theory, it is necessary to observe the definition of law given by Fuller.

2. Definition of Law

Fuller does not present a concept or definition of law. However, he does present a strong argument for law's moral significance. According to Fuller, 'law' is the enterprise of subjecting human conduct to the governance of rules. In Fuller's view law must be a system, and not merely the will of the sovereign. Fuller stresses that the rule of law-that is, the existence of a legal system which is predictable, non-arbitrary and stable-is in an important sense a moral commitment. A morality different to that of the personal morality of excellence; one distinctively tied to legality and public obligations.

3. Substantive Natural Law

Of substantive natural law there are three, or possibly four, related aspects, two related to the individual man and the other related to associations of men. The most fundamental aspect of substantive natural law relates to man in his essence. Essence means three fundamental propositions (namely, living, purposing and communicating) which are intended to possess a scientific status.

Survival may be considered the minimal content of natural law. Survival as a goal, however, seems to be necessarily implied in all attempts to ascertain how men shall live together, and in this latter sense the

[10] Douglas Sturn, Lon Fuller's Multidimensional Natural Law Theory, *Stanford Law Review*, Vol. 18, No. 4, 1966, p. 612.
[11] Maimul Ahsan Khan, *Jurisprudence Reconstructing the Ideals of Legality, Politics, and Morality*; Law's Empire Publishing, Dhaka, 2011, p. 379.
[12] *Ibid*
[13] Helen Silving, *Supra note* 4, p. 477.

principle of survival attains a special status relative to human conduct. It is this societal dimension of purposiveness that seems to lead Professor Fuller to add a third dimension to the aspect of substantive natural law that relates to man in his essence. Communication is one crucial means for human survival, but on the other hand, survival can only be meaningful for the sake of communication. By communication, Fuller means the interchange among men of values, qualities, and meanings.

Together these norms of purposiveness and communication constitute the "minimum content of a substantive natural law," with the norm of survival or life added as the necessary condition for their realization. Where the most fundamental aspect of substantive natural law relates to man in his essence, the second aspect of substantive natural law relates to man in his individuality. Having postulated purposiveness as an essential characteristic of man, Fuller observes that an adequate understanding of a particular man's behavior must take account of the particular purposes that propel him, that cause him to do what he does.

But a single purpose does not stand alone. It constitutes part of a set or system of purposes. The character or nature of any particular man at any particular time consists in a complex congeries of more or less related purposes. A purpose is, as it were, a segment of man. The whole man, taken in the round, is an enormously complicated set of interrelated and interacting purposes. This system of purposes constitutes his nature. The term 'nature' here seems to designate the peculiar character or individuality of a particular person. Thus, according to Fuller, there is a natural law of each individual person. The term 'law' dictates the normativeness of the complex purposive system that constitutes one's character; the term 'natural' indicates that this normativeness subsists independently of one's acknowledgement of it, yet is more or less discoverable, as well as alterable, by means of one's powers of reflection and intuition. Fuller's understanding of man is not individualistic. Forms of human association do not put a limitation on individual freedom or purposiveness. Rather, the possibilities of human choice and action are actually vastly increased by means of various forms of association. Associations, organizations, institutions, forms of social order are properly conceived by Fuller as basically expressions of human purposiveness.

In Fuller's understanding the essence of an 'institution' can be found in mental attitudes. In one of his writings, Fuller expresses his reluctance to use the term 'natural law' to designate the common need, the purposiveness, the normativeness of society. But the common need involves a continuous balancing and rebalancing of societal and individual needs. In accordance with Fuller, judiciary is also one association among others and the aims of this organization and the means appropriate to their realization will say as to whether or not the association is faithful to its stated purposes and to satisfy the common need of the society.

4. Procedural Natural Law

It is the "inner morality" of a form of social order or institution that Fuller designates "procedural natural law" or the "natural laws of the social order." These natural laws of forms of social order are the "compulsions necessarily contained in certain ways of organizing men's relations with one another." Different methods and different institutions of dispute resolution in the form of compulsion are used to solve controversy. But Fuller insists that in all instances the 'Rule of Law' should prevail. The rule of law in this context means that the men affected by the decisions that emerge from social processes should have some formally guaranteed opportunity to affect those decisions. The converse of the rule of law is what Fuller calls 'absentee management', which is found wherever a decision is made (1) in the absence of a "full and sympathetic understanding of the situation to which it is to be applied" and (2) without affording a man "some participation in the decisions that affect the practical significance of his freedom." The basis on which absentee management is considered an evil and the rule of law is considered morally desirable in the formation of policy matters and in the resolution of disputes is the most fundamental aspect of substantive natural law, that which relates to man in his essence, for it is only by adherence to the rule of law that purposiveness and communication are maintained throughout the associational life of man. Thus there is an essential connection between the three (or four) dimensions of substantive natural law (that which relates to man in his essence, that which relates to man in his individuality, and those that relate to man in his associational life) and procedural natural law.

However, the rule of law specifies a set of requirements which lawmakers must respect if they are to govern legally. As such, the rule of law restricts the illegal or extra legal use of power. It is generally agreed that Lon Fuller's eight principles of legality capture the essence of the rule of law.[14] In brief, the principles are these:

1. The principle of generality: Laws must be general, specifying rules prohibiting or permitting behaviour of certain kinds. A legal system makes decisions according to rules; there is no legal system where all decisions are made on an ad-hoc basis.
2. The principle of promulgation: Laws must be widely promulgated or publicly accessible. Publicity of laws ensures citizens know what the law requires. A legal system publishes its rules; there is no legal system where all the rules are kept secret.
3. The principle of prospectiveness: Laws should be prospective, specifying how individuals ought to behave in the future rather than prohibiting behaviour that occurred in the past. Naturally, the rules of a legal system are prospective in character; There is no legal system where all the rules are retrospective.
4. The principle of clarity: Laws must be clear. Citizens should be able to identify what the laws prohibit, permit, or require.
5. The principle of consistency: Laws must be non-contradictory. One law can't prohibit what another law permits.
6. The principle of possibility: The rules of a legal system require only what is possible; There is no legal system where rules demand the impossible.
7. The principle of stability: The rules of a legal system remain constant through time; There is no legal system where the rules are altered with great frequency.
8. The principle of congruence: There should be congruence between what written statute declare and how officials enforce those statutes.[15] For example, congruence requires lawmakers to pass only laws that will be enforced, and requires officials to enforce no more than is required by the laws.[16] Judges should not interpret statutes based on their personal preferences and police should only arrest individuals they believe to have acted illegally.[17]

Fuller writes of these principles of legality or of the internal morality of law as the "ideal of the legal order". The problems which arose in the absence of the eight principles noted above are presented by Fuller in his book 'the Morality of Law' with an entertaining story about an imaginary king named Rex who attempts to rule but finds he is unable to do so in any meaningful way when any of these conditions are not met.

To the extent to which these procedural natural laws of law are violated, the endeavour to maintain an operative legal system fails; to the extent to which there is fidelity to these procedural natural laws with whatever qualifications are made necessary by the exigencies of a given situation, the endeavour to maintain a regime of law is successful. However, the goodness and badness of a legal system is also to be judged from the standpoint of other levels of analysis, namely the various dimensions of substantive natural law.

Fuller notes that this generality requirement is consistent with general injunctions on behavior being issued to specific individuals or groups. To meet the generality requirement, laws need not apply to the entire population. When lawmakers respect the eight principles of the rule of law, their laws can influence the practical reasoning of citizens. Citizens can take legal requirements and prohibitions into consideration when deliberating about how to act. They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke. When the rule of law is realized, their expectations of congruence will not be disappointed. Taken together with the reasonable expectation that fellow citizens will also obey the law, these expectations justify the belief that the law gives citizens reasons to act or refrain from acting in certain ways.[18]

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[14] Colleen Murphy, Lon Fuller and The Moral Value of the Rule of Law, *Law and Philosophy*, Vol. 24, 2005, p. 240, also available at http://faculty.las.illinois.edu/colleenm/Research/Murphy-%20Fuller%20and%20the%20Rule%20of%20Law.pdf, last visited on 15.04.2014.

[15] Lon Fuller, *the Morality of Law*, Yale University Press, New Haven, rev. ed. 1969, Fuller has an extended discussion of each criterion from pp.46 to 90.

[16] *Ibid*

[17] *Ibid*

[18] Colleen Murphy, *Supra* note 14, p. 241.

In Fuller's view, the rule of law provides some normative grounds for thinking that citizens have a moral obligation to obey the law. However, this obligation is conditional. It is partly conditional upon the actions of government officials. When government officials routinely violate the rule of law, passing retrospective legislation or basing their legal rulings on personal whim, then citizens no longer have a duty to obey the dictates of a government. As Fuller states, certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted.[19] In so far as officials pass clear, prospective, non contradictory laws and enforce those laws consistently and in accordance with the declared law, citizens have reason to obey the law, even when the government pursues a particular policy with which individual citizens disagree.[20] Fuller's account helps to explain why it is rational for citizens to participate in the system of cooperation which the legal system establishes.[21] His account also helps us understand the way in which the rule of law limits the arbitrary exercise of power, by setting restrictions on the kind of rules officials can pass as well as on the actions officials legitimately can take.[22]

5. Morality and Law

The question of the relation between natural law and statutory and decisional law is synonymous with what is often termed the question of the relation between morality and law. In Fuller's understanding this relationship is twofold.

1) Substantive natural law in its various dimensions constitutes in Fuller's terms the external morality of law and

2) the procedural natural law of the legal order constitutes the internal morality of law.

Fuller includes any and all legal systems in his observation that order, coherence, and clarity have an affinity with morality.[23] Fuller is not clear whether he means that this affinity is a matter of historical observation or a matter of necessity.[24] Probably it may be both.[25] Like Dworkin, Fuller is placing himself in the center or middle between the extreme positivism (extreme positivists, e.g. Bentham, Austin, Hart) and extreme natural law (extreme natural law theorist, e.g., Aquinas, Cicero).[26]

We know that law is defined by Fuller as the enterprise of subjecting human conduct to the governance of rules. The legitimation of a legal order involves acceptance by those subject to the order, and acceptance involves reference to morality, to both the external and the internal morality of law. The bearing of the external morality of law or of substantive natural law on law can also be seen at the point of making, interpreting, and applying particular rules of law. A particular law, Fuller observes, is both a set of words and an objective. The objective may be expressed in the words used, and an interpreter of a law may in fact discern more clearly its objective or purport than the draftsman. But in any case the law is not merely the words on paper or the words spoken. A particular law, whether statutory or decisional, is a directive or a norm of human activity. As a directive or norm it is an attempt to provide an explicit articulation of some aspect of an association's total and complex purposiveness. It may constitute a decision resolving a conflict among varying elements within that total purposiveness; it may contribute a new element altogether; it may re-inforce in an explicit manner a dominant element in the structure of common needs. But in very case the act of making a law is properly viewed as to some degree, however minute, a creative or formative act of social purpose.

Thus in the interpretation of particular laws, attention must be centered not so much on the words in which the law is cast, but on the purpose of the law.

The force of established institutions has now become one of the realities that the judge must respect in making his decision. If the conditions of successful group living determine the rules he ought to apply to the group, the rules already applied themselves determine in part what those conditions are. Man's nature

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[19] Lon Fuller, *Supra* note 15, p.39.
[20] Colleen Murphy, *Supra* note 14.
[21] *Ibid*
[22] *Ibid*
[23] Anthony D'Amato, *Lon Fuller and Substantive Natural Law*, Northwestern University School of Law Scholarly Commons, Northwestern University School of Law, 1981, p. 02.
[24] *Ibid*
[25] *Ibid*
[26] *Ibid*, p. 01.

consists partly of what he has made of himself, and natural law, therefore, demands that we must within certain limits respect established positive law.
So, Fuller concludes, whether one considers a newly formed society or a long established one, "the basic problem of the judicial process remains that of discovering and applying those principles that will best promote the ends men seek by collective action.
Thus, within the framework of Fuller's theory, the relationship between substantive natural law and statutory and decisional law is complex, but it is impossible to separate one from the other. The complexity of the relation in any particular situation are in a dynamic state and are composed of many elements and dimensions all of which are not altogether compatible with each other. It is impossible for a legal system to operate without constant reference to and reliance upon the morality or substantive natural law of the association of which the legal system is a part. Therefore, to Fuller, the line between the two is hazy, uncertain, and imprecise. So, both substantive and procedural natural law applies not only to national legal system, it applies as well to the multiple large and small legal systems functioning within the various institutions and groups created by mankind.

Whether or not one is obliged to obey the law depends upon both substantive and procedural matters. But it is clear that within the framework of Fuller's analysis, there would probably be no clear and certain answer to that question. The justification of a particular law or legal institution or legal order requires, an examination of its relative compatibility and incompatibility with substantive natural law. The most determinative criterion in assessing the obligatoriness of a legal order as a whole derives from the aspect of substantive natural law relating to man in his essence, which dictates that the institutions of society should be constructed in such a way formally to guarantee maximal participation of all persons affected by them in their decisions.

The justification of particular laws and legal structures involves as well an examination of their conformity with the principles of procedural natural law. This is what Fuller means when he writes, "certainly it is clear that the obligation of fidelity to positive law can't itself be derived from positive law." Rather the obligation is derived from the relation of positive law to both substantive and procedural natural law. It is on this basis that Fuller presents his analysis of law in the Nazi period of German history. Fuller insists, first, that one must make distinctions among different areas of German law during the Nazi period. But so far as there was justification to disobey certain Nazi laws or oppose certain Nazi institutions, that justification rested not only on the basis of the morality external to the law, substantive natural law, but as well on the basis of morality internal to the law itself. In many instances what purported to be law, because of its intolerable and exceeding violation of the principles of the procedural natural law of law, was properly considered insufficiently legal to warrant a certain obligation to obey.

However, it is true that Fuller never claimed that specific laws or even regimes can't be evil and at the same time legal.[27] He merely claimed that law intrinsically has some attributes that are moral; underlying moral purposes and intrinsic structural attributes-laws inner morality-that inherently affect morality. Similar claims can be made about other disciplines.[28] For example, buildings are designed to accomplish human (moral?) goals, such as providing shelter. A combination of brick and mortar is not a house unless it accomplishes minimal purposes. Moreover, buildings have intrinsic qualities that affect moral issues, such as providing enclosure and occupying space. The autonomy of architecture as a discipline is not threatened by these connections with morality. Legal positivism need not be threatened by a demonstration that law is as intrinsically connected to morals as architecture.[29]

6. Conclusion

In 'the Morality of Law' the various dimensions of natural law theory are explained and it is shown that these dimensions are related to each other and to law in the sense of statutes and judicial decisions. Here statutory and decisional law is not considered an autonomous, unrelated, isolated dimension of human institutions and human action.[30] Rather positive law and natural law are co-existent and there can

[27] William Powers, Lon L. Fuller. By Robert Summers, *Duke Law Journal*, Vol. 1985:221, pp. 231-232.
[28] *Ibid*.
[29] *Ibid*.
[30] Douglas Sturn, *Supra* note 10, p. 638.

be no natural law unless there is some form of rudimentary positive legal organization in relation to which natural law may be "natural".[31] Accordingly, law is an aspect of normative reality. In this sense law is itself an expression of morality. Second, normative judgments, legal and moral, are properly related to objective facts, facts of a purposive character.

Taking into account these two propositions, according to Fuller, law, as the enterprise of subjecting human conduct to the governance of rules, is one institutional means whereby an association attempts and may be able to fulfill its common need and realize its purposes. But the common need and purposes of associations are objective data against which the adequacy of law can and ought to be measured. At the same time, as an institutional enterprise, law generates its own norms which must be adhered to if law is to fulfill its societal function. Similarly, associations are means whereby men may express and realize their needs and purposes. So, the moral assessment of the operation of associations requires reference to certain objective data-the individuality and essence of the human beings who constitute the membership of the associations and who are affected by the decisions and actions of the associations. Finally, man is a living creature whose fundamental purpose or obligation is to be himself, both in his essence and in his individuality, as fully as possible.

Nevertheless, Fuller's conceptual naturalism is fundamentally different from that of classical naturalism. First, Fuller rejects the classical naturalist view that there are necessary moral constraints on the content of law, holding instead that there are necessary moral constraints on the procedural mechanisms by which law is made and administered: "What I have called the internal morality of law is … a procedural version of natural law … [in the sense that it is] concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be".[32]

Second, Fuller identifies the conceptual connection between law and morality at a higher level of abstraction than the classical naturalists. The classical naturalists view morality as providing substantive constraints on the content of individual laws; an unjust norm, on this view, is conceptually disqualified from being legally valid. In contrast, Fuller views morality as providing a constraint on the existence of a legal system: "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all".[33]

In sum, to Fuller, law is an aspect of social reality, and social reality is an expression of humanity. It is the acknowledgment of this interconnection, always complex and never wholly constant in detail, that constitutes the foundation of Professor Fuller's legal theory.

[31] Helen Silving, *Supra* note 4, p. 480.
[32] Lon Fuller, *Supra* note 15, pp. 96-97.
[33] *Ibid*, p. 39.

Challenges in Reforming Hindu Inheritance Law: Bangladesh Perspective

Uzma Shukrana[©]

Abstract

Bangladesh ratified CEDAW in 1984 with a reservation in equality clause which makes it almost impossible to claim equality in laws for a woman. There have been constant recommendations on withdrawing this reservation, but in vain. The national laws such as, inheritance law in particular still follows inequality regarding inheritance. For instance, Hindu women are totally excluded from inheritance in presence of a male heir. It is noteworthy that Hindus make up to 9.2% of the total 160 million population, and no reform was done after 1937 in this sphere. This total exclusion is a contrast to universal human rights standard. There are actually two sides of stakeholders, one side is blindly supporting the current law, another portion wants reform in consonance with global law and want equality in inheritance. I intend to show in my paper how this equality can be established in inheritance law with the consonance of global human rights law. This will be done by discussing the protection mechanism of inheritance law i.e., how it is enforced, the discourse between global human rights law and local law in inheritance perspective, and discussing the key arguments of the stakeholders. All these will advocate to establish grounds for the total reform of inheritance law.

Introduction

Bangladesh follows dualist model of application of international law in its domestic spheres. For this reason, Bangladesh has to enact necessary legislation to implement international obligations under international human rights treaties which it has acceded to or ratified. Out of all these international treaties, CEDAW is one of the core global human rights conventions which aims principally for eliminating discrimination against women. Bangladesh was independent in 1971and it sought to address the pre existing colonial laws which are discriminatory towards women. As a part of this aspiration, Bangladesh ratified CEDAW in 1984.[1] Compared to the ratification of other core Human Rights treaty, Bangladesh was quicker in ratifying CEDAW. Bangladesh ratified ICCPR[2] in 2000 and ratified ICESCR[3] in 1998. Thus it was the intention of Bangladeshi government to promote women's rights according to CEDAW from the very beginning of its independence. However, the ratification of CEDAW came with some reservations. Among all the reservations of CEDAW, Art 2 of CEDAW is the most important article which is a bar to abolish the discriminatory laws for women. Art 2 can be deemed as the heart and soul of the CEDAW as the article calls for equality of women in all aspects of laws and national policies and to ensure no discrimination policy for women. Art. 2 obligates the state to enact a policy of non-discrimination to prohibit discrimination, set up effective mechanism for redress and repeal all discriminatory laws and policies. This reservation is a clear inconsistency to Bangladesh's aspiration in abolishing discriminatory laws. This reservation is also not in conformity with the Constitution. The supreme national law of the state is the constitution of People's Republic of Bangladesh which declares Bangladesh as a secular state and also ensures that states will enact law in consonance with international law.[4] Furthermore, the constitution says that state will ensure equality before law and equal protection of law for all citizens without any discrimination to race, creed, religion, sex and ethnicity. Thus the reservation in CEDAW , particularly art 2 is inconsistent with the spirit of Bangladesh's commitment to implement international standards in domestic law . This reservation is also obviously against the spirit of the constitution which ensures equality for women in national laws. The reservation which is still standing even after almost 30 years, has been considered as one of the main obstacles for reform of various family laws of Bangladesh. Among these laws, the Hindu inheritance law is particularly discriminatory towards women.

National Laws for Inheritance: Position of Widows and Daughters

Bangladesh follows dualist model of application of international law in its domestic spheres. One of the core elements of dualist model is the international laws which the state has ratified, need to be approved

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[1] Convention on Elimination of all forms of Discrimination against Women, Adopted by UN General Assembly 34/180 of 18 December 1979, entered into force 3 December 1981.

[2] International Covenant on Civil and Political Rights. Adopted by UN General Assembly on 16 December 1966 and came into force on 23rd March 1976.

[3] International Covenant on Economic, Social and Cultural Rights, Adopted by UN General Assembly on 16 December 1966 and came into force on 3rd January 1976.

[44] Art 25 of the constitution of the People's Republic of Bangladesh.

by the parliament before applying these international standards into our national law. Because of this, in addition to international standard of CEDAW, it is therefore important to examine the national laws of inheritance. This section will examine the current national law and analyze how far it is consistent with CEDAW and constitution of Bangladesh.

The inheritance laws of Bangladesh is guided by personal religion as opposed to civil law.The Hindus constitute 9.2% of the total 163 million population of Bangladesh and the number can be considered as the third highest Hindu population of the world.[5] The Hindu inheritance law completely excludes daughters from inheritance in presence of sons and refuses absolute ownership of female heirs. Hindu law was widely modified for women in 1937 by Hindu Women's Right to Property Act. After that no reform was done for women. There are number of inequalities in Hindu law for females.

The Bangladeshi Hindus follow the laws of Dayabhaga or Bengal school. This school's inheritance law is guided by the doctrine of spiritual benefit. The doctrine implies the right of male heirs to offer oblations to purify the deceased's body and to give rest to the spirit. It is the guiding principle for succession. The heirs are prioritized on this right. Female heirs are not given priority to offer such oblation. In-fact they stand after deceased's son, son's son, grandson's son. Only five kinds of female heirs were recognized later by the 1937 Hindu Women's Right to property Act -widow, daughter, mother, father's mother, father's father's mother. The succession rules of a Hindu woman are subject to some limitations. The female heirs do not succeed absolutely. They have limited life interest on the property. But male heirs inherit absolutely. The female can neither be a full owner nor can she be a fresh stock of descent. That means after the death of the female heir, the property goes back to the original owner from whom she inherited. The succession then will take place among the next kin of the original last full owner. For example if a Hindu man dies leaving a wife and brother, the wife will inherit for her life. After her death the estate goes back to her late husband's next kin i.e., the brother. Since the brother is a male, he succeeds it completely. Then because he is a fresh stock of descent, his own heirs will inherit upon his death.[6]

Even when a female heir inherits after all these discriminatory rules, she has some restrictions. She can sell her property only for legal necessity or for religious or charitable purposes. This means there are some recognized grounds such as performance of act, payment of debt, religious duties, maintenance of property. If she deviates from it, the kin of the deceased person who are likely to inherit after her death can exclude her.[7] Furthermore female heirs can be excluded from inheritance on ground of unchastity. If she is proven to be unchaste she will not inherit. The remarriage of Hindu widow is a ground for exclusion of inheritance from her husband's estate.

Again, male issues play an important role in inheriting. When inheritance is taking place among married daughters, a daughter who has male issue or likely to have male issue will be given priority. Thus the Hindu law is clearly unequal, but the biggest criticism Hindu law faces is the exclusion of daughters in presence of sons. Besides the absolute exclusion of daughter in presence of son, the limited interest of female heirs in property is another issue of great concern. This law is a discourse with the constitution which is the supreme law of Bangladesh. Art 27 of the Bangladesh Constitution guarantees equality before law and equal protection of law. Art 28 prohibits government to enact such legislation which is discriminatory in respect of race, religion, sex, caste or birth place. Art 28 also obligates government to take positive action for the advancement of women. Art 31 and 32 require women to enjoy right to life, liberty and right to be treated in accordance with law. Art 44 and Art 102 entitles women to file writ petition to enforce any of the fundamental rights.[8]

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[5] Huda, Shahnaz., 2011. *Combating gender injustice : Hindu Law in Bangladesh*. Dhaka: South Asian Institute of Advanced legal and human rights studies (SAILS). The author is a professor of University of Dhaka who undertook the study with the assistance of SAILS, and with the support of Bangladesh embassy of Kingdom of Netherland.The study was a focused group interview in 14 highest populated Hindu districts of Bangladesh in the 7 divisions.

[6] , R.K., Agarwala *"Hindu Law"*. Allahabad:Central law agency, 1958, pp. 280-300.

[7] *Supra* note 5.

[8] (Shadow report, 2010, p.16)

The constitution of Bangladesh thus guarantees women to be equal and restrain government from practicing any discriminatory law. So Bangladesh has both national and international standards to ensure equality for women. But the current law of inheritance which was last reformed in 1937 is a clear discourse with the international and constitutional standards. The reports of Bangladesh submitted before the CEDAW Committee clearly indicate that the government is reluctant to reform any personal law due to the excuse that personal law is incapable to be changed because of religion. Therefore, the opinion of grass root Hindu people is essential to examine here in order to understand whether the grass root people want to reform their personal law of inheritance.

The Opinion of Grass Root People regarding Reform

Grass root people's acceptance of reform is crucial for implementing any reform. Therefore it is vital to study the opinion of the grassroot people. Huda[9] performed a study in the 14 districts of Bangladesh having the highest Hindu population and came up with surprising data. Even though no reform was done since 1937, 81% of the total respondents said that they would want daughter's inheritance to be ensured in presence of a son, only 17% responded negatively.[10] Those who responded negatively gave two reasons - firstly they claim that the prevalent practice of dowry often ends up giving more money to daughters than they could be entitled in their inheritance had there been a provision of inheritance for them. Secondly they fear that giving inheritance to daughters would encourage Muslim men to marry a Hindu woman for property and this might result in conversion.[11] Thus the dowry practice and insecurity of the minorities are the main reason for the exclusion of inheritance.

Even though the 81% of the respondents support inclusion of daughters in inheritance the government and Hindu , Budha, and Christian union front differs with the public opinion.This front is the largest body of the minorities group of Bangladesh, it is very influential in policies and decision making regarding the religious minorities. Instead of inclusion of daughters they are more inclined on setting some conditionality which ensure inheritance only for some female heirs such as; widows and only unmarried daughters. Advocate Rana Das Gupta who is the secretary of Hindu, Buddha, and Christian union front of Bangladesh has opined that Hindu widows should be given absolute ownership as having limited interest in the property. He also said that only unmarried daughters should be give inheritance on condition that the property will be given back to brothers upon marriage.[12] So obviously, the issue of absolute ownership to all female heirs and the inclusion of both married and unmarried daughters in presence of brothers is still neglected by the organization which represent the minorities of Bangladesh in policy making.

Though females suffer in general due to such discriminatory policy, the misery of widows in prticulr know no bound due to the limited ownership. Ruma Haldar[13] conducted a study on hundred widows to find out the socio-economic condition and to what extent they enjoy their limited ownership in the villages of Manikganj, Lakshipir, Arichaghat, and Barisal Zilla sadar of Bangladesh. The results were quite shameful, 96 out of 100 widows were capable of making household decisions and be able to hold a valuable position in the family. The 96% said that they were dependent on the joint families and as they had no right to sell the property without the other heirs consent and without establishing legal necessity and religious and charitable ground, they are practically a "slave".[14] Thus the widows misery are increased after the death of their husband's because of not having absolute ownership in property, and because they are unable to sell the property without the heirs consent. It should be mentioned that widow's remarriage is ground for exclusion from deceased husband's property.

Since the government and religious body have opposed the reform despite public opinion and constitutional and international standards, Dr Huda has called for uniform family code which would ensure

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[9] Shahnaz Huda, 2011. *Combating gender injustice: Hindu Law in Bangladesh*. Dhaka: South Asian Institute of Advanced legal and human rights studies (SAILS). The author is a professor of University of Dhaka who undertook the study with the assistance of SAILS, and with the support of Bangladesh embassy of Kingdom of Netherland.The study was a focused group interview in 14 highest populated Hindu districts of Bangladesh in the 7 divisions.

[10] *Ibid*

[11] *Ibid.*

[12] *Ibid. p.33*.

[13] Haldar, Ruma., 2005. "*Socio economic conditions of disinherited widows"*, published in The Daily Star,on 28th March,2005.

[14] Ibid. .

the matter of inheritance according to civil law as opposed to discriminatory personal law.[15] But the proposition of uniform family code was cancelled by Law commission of Bangladesh[16] in the report submitted to the government on the possibility of enacting a uniform family law was ruled out. For the reform of Hindu law the commission suggested that the Hindus are guided by the ancient Dharmashastras or religion which is incapable to be changed. When it was cited by the NGOs that India has changed the law, the commission replied that India did not touch the laws of the Muslims who are minority in India. The commission further said that the reform of inheritance introduced in 1956 in India does not apply Muslims, so Bangladesh should not be changing the laws for the minority too.[17].But in my opinion, the report emphasizes more on the suppression of the minorities as it tries to rationalize the non reform on the ground that India did not change the inheritance law for Muslims, it is more of a straw argument in my view. Actually contrary to the law commission's report, the case of reform of Hindu law in India could be helpful in reforming Bangladesh's inheritance law as well.

The position of Bangladesh government regarding reform of inheritance law before the CEDAW Committee

As noted before, CEDAW plays an important role to abolish discrimination against women. Among the six core UN conventions, CEDAW specifically tends to eliminate discrimination against women by calling for modifying or abolishing existing laws or customs which are discriminatory towards women. A huge number of states have ratified CEDAW and there is a monitoring body for its implementation. Bangladesh ratified CEDAW in 1984 with an aspiration to remove inequality against women. The CEDAW committee has repeatedly suggested to Bangladesh to remove the reservation and abolish the discriminatory laws, and to enact necessary legislation to implement international obligations under international human rights treaties which it has acceded to or ratified.

As a state party of CEDAW since 1984, so far Bangladesh has submitted 5 periodic reports to CEDAW committee. The last report was submitted in 2010 and was revised by the CEDAW Committee in 2011[18]. For the purpose of the paper it is essential to focus on the comments of the government representatives before the CEDAW Committee in the five periodic reports Bangladesh submitted so far. When the CEDAW committee first expressed concern about the reservation about art 2 in the initial reporting in 1987, the government responded that they will ensure that there will be a positive action in the next periodic report. But in the second periodic report submitted in 1990 to the committee, no such "positive action" was reported.[19] The government simply did not take any step to withdraw the reservation as expressed in the initial report. The defense of the government representative was "the provision of the personal law cannot be changed easily as they were based on religion". Nonetheless, the government again said they will take steps to withdraw the reservation. However, no indication of timeline was given as to when exactly the positive step will be taken. In 1997 in its 3rd periodic report, the government said that they will review whether or not it is possible to withdraw the reservation. They representative of Bangladesh said that art 2 has to be consistent with the religion. In the two periodic reports which were submitted by the government in 2003 and 2010 more or less held the same argument which involves repetition of the same excuse of religion, and ensuring the committee that government will take some positive action to repeal the discriminatory laws.[20] One thing needs to be mentioned that besides art 2, Bangladesh had couple of other reservations in CEDAW which they eventually withdrew, but they are not related to abolishing discriminatory laws particularly giving women equality in personal laws such as, inheritance. Due to the withdrawal of reservations, the citizenship act which now allows women to pass

[15] *Supra* note 7, p. 42.
[16] Office of the law commission of Bangladesh submitted a report to the government on 18th July ,2005, "Opinion on the study report for marriage , inheritance, and family laws in Bangladesh toward a common family code" , the report is available at the commission's official website at www.lawcommissionbangladesh.org, last accessed 22nd March, 2013.
[17] *Ibid,* pp.3-4.
[18] Andrew Byrnes and Marsha Freeman, *"The impact of CEDAW Convention: Paths to equality",* A World Bank Development Report 2012 on Gender Equality and Development, Washington : World Bank, 2011, p. 33.
[19] *Ibid*
[20] *Supra* note 13, p. 34.

citizenship to their children has been passed in 2009[21] but no significant improvement has been made regarding reform of personal law including inheritance law.

The Shadow report submitted to the UN CEDAW committee in 2010 by 22 NGOS of Bangladesh also called for the reform of discriminatory laws and claim that to improve the life of women of all communities personal law should be reformed beyond the sphere of religion.[22] They have proposed for a uniform family code based on civil law.[23] They have also suggested to reform the law beyond religion.. The Shadow report highlighted a significant point that the constitution of Bangladesh guarantees some fundamental rights to the citizens of Bangladesh which could ensure equality of Bangladeshi women.

Example of Reform of Inheritance Law in India

Huda brings the example of India where the majority of the people are Hindus. India has incorporated equal rights to succession by abolishing the old law in 1956. Now the female heirs inherit equally as a male heir and daughters are not excluded.[24] India changed the succession law in 1956, it should be noted that Bangladesh was a part of India until 1947. The laws which are currently in force in Bangladesh were enforced in India until India changed the succession law completely in 1956.

India reformed the succession law completely in 1956. Unlike India, Bangladesh still carries the century long inheritance law. The World Bank conducted a study in India and found interesting positive outcomes of the benefit of equal inheritance law in two provinces Karnataka and Maharashtra. The authors of the study Deningyer, Goyel, and Nagarjana[25] undertook a study in the 1371 rural households of the two provinces to compare the impact of inheritance law on women after the reform. By the survey in these 1371 rural households, they proved that inheritance is not only about economic empowerment, but also about improving a better position in the society. They found that the reform and ensuring equal inheritance of woman has indeed increased the level of education and has delayed the early age of marriage of women by 0.5 years. The law moderately increased the inheritance of women by 22%.They also found that after the reform women have gained more bargaining power with their prospect of marriage age , and have been able to participate in households decisions. For instance, they found that after the reform the women found better educated spouse and was able to favourably decide on their reproductive right. All these factors contributed positively to improve the socio-economic status of women in the two provinces.[26]

The India's case was cited to prove that Hindu law is capable to be reformed as India has more Hindus than Bangladesh. The impact of reform in India has indeed positive impact on rural women as indicated in the survey conducted by Deningyer, Goyel, and Nagarjana.[27]

Government's Initiative to Change Inheritance Law

Bangladesh government has been under pressure by the CEDAW Committee and the NGOs to implement CEDAW. In this light, recently the Bangladesh government proposed the draft of "Women Development Policy 2011" in April 2011 with a provision of equal rights for women and men to inherited property. This policy was quite revolutionary for women rights considering the fact that it challenged the Bangladesh's religious personal law which was enacted in the British period a century ago. As soon as the news of this policy surfaced the major fundamentalist groups (Mainly Muslim) organized violent protests against government calling for nationwide strike. The NGOs, however, supported the implementation of this policy and to abolish discriminatory laws such as inheritance law. This policy was made with intention to fulfill CEDAW obligations fully. But finally government withdrew its original position

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[21] Bangladesh State Party Report submitted to CEDAW Committee, 2010. Available at 0HCHR Website , last accessed on 22nd October, 2012, pp. 20-21.

[22] Alternative Report on CEDAW Committee, submitted by citizen's initiatives on CEDAW Bangladesh (CIC-BD), 2010. Dhaka:Bangladesh

[23] Shadow Report, p. 61.

[24] *Supra* note 7, p. 43.

[25] Klaus Deningiyer, Aparajita Goyel, and Hari Nagarjana, "*Inheritance reform and women's access to capital : Evidence from India' s succession Act."* Policy research working paper 5538, World Bank, Washington DC, 2010.

[26] *Ibid*, pp. 20-30.

[27] *Ibid*

and said that they did not mean to meddle in religious law based personal laws. In this regard a comment of Dr Ctiitta Ranjan Dash, the Bangladeshi representative in the minority forum of UNGA, Human Rights Council is worth mentioning. He said that the religion based politics, the fear of losing Hindu male voters who are actually the beneficiary of the present law, and the ignorance of Hindu women in policy making could be identified as the main reasons for the existing discriminatory legal framework.[28] He also said that, absence of Hindu women in the legislature could be another reason for the non reform. Out of 330 members of parliament, only one is a Hindu woman.[29] Clearly Hindu women lack in socio economic empowerment compared to other Muslim women and Hindu males.

Pereira, a Bangladeshi human rights lawyer also opines that "in an agrarian based society where the majority of the people are poor and illiterate, the sway of religion propagated by the religious leaders, has always been the strongest". She also mentions that patriarchy, colonial legal system, and the strong political position of the religious leaders have hindered the progress of reform of personal laws in advancement of women.[30]

Clearly Hindu women lack in socio economic empowerment compared to other Muslim women and Hindu males. As indicated in literature review, there have been many propositions for the reform. The shadow reports suggested to enact a uniform family code for both Muslims and Hindus. The CEDAW committee also suggested to abolish discriminatory laws for women. But the presence of strong fundamentalist groups, and also the reluctance of Hindu Christian Buddhist Union Front which is a quite influential body can be inferred as major constraints in enacting national law in consonance with CEDAW. Besides this religious front, Law Commission which periodically advises government in enacting or reforming legislation, this Commission was also against reforming the law.[31] However, in its recent reports, Law Commission recommended the Bangladeshi government to modify the inheritance law in Hindu Law. [32] The Commission has been previously opposing the reform, but in the two recent reports, the Commission conducted a focused group study and conducted a survey on 250 people of the three major cities-Dhaka, Chittagong , and Rajshahi. 86 percent of the participants were supportive of ensuring equal inheritance of women.[33] This is a positive change regarding the previous stringent position of Law Commission. In its early reports, the Commission were non supportive of the reform.

Findings

The CEDAW and the constitution have laid down the benchmark for reforming the discriminatory inheritance law. The question is whether the international and constitutional concept of equality in inheritance is supported by the grass root level. The studies of Huda and Halder in the grass root level were shown to understand the general trend of people regarding reform of inheritance law. 81% of the total respondents of Huda's study said that they would want daughter's inheritance to be ensured in presence of a son, only 17% responded negatively.[34] The 96% respondents of Haldar's study said that the widows were dependent on the joint families and as they had no right to sell the property without the other heirs consent and without establishing legal necessity and religious and charitable ground , they are practically a "slave".[35] Law Commission's survey as mentioned earlier , also proves that 86% of the respondents were in favour of the reform. Thus, it is clear from both the studies that the grassroot people are suffering much from the current inheritance law and more importantly as evident in both studies, people are in favour of reform. However, an interesting discourse from these studies of root level is obvious in the policy of the government when the government has repeatedly shown their reluctance to reform the inheritance laws in the name of religion in the five periodic reports submitted to the CEDAW Committee. The view of government is also evident in the minority group Hindu, Buddha, and Christian

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[28] Chitta Ranjan Das, "Discrimination Towards Hindu Women within the Legal Framework of Bangladesh", presented before Forum On Minority issue, United Nations General Assembly, Human Rights Council on 29-30 November, 2011. Last accessed on 10th August,2013.

[29] *Ibid*

[30] Faustina Pereira, "The fractured scales:The search for a Uniform personal code", Dhaka, University Press Limited, 2002, p. 88.

[31] Bangladesh Law Commission official Website, reports were published in 2003. Last accessed on 1st September, 2014

[32] Bangladesh Law Commission official Website, reports were dated on 12.02.2013 and 7.8.2012. Last accessed on 1st September,2014

[33] Report of Law Commission for reforming Hindu Law, p.13, published on 7th August, 2012.

[34] Huda, supra note p.32.

[35] Halder, The Daily Star: 26/3/2005.

Union Front, and in the report of Law Commission. But Huda's study indicates that the reason of non reform could be other than religion. According to Huda, the 17% who responded negatively for reform gave two reasons - firstly they claim that the prevalent practice of dowry often ends up giving more money to daughters than they could be entitled in their inheritance, had there been a provision of inheritance for them. Secondly they fear that giving inheritance to daughters would encourage Muslim men to marry a Hindu woman for property and this might result in conversion.[36] Thus the dowry practice and insecurity of the minorities are the main reason for the exclusion of inheritance.[37] Obviously the excuse of religion as stated by the government before the CEDAW Committee in the past 28 years for non reform is clearly not a bar in the eye of the grass root people. An important finding regarding government and religious body's defense of religion is that if the personal religious law is bar to reform the inheritance law, then the law should be reformed according to civil law. The NGOs shadow report to the CEDAW committee and Huda, Halder all have opined to reform the inheritance law according to civil law. Bangladesh is not a religious state by constitution, it is a secular state. So clearly, the civil law can be a good scope for the reform of inheritance law.

Conclusion

Bangladesh has a commitment to ensure equality for women according to international obligation undertaken by CEDAW by withdrawing the reservation. Both the CEDAW and the spirit of the constitution go against the non reform of discriminatory inheritance law. The notion of equality enshrined in CEDAW and the constitution is also supported by the mass grass root people as indicated by the studies discussed in the paper. But the CEDAW's international standard, the supreme law of land-the constitution, and the public opinion regarding reform has not been able to make government change their policies in respect of reforming the inheritance law. Organisations like Hindu, Christian union front of Bangladesh are also supporting government. In my view, the government and the bureaucratic organizations' defence of religion regarding reform is a result of lack of good will for repealing discriminatory laws for women in general .The defence of religion is cultivated due to lack of importance of women in laws and policies. The grass root Bangladeshi Hindu people, a major Hindu country like India would not have supported the reform of inheritance law if religion was actually an issue. Moreover, Bangladesh is a secular state by constitution, if religion is a problem for the policy makers they can reform the law by the civil law. Thus the bottom line is inheritance law can be reformed in so many ways, the only problem regarding any attempt of reform is clearly a lack of good will by the government and the bureaucratic organistions patronized by government. The discrimination has continued since centuries, now the rules need to be changed according to the international law, Constitution and public opinion.

[36] Shahnaj Huda, supra note

[37] Shahnaj Huda, supra note p. 32.

'Fatwa' Violence against Women in Bangladesh: A Socio-legal Approach

***Meher Nigar*[©]**

Abstract

Every year, a significant number of women are subjected to fatwa instigated violence in Bangladesh. Despite the rulings of the higher judiciary and different steps taken by the government, still fatwa continues to be used as a tool for violence against women. This article covers exclusively the fatwa instigated violence committed against rural women in Bangladesh. This study finds that the grounds on which fatwa issued, such as, adultery, having love affairs, oral divorce, etc. are not punishable offences under any law in Bangladesh. Moreover, the forms of punishment executed by fatwa are not sanctioned by any law in force in Bangladesh and thereby it constitutes a clear violation of existing laws in Bangladesh. This write-up attempts to show the extent of violence occurring in the name of fatwa, its impact on women's rights, the factors that allow fatwa and finally suggests integrated strategy to be adopted at policy and action level to eliminate this social evil.

1. Introduction

Violence against women and girls continues to be a global epidemic that kills, tortures, and maims – physically, psychologically, sexually and economically.[1] Even though most societies proscribe violence against women, the reality is that violations against women's human rights are often sanctioned under the garb of cultural practices and norms, or through misinterpretation of religious tenets.[2] The condition of women in Bangladesh is not an exception to this. For decades, they have been kept oppressed by religious fanaticism, superstition, oppression and various discrimination.[3] Particularly, the condition of rural women is more convoluted. In addition to the agonies generally suffered by them only because they are women, they are often victims of 'fatwa' violence. Fatwa or Islamic religious edicts which do very often result in extra-judicial punishment is continuing to be used as a major tool of violating women's rights in Bangladesh.

For the purpose of this write-up, the term 'fatwa violence' includes violence against women (including girls) which has been constituted in the form of fatwa issued in rural areas through *shalish,*[4] by Muslim clerics using religion. However, these practices are not unique to Muslims alone or to Bangladesh. The Hindu village '*panchayets*' in many villages of India and tribal regions of Pakistan-Afghanistan border are infamous for having a parallel quasi-judicial system based on local customs and practice.[5] Fatwa was in practice even in Roman reign, in ancient England.[6] Since ancient times, its practice shows that mainly the vulnerable segments, particularly the women, are the victims of fatwa. It has also been issued against authors, poets, novelists, or even against scientists. Whenever their work or creation challenges the traditional social norms, they became the target of fatwa. While recognizing that other forms of fatwa violence are equally worthy of attention, this write-up does not look at the fatwa issued against other classes of people rather against rural women only. It does not cover the origin of fatwa, or how it is in practice in different societies and different countries crossing the border of Bangladesh. In other words, this article exclusively covers the fatwa instigated violence committed against rural women in Bangladesh.

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[1] Domestic Violence against Women and Girls 2000, A Digest prepared on research carried out by the UNICEF, at 2. http://www.unicef-irc.org/publications/pdf/digest6e.pdf.

[2] *Ibid.*

[3] Barrister Tureen Afroz, 'CEDAW and the Women's Rights in Bangladesh-a promised Silver Lining', http://www.worldnewsbank.com/tureen-seminar.html.

[4] *Shalish* is an institution which goes back to traditional form of dispute resolution; It consists of local elders (usually the local elites including village elders, school master, Imam and so on) seeking compromise solution in local disputes on family or inheritance matters…..They have clearly no authority to try criminal cases. See also, Amnesty International, *Bangladesh: Fundamental rights of women violated with virtual impunity*, 1 October 1994, ASA 13/09/1994, available at: http://www.unhcr.org/refworld/docid/3ae6a9891a.html.

[5] *Adnan Karim, 'Fatwa: to be or not to be, that is the question', Law Chronicles Online, http://lawchroniclesonline.blogspot.com/2011/04.*

[6] Dr. Mohammed Hannan, *Bangladeshe Fatowar Itihas*, Bangladesh Nari Progati Sangha, 1998, p. 9.

This write-up attempts to set out the magnitude of violence occurring in the name of fatwa against women, and its impact on women's rights. Fatwa have been used to persecute women by-passing the established court system. Focusing on this fact, this research work studies the factors that allow fatwa and comes up with an integrated policy response to eliminate this social evil.

2. Fatwa violence against Women: a Synopsis

Every year, a significant number of women are subjected to fatwa instigated violence in Bangladesh. This section ventures to give a brief idea about the term fatwa and how it constitutes violence against women. It also explores how this extra- judicial punishment violates existing laws and women's rights including fundamental rights enshrined in our constitution.

2.1. Fatwa: An explanatory Note

'Fatwa' is an Arabic word which literally means 'legal opinion'.[7] Fatwa is the formal opinion of a *Mufti (*jurisconsult) upon the legal issues involved in a factual situation. The *Mufti* has to be a "competent legal scholar".[8] Thus, in Islamic law, for an opinion to be appropriately termed as 'fatwa', it must come from a *Mufti-* a consulting canon-lawyer in Islam, who upon application gives fatwa or legal opinion on points of canon-law (Encyclopedia Britannica).[9] Fatwa was developed early in Islam to interpret difficult questions not addressed by prevailing law. The word is derived from the root *fata*, or *fatah*, which means youth, newness, clarification, explanation.[10]

If the true essence of fatwa is examined, it is to be understood that the fatwa which is in practice in our country is not 'fatwa' in any sense; rather disguised as religious edicts, it is often abused as a tool for torturing and suppressing women. In Bangladesh, fatwa is issued through *shalish* usually to punish women for so-called anti-social or immoral activities[11] that may include their involvement in extra marital affairs, premarital pregnancy, not going through an intervening (*hilla*) marriage after oral divorce, etc. They are penalized by adopting different disgraceful and humiliating methods often amounting to a kind of violence.

Fatwa, in itself, is not abusive to Muslim society but it is the misinterpretation and misuse of the term and its misconceived practice that are dangerous to the society. When it is used for imposing extra-judicial punishment, at times cruel and inhumane, against innocent victims, it does not any more remain as only a religious phenomenon; it then crosses the religious boundary[12] and raises questions as to its social and legal stand.

2.2. Magnitude of the Problem: An Analysis

Fatwa is neither uncommon nor a recent phenomenon in Bangladesh. Since independence, Bangladesh has witnessed several cases of priests at mosques issuing fatwa trying to deliver informal justice on various issues but the rate of reported violent acts through fatwa against women has risen at an alarming rate, especially, since the early 1990's.[13] From 1990, fatwa being issued by rural clerics resulting in corporal punishment against women and men drew increasing attention from the media and human rights organizations nationally and internationally. The first case that catalyzed national response for the first time is Nurjahan's case. In January, 1993 a fatwa was pronounced against one Nurjahan in remote Chatokchara, Sylhet, for contracting second marriage though she was duly divorced by her first husband. She was required to stand waist deep in a pit and be pelted with stones by fellow villagers. Nurjahan's parents were also sentenced to 50 lashes each while her second husband was subjected to stoning. Nurjahan survived the stoning but committed suicide in utter indignation. Nurjahan's death was rapidly followed by several other egregious cases of what increasingly came to be known as 'fatwa violence'.[14]

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[7] Bangla Academy Arabic to Bengali Dictionary, (Dhaka 1993), at 1868.

[8] Fatwas Against Women in Bangladesh, Published by Women Living Under Muslim Laws (WLUML)1996,at11. http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/misc/fatwa-bangladesh-eng.pdf.

[9] Adnan Karim, *Supra* note *5. Law Chronicles Online, http://lawchroniclesonline.blogspot.com/2011/04.*

[10] http://www.positivearticles.com/Article/Fatwa/44174.

[11] Sharmeen A. Farouk, 'Violence against women: A statistical overview, challenges and gaps in data collection and methodology and approaches for overcoming them' (2005). http://www.un.org/womenwatch/daw/egm/vaw-stat-2005/docs/expert-papers/Farouk.pdf.

[12] Barrister Tureen Afroz, *Supra note 3.*

[13] Arafat Hosen Khan, 'Putting an End to Fatwa Violence' (2012), Volume 6, Issue 3, *Forum (a monthly publication of the Daily Star).*

[14] *Ibid.*

Immediately after the Nurjahan incidence in Sylhet, another Nurjahan was tried by village salish in Faridpur district on charges of adultery.[15] Kerosene was poured over her and she was burnt to death. In the same year, Feroza of Satkhira[16], accused of a relationship with a Hindu boy was similarly sentenced to public flogging with 101 lashes. She died shortly afterwards. Kadbanu of Rangpur[17] was forced into exile. All these incidents happened over a period of nine months only. Cases compiled by Ain O Salish Kendra (ASK), a human rights watchdog, from different newspapers show that between 1995 to 1997 at least 23 cases of fatwa instigated violence have occurred.[18] With the continuance of fatwa instigated violence, a demand to prohibit the Muslim clergy from issuing fatwa gathered momentum. In this context, almost a decade after the focus on fatwa violence first began, the High Court Division banned fatwa altogether. [19] The High Court Division on the basis of a newspaper report about a fatwa against one Shaheda Begum of Naogao, requiring her to undergo a *hilla (*interim) marriage*,* gave judgment on the matter in 2001. The judgment declared all kinds of fatwa to be illegal. Unfortunately two appeals were preferred against this judgment. While the appeal regarding the validity of fatwa was pending in Appellate Division, in 2009, a writ was filed by five leading women's rights organizations challenging the state's failure to address extra-judicial punishments imposed by *Shalishes.*

The High Court Division issued its judgment in 2010, criticizing the Bangladesh government for not protecting its citizens, especially women, from cruel, inhuman, and degrading treatment or punishment. Saying that the punishments contravened constitutional guarantees of the rights to life and liberty, the court directed the government to investigate and prosecute those responsible and to take preventive steps with awareness campaigns in schools, colleges, and *madrasas*. Despite these positive approaches of the civil society and the judiciary, fatwa continued. The issue became especially urgent when, in January 2011, a *shalish* in Shariatpur district in the Dhaka division ordered 100 lashes for Hena Akhter, an adolescent girl, for an alleged affair, though by most accounts she had reported being sexually abused instead. She collapsed during the lashing and ultimately died. Since Akhter's death, the local media has reported at least three suicides of girls following similar punishments.[20] Akhter's death caused a national outcry and then after more than 10 years, in 2011, the Appellate Division delivered the decision on appeal that was preferred against the judgment delivered in 2001.It came up with five-point directives. It restated that no punishment, including physical violence and/or mental torture in any form can be imposed on anybody in pursuance of fatwa. It held that fatwa can be issued only by "properly educated persons" and clarified that even where issued, they cannot affect rights, dignity or reputation of others, and they are not binding and cannot be enforced. That means, modifying the High Court Division ruling in 2001 declaring all kinds of fatwa to be illegal, the Appellate Division declares fatwa itself 'legal' when it is pronounced regarding religious matters, by properly educated persons; but punishments in pursuance of fatwa is 'illegal'. And on February, 2011, the HCD issued an order, in addition to the order issued in 2010, directing that the punishments in relation to fatwas are unconstitutional and punishable offences.[21] Obviously the year 2011 is very auspicious for victims and for those who stand against this fatwa practice. Although fatwa had been declared illegal a decade back, girls and women of the country still fall victims to fatwa. Statistics released by Ain-O-Shalish Kendro revealed that a total of 324 incidents of fatwa took place throughout the country from the years 2000 to 2011 and unfortunately, 77 cases only out of the total incidents were filed during the period.[22] A report carried by Deccan Herald of India on October 2011, shows that since 2000 to 2011 more than 500 women have been subjected to fatwa instigated violence in Bangladesh,[23] In the year of 2011, as per the data preserved by the Bangladesh Mohila Parishad, during

[15] 5. 5. 1993, at Sripur village, Madhukhali thana, Faridpur.
[16] 1. 9. 1993, at Kalikapur village, Kaliganj thana, Satkhira District.
[17] 1. 9. 1993, at Dewantoli village, Maniganj thana, Rangpur District. Kadbanu gave birth to a child allegedly following an extra-marital relationship. A group of young men accused her of zina and buried her waist deep in a pit prior to pelting her with stones. She was rescued by another woman, but she had to leave the village and has sought refuge elsewhere.
[18] Sultana Kamal, 'The Fate of Nurjahans' and the Constitution of Bangladesh', *Fatwas against Women in Bangladesh (A readers and compilation series),* published by WLUML. 1996, at 80.
[19] *Editor, the Banglabazar Patrika vs. District Magistrate and Deputy Commissioner, Naogao* (2000) (HCD).
[20] Bangladesh: Protect Women against 'Fatwa' Violence, Human Rights Watch, 2011, www.hrw.org/news/2011/07/06/bangladesh-protect-women-against-fatwa-violence.
[21] *Bangladesh Legal Aid and Services Trust vs. Govt. of Bangladesh* (2010) (HCD).
[22] Human Rights Report 2005, 2006, 2007, 2008, 2009, 2010,2011 –a regular annual publication by ASK, www.askbd.org/web/?page_id=430.
[23] 500 women fatwa victims in Bangladesh in past 10 years, Deccan Herald, February 14, 2011, www.ndtv.com/article/world/.

the months of January to July a total of thirty-three incidents of fatwa violence had taken place in the country.[24] Very recently, in Mirasarai, Chittagong a fatwa was issued against Asma Aktar, a house wife on allegation of adultery which declared that she would be buried chest-deep in the ground and stoned as punishment.[25] Though it was not executed, this incident unveils the fact that a decade preceding and a decade after the declaration of fatwa as illegal, violence instigated by the so-called religious decrees continues with the same force.

An analysis[26] done on fatwa cases reported from last 15 years, leads to the finding that fatwa issued against women mainly on the allegation of *zina* or adultery. A woman is charged with adultery for having love affairs, extra-marital relations, illegal/ sexual relations, pre-marital pregnancy etc. Another ground of issuing fatwa is oral divorce. Moreover, the analysis shows that *hilla* is the most practiced form of fatwa issued in oral divorce. Then, lashing, ostracizing, caning, whipping, stoning, blackening face are the forms in which fatwa are executed. A chronological account of different fatwa related incidents since 1990 shows one thing very clearly that whenever a new incident of fatwa violence occurs against woman with severe brutality, it shocks the conscience of the nation. Media plays active role to stop fatwa, civil society and NGOs move against it, raise their voice; rulings come from judiciary and promises from executive to take actions to stop fatwa violence. Then, after sometime the issue remains out of sight. Then again, fatwa is issued somewhere against someone and pokes the media, civil society, government and so on. But ultimately the situation remains unchanged. People were shocked to hear about one Nurjahan, one Hena Akhter but there are still millions of Noorjahans in rural Bangladesh whose plight and torture never get reported in the newspapers.[27] They are systematically tortured, punished and humiliated without having any recourse to the justice system.

2.3. Fatwa: a Tool for Violating Women's Rights

Fatwa violence against women continues unabated in Bangladesh. People's lack of knowledge about the law and religion, poor education and absence of social awareness are the key factors which allow fatwa to be issued.[28] Besides, reasons for such continuance include, among others, lack of political will, denial by the Government authorities, corruption and impunity.[29] Huge procedural gaps in the state interventions to prevent such violence, weaknesses in the legal framework, lack of gender sensitivity in the administration and poor law and order situation also play active role in rising violence against women.[30] Above all, the discriminatory socio-cultural attitudes rooted in the system and in the public mindset in general, the economic inequalities act as a root cause for all kinds of gender-based violence including fatwa violence.

In the preceding section of this write-up, it is pointed out that offences for which women have been subjected to fatwa are prominently adultery, 'oral divorce', having love affairs, rape, premarital pregnancy or extra-marital relations, etc. But the offences for which they received this punishment are not described as offence under any law in force in Bangladesh. For example, fatwa issued against women for *zina* or adultery but under our national law a women can not even be prosecuted for adultery.[31]

Women are harassed, whipped, stoned and have had their hair cut in the name of fatwa. Fatwa impose many corporal punishments which in many cases lead to victims' deaths. When a woman is verbally divorced by her husband she is subjected to *hilla* marriage. Sometimes village headmen marry such women and enjoy them in the name of *hilla* marriage. The forms of punishments, such as stoning, whipping, *hilla,* etc. that are inflicted by fatwa are imposed in the name of *'Shariat'* law. But, in Bangladesh, *the Muslim Personal Law (Shariat) Application Act,* 1937 provides that *Shariat* law may be

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[24] Fatwa thrives in Bangladesh on People's unawareness, News network (a non-profit organization), May 12, 2012, http://www.newsnetwork-bd.org/fatwa-thrives-in-bangladesh-on-peoples-unawareness/.

[25] The Daily star, 17 Oct.2012.

[26] This analysis is done by the author on the basis of data compiled by Resource Centre, BNWLA for 2000-2004, ASK in its annual Human Rights Report titled Human Rights in Bangladesh for 2006, 2007, 2008, 2009. *Manobadhiker Bangladesh 2010(an annual publication by ASK),* p. 172, and newspaper report.

[27] Barrister Tureen Afroz, *Supra note 3.*

[28] Sharmeen A. Farouk, *Supra* note *11.*

[29] Mid-term Assessment and Report on the Universal Periodic Review: Bangladesh, (Reporting Period: February 04,2009-February 03,2011), jointly submitted by the Odhikar and International Federation for Human Rights (FIDH), at-5-6.

[30] Dr. Mahbuba Nasreen, *'Elimination of violence against women in Bangladesh'*, (Daily Star, November 26, 2010).

[31] *The Penal Code, 1860,* s 497.

applied for Muslim females relating to their marriage, dissolution of marriage, etc. as mentioned in section 2 of the Act. But these issues are subject to the provisions of *the Muslim Family Laws Ordinance (MFLO),* 1961 and *the Muslim Marriages and Divorces (Registration) Act,* 1974, as these two laws regulate the procedure relating to Muslim marriages and divorces. These laws neither contain any provision allowing a private person such as Mufti, Moulana or Imam to administer marriages or divorces on behalf of the concerned authority nor anything for *hilla* marriage. Section 7(6) of the *MFLO*, 1961 clearly states that a wife whose marriage has been terminated by divorce can re-marry the same husband, without an intervening marriage with a third-person, unless such termination is for the third time so effective. So, when a woman is compelled to perform *hilla* marriage, it is an offence as it goes contrary to existing laws.[32] Besides, the forms of punishment by fatwa are not sanctioned by any law in force in Bangladesh.
In our country, only the Supreme Court, Courts established under the Code of Criminal Procedure and those constituted under special laws can adjudicate on offences[33] and can impose penalties. To the extent that traditional dispute resolution or alternative dispute resolution takes place, it is also required to be carried out in accordance with law and this cannot involve the imposition of penalties for conduct not recognized as offence under Bangladesh law.[34] So imposition of extra-judicial punishments by persons not authorized by law is itself an offence.

Moreover, fatwa amounts to a clear violation of the fundamental rights of women as guaranteed by Articles 31, 32 and 35 of *the Constitution of Bangladesh*. The combined effect of these articles show that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law; no person shall be convicted of any offence except for violation of a law in force at the time of commission of the act charged as offence and he shall not be subjected to torture or cruel, inhuman or degrading punishment or treatment. Hence, the victims are not treated in accordance with law. They often undergo cruel, inhuman punishment for an offence not termed as an offence under our national law which is a clear contravention of article 35 of our constitution. Fatwa violence still continues. Absence of authority of the fatwa giver, violation of victim's fundamental rights, contravention of existing laws and many other disabling factors can not stop this evil till today.

3. Combating Fatwa violence: Obligations of the State

States have concrete and clear obligations to address violence against women, whether committed by state agents or by non-state actors. States have an obligation to act with due diligence to prevent violence against women, to protect them, to hold perpetrators accountable and to provide justice and remedies to victims.[35]

Bangladesh has an obligation under international law to prevent, prohibit and punish torture and other cruel, inhuman or degrading treatment or punishment. It is also under an obligation to end discrimination against women as discrimination is the root of all forms of violence against women. These obligations are contained in a number of international treaties binding on Bangladesh, such as, *the International Covenant on Civil and Political Rights (ICCPR)* provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;[36] whereas, Articles 2 and 16 of *the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* states that states must prevent acts of torture and other ill-treatment.

In 1984, Bangladesh ratified *the Convention on Elimination of all forms of Discrimination against Women*, 1979, commonly known as CEDAW.[37] While the Convention does not specifically address violence, then CEDAW Committee, through its General Recommendation No. 19, addressed the concept of violence

[32] *BLAST and Others* V. *Bangladesh and others* [2010] (HCD).
[33] *Ibid.*
[34] *Ibid.*
[35] Ending violence against women From words to action, United Nations Publication, 2006, at iv.
[36] *ICCPR, Article 7.*
[37] While ratifying the CEDAW, Bangladesh made reservations to Arts.2, 13(a), 16(1)(c),16(1)(f). Later, it removed reservation from Arts. 13(a), 16(1)(f), and still maintains reservation to Arts. 2 & 16(1) (c). Article 2 commits states to agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. Art Article 16(1)(c) states about equal rights and responsibilities during marriage and at its dissolution.

and its relationship to the obligations set out in the Convention, specifying responsibilities of State Parties with regard to violence against women. By ratifying the Convention, the Bangladesh Government binds itself to implementing its provisions which provide that state-parties should ensure in every sphere of life, that women enjoy all the human rights and fundamental freedoms.[38]

Bangladesh is a party to *the Charter of the United Nations*. Hence, Bangladesh is under an obligation to promote universal respect for all, to ensure 'gender equality' and to combat 'discrimination against women', pursuant to Articles 55(c) and 56 of *the Charter of the United Nations*.[39] Bangladesh has endorsed the Platform for Action (PFA) of the Fourth World Conference of Women held in Beijing in 1995 without any reservations[40] and since then, the Government of Bangladesh has identified violence against women as a priority issue. Bangladesh placed its commitment to ensure its implementation at national level. In the national context, article 27 of *the Constitution of Bangladesh* guarantees equal protection of the law for all of its citizens, including women. Article 28 of the Constitution expressly prohibits discrimination amongst citizen on grounds of religion, race, caste, sex or place of birth. A combined study of these articles obviously leads one to conclude that women in Bangladesh are guaranteed equality with respect to men before the law in every matter except for those covered by the personal laws.[41]

4. Strategies and Interventions: An Integrated Approach

An effective strategy is one that is designed to be culture and region-specific, providing victim-survivors easy access to wide-ranging services, involving the community and individual stakeholder in the design of interventions.[42] This section of the article attempts to formulate a framework for coordinated action at the policy and program level. By focusing on the stakeholders and by highlighting the responsibility of the victim segment, the local community, the civil society, the state and the international organizations, this framework points to relevant areas of action. These areas are not mutually exclusive rather interventions may overlap several areas at once.

Women

To stop fatwa violence, the initiative must start from the women themselves. As their life and dignity are at stake, they should be made the most significant actor in this struggle. The traditional socio-cultural practices with repressive and negligent attitudes towards women, the concepts of patriarchy and masculinity largely contribute to the ongoing violence against them. Even worse is the women's lack of awareness about their rights irrespective of their educational or social status. So, the only way to counter this evil is to create greater awareness amongst the general people which would change attitude towards women positively to recognize their capacity and rights; to empower the women through education, employment and legal literacy and finally to motivate them to face this violence by strong organization. It is always the best way to fight collectively instead of fighting individually. If the fatwa affected women including the others stand united, obviously fatwa can be countered and stopped. A strong victim women's organization can protest practice of *hilla* or other unethical activities by so-called religious preachers; can take the rape or other criminal cases before court; can make the victims feel they are not alone and helpless and this feelings encourage them to stand against the wrong done against them. When the collective strength of the affected people is stronger than that of the fatwa giver, certainly it will lessen the extent of the incidents of fatwa violence.

Local Community

Local community is the most important factor while taking different strategies to combat fatwa violence. Fatwa is passed in public through *shalish* but the people attending the *shalish* hardly protest the *shalish* verdict though most of the time it amounts to extra-judicial punishment having no legal standing. One reason is that, they do not even know that fatwa is not law, not to mention who has the authority to issue

[38] Barrister Tureen Afroz, *supra note 3.*
[39] *Ibid.*
[40] The Platform for Action (PFA) is an agenda for women's empowerment. It was adopted by the Fourth World Conference on Women in 1995. It calls upon governments to take action to address several critical areas of concern, among them violence against women. It also requires all governments to develop strategies or national plans of action to implement the Platform locally.
[41] Barrister Tureen Afroz, *Supra note 3. The Muslim Personal Law (Shariat) Application Act,* 1937*, S 2* provides that *Shariat* Law will be applicable to Muslim females relating to certain issues enshrined therein.
[42] *Supra* note *35, p.* 14.

it. In others, declaring them in the name of religion persuades many people to support it. Their lack of knowledge on Islamic law and its confined interpretation facilitate the local elites to continue with this evil. Hence, every strategy must emphasize enlightenment of the entire society to the crimes instigated by fatwa. Community information and education regarding the nature and unacceptability of fatwa violence should be developed. Community elders and religious leaders have the responsibility to demonstrate leadership in this area. Religious leaders should be encouraged to re-examine the doctrines and cultural practices that lead to the subordination of women and violation of their rights. They should play strong role in developing newer form of cultural norms that respect women and promote their safety and dignity. Creating awareness about the impact of fatwa violence on communities conveys the importance of preventing such violence against women.

Civil Society

Civil society can act as a pressure group to make government work positively in fatwa violence issue. A large number of national and international NGOs are presently working in Bangladesh. Many of them are involved in gender-specific programs to benefit women. Several NGOs including the Women's activists are playing crucial roles in implementing PFA, CEDAW, MDG,[43] through acting as pressure groups. They have undertaken various programs to strengthen the capacity building of women and of state interventions to combat violence against women.

The media plays key role in both influencing and changing social norms and behavior. It can help to reverse social attitudes that tolerate violence against women by questioning patterns of violent behavior accepted by families and societies.[44] It is seen that mainly the print media is very conscious of the issue of fatwa violence in Bangladesh. Role of electronic media in this field is not satisfactory. But, most of the people in rural areas are illiterate and they don't have adequate access to news papers or other printed information. It is easy to communicate to them any information through electronic media. Hence, a conscious effort to make media professionals aware of the issues can play an important role in addressing 'fatwa' violence. Alternative media channels such as theatre groups, puppeteers, musicians and performers of all sorts, who have acceptability to the rural people, have a role to play in raising public awareness against the issue.

Academia and research organizations should address the chronic lack of statistics on fatwa violence that acts as a barrier to policy change on this issue. Reliable data on the magnitude, consequences, and the economic and health costs of gender-based violence will help to place the issue on the policymakers' radar screen. Researchers need to identify best practices in prevention and treatment, and evaluate them for effectiveness. Greater collaboration is required between research and academic institutes, women's organizations, and NGOs when conducting qualitative research to deepen understanding of the causes and consequences of fatwa violence on women. Such research needs to be fed back to the community so that it can lead to awareness and transformation.

The State Machinery

Bangladesh is party to almost all core human rights treaties[45] including the *CEDAW*, and other human rights instruments on women's rights. It removed some of the reservations to *CEDAW* which constitute positive measures to address violence against women. Similarly, the inclusion of the principle of equality of men and women in the constitution, in accordance with international standards, enhances the framework to combat violence against women. Bangladesh, in addition to general criminal laws, enacted a number of special laws to cover different forms of violence against women, such as *Domestic Violence (Prevention and Protection) Act*, 2010; *the Prevention of Repression Against Women and Children Act*, 2000 (amended in 2003) etc. Though there is no specific law covering fatwa violence, the existing legislations on women's rights are conducive to combat this iniquity.

The Government has undertaken policy measures to implement the *Beijing Platform for Action*. *The National Policy for the Advancement of Women* and *the National Action Plan for the Advancement of*

[43] Millennium Development Goal (MDG) pledges explicitly to combat all forms of violence against women to implement the *CEDAW*. 2015 is fixed as timeline to achieve MDG goals.

[44] *Supra note* 1, p. 16.

[45] A report presented by Bangladesh in response to the recommendations made during the UPR of Bangladesh on 3 February, 2009, p. 2, www.upr-info.org/IMG/pdf/followup-bangladesh-odhikar.pdf.

Women are two significant initiatives of which principal focus is to eliminate gender disparities in the areas of law, economics, society and the family.[46] Bangladesh established *One- Stop Crisis Centers (OCCs)* in all six Divisions for victims of violence. [47] These centers provide victims with emergency medical treatment, police assistance, legal aid and shelter facilities. Non-governmental organizations are working closely with the Government in raising awareness on preventing violence against women. The Bangladesh Directorate of Women's Affairs has launched a 24-hour call centre open to all victims or potential victims (women, men, children) of violence. The helpline provides immediate service to victims and links up to relevant agencies: doctors, counselors, lawyers, DNA experts, police officers etc. It is accessible from all parts of Bangladesh and through any mobile network.

Despite all these positive steps taken by the state, the ultimate truth is that violence against women in Bangladesh is continuing. Unfortunately, Governments, of past and present, even though being aware of such cruel and inhuman activities carried on in the name of religion and fatwa, have never taken any strong action to prohibit such activities. It is really frustrating that the role of all the Governments has been limited only to post-incidence consequences like visit to the victim and providing consolation to the family. Besides, extreme reluctance to lift the reservation on Article 2 of *CEDAW* shows a lack of commitment to improve the situation and status of the women in Bangladesh. Bangladesh has two landmark judgments on fatwa delivered by the Apex court. It clearly highlights the points to be considered in matter of fatwa, such as, it must come from properly educated person or it can not affect one's right, reputation or dignity etc. The positive approach of the judiciary in matter of fatwa issue definitely is of help to protect women from fatwa violence.

Although the judgment by the Supreme Court appeared promising, women's rights activists in Bangladesh remain skeptical. Together with Human Rights Watch, ASK, BLAST and Nijera Kori, BRAC has compiled a list of actions for the government to follow to facilitate the execution of the Supreme Court's judgment. It includes implementing awareness campaigns, establishing 24 hour help-lines, improving access to safe shelters, providing psychological support and legal services, and finally monitoring investigations and prosecutions to ensure perpetrators of extrajudicial punishments are being held accountable.[48] Considering the actions recommended by the higher judiciary and the leading women's organizations, this write-up comes up with the following action plans:

- Government should immediately withdraw the reservation on Art.2 and 16.1 (c) of *CEDAW* and implement *CEDAW* obligations by adopting relevant policy and strategy.
- It must take steps to incorporate all signed and ratified international human rights instruments in to municipal laws. In line with this, Government should reform all discriminatory personal laws.
- At present, there are a number of laws on protection of women's rights in Bangladesh. Some of the laws are directly and some are indirectly related to violence against women. But dealing under a special law rather than by a general provision begets more effective outcome in any matter. So, a special law on fatwa can be enacted or at least, incorporation of a specific provision on fatwa in existing legislations may be of use in this regard.
- State must not confine itself to the enactment of the laws only but also stress its proper execution by bringing the perpetrators under the purview of law, by providing the victims with necessary assistance including adequate compensation and protection and by presenting a safe environment for the victim survivors.
- A systematic effort has to be made that must not only cover the protection from but also prevention of fatwa violence. It can generate massive awareness against the fatwa violence which includes educating everyone in schools, colleges, and madrasas about the fact that punishments under the garb of fatwa are illegal and to regularly publicize these messages through print and electronic media. To this end, Government can work in close collaboration with the NGOs working in this field.
- The Supreme Court in a ruling in 2010 ruled that fatwa can be issued by 'properly educated persons' only but is silent to define the properly educated persons. As such, it makes room for the

[46] *Supra note 33*, p. 4.
[47] *Ibid*.
[48] *Cori Fleser, 'Fatwa' Violence Against Women Continues', August, 2011, http://blog.bracusa.org/2011/08/fatwa-violence-against-women-continues.html.*

abusive use of this power. Hence, to avoid this misunderstanding, government can form a formal body with the authority of issuing fatwa. With proper authority vested in a body, such arbitrary misuse of fatwa may cease.

- A systematic data collection mechanism on violence against women should be developed. An accurate and systematic reporting of violence incidents by governmental and non-governmental organizations can contribute to develop an effective strategy in this issue. Police, One-Stop Crisis Center, local government and NGOs can maintain computerized database on the violence including fatwa violence. A routine community based prevalence studies on this issue by state and the NGOs can do much in this field.

International Organizations

International organizations such as the United Nations, its bodies and specialized agencies have placed the issue of violence against women on their agendas. By advocating with national governments, and by supporting programs run by both governmental and non-governmental organizations, these organizations can play critical role to prevent and reduce fatwa instigated violence against women in Bangladesh. For example, the Universal Periodic Review (UPR)[49] under the auspices of Human Rights Council, CEDAW sub-committee,[50] etc. are working to improve human rights including women's rights situations in Bangladesh.

5. Conclusion

Violence against women by imposing illegal punishments in the name of fatwa continues. It continues despite their being declared illegal by the High Court Division. It is alarming that instead of continued proactive role of the HCD, new cases of beating, isolation, public humiliation; all imposed in the name of fatwa are being reported in the media. That means, this evil is so deep rooted that it can not be eradicated by mere legislation or judicial interference rather it requires political will and positive commitment at the highest levels to make it a priority locally, nationally, regionally and internationally.

Eliminating the practice of issuing fatwa against women remains one of the most serious challenges of our country. While Bangladesh has a strong set of laws to tackle violence against women, the implementation remains poor.[51] The problem here is manifold. The government's role is not satisfactory in this matter. Government adopted women friendly laws literally, but in practice, it neither implements the laws related to addressing the incidence of violence against women, nor do the victims get any recourse under the flawed and dysfunctional criminal justice system. Our socio-cultural attitudes towards women and collapsed rule of law system create more room for victimization of women. Besides, public institutions and state agencies in Bangladesh are largely made up of men, all of whom belong to a society with repressive and negligent attitude towards women-who are seen as inferior creatures-contributing to the ongoing discrimination against them.[52] In many fatwa violence incidents, it is reported that not only is justice not served but in addition, the victims are re-victimized for reporting their perpetrators. There are many cases where woman's grievances are not only denied by the local authorities, but the accused took upon themselves the responsibility of punishing her for speaking out against them, with apparently no action being taken by the local police. Such gross transgressions of justice by the law enforcing agencies will discourage victims of crime from coming forward and reporting violence occurred against them.[53] Moreover, the measures taken by the authority to combat violence against women including fatwa violence proved inadequate as those do not have any preventive approach; there are laws which only focus the punishment of the perpetrators. So, a comprehensive and integrated approach guided by the concept of prevention, protection, early intervention by the states, accompanied by a strong accountability mechanism is critical for resisting fatwa violence

[49] Bangladesh's first UPR took place on February 3, 2009 and the second will be held after four years.

[50] CEDAW sub-committee in co-operation with others has undertaken a series of awareness raising program in Bangladesh on the issue of violence against women.

[51] Universal Periodic Review: HRW Submission on Bangladesh 16th UPR session, April - May 2013, April 18, 2013 , http://www.hrw.org/news/2013/04/18/universal-periodic-review-hrw-submission-bangladesh.

[52] *Bangladesh: Manifold struggles needed to realize women's inherent right*, Bangladesh Desk, Asian Human Rights Commission, 2011 Ethics in Action, Vol.5 No. 6, http://www.ethicsinaction.asia/archive/2011-ethics-in-action/vol.-5-no.-6-december-2011/bangladesh-manifold-struggles-needed-to-realize.

[53] The Daily Star, (editorial), Oct.18, 2012.

Although, significant work has been undertaken by States, NGOs, Women's groups and the judiciary to address fatwa violence, at the same time, much more remains to be done. The 2011-2012 Progress of the World's Women report produced by UN Women speaks to the efficacy of "well-functioning legal and justice systems" as "vital mechanisms" through which women can access their rights.[54] To develop this mechanism, the government needs to play an integral role in this process. Bangladesh participated in the Universal Periodic Review (UPR) process at the UN Human Rights Council on 29 April 2013 in the 16th Session of the UPR Working Group in Geneva, Switzerland. Here, it is noted that Bangladesh has some positive achievements in protecting women's rights, such as, adoption of *National Women's Development Policy* 2011 expressly referring to *CEDAW*, and reiterating promises of gender equality in various sectors, High Court directives (since 2009) declaring extra judicial punishments in the name of fatwa (2010) as unconstitutional etc. At the same time, discriminatory personal laws and policies denying equal rights of men and women, inadequate enforcement of law, social stereotypes, stigma, lack of witness and victim protection contribute to continuing violence against women including fatwa case.[55] In this context, states participating in the dialogue posed a series of recommendations to Bangladesh. These pertained to the following issues among others: to step up efforts to prevent violence against women including by ensuring proper enforcement of laws and prosecution of offenders; to implement the national development policy for women; to lift remaining reservation to the *CEDAW*, etc.[56] So, Bangladesh should set goals to fight violence against women keeping in mind these recommendations. While emphasizing responsibility of the concerned authorities to do the needful in preventing and punishing fatwa related offences, it is also responsibility of the community at large to take a stand against such barbarism, by protesting it, reporting it and supporting the victims in their fight for justice.

[54] *Supra* note *40.*

[55] Human Rights Forum Bangladesh UPR Stakeholders Report, Summary March 2013, http://www.askbd.org/web/wp-content/uploads/2013/02/Human%20Rights%20Forum%20Bangladesh%20-%20UPR%20Stakeholders%20Report%20-%20Summary%20March%202013.pdf.

[56] Universal Periodic Review – MEDIA BRIEF, 26 April 2013, http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights26April2013am.aspx.

Higher Education Tax Benefits on Qualified Education Expenses: an Experience of U.S. Tax Law

Abul Hasnat Muhammed Salimullah[©]

Abstract

This paper investigates the IRS (Internal Revenue Service) tax code that provides a variety of tax incentives for qualified tuition and related expenses of the students who are enrolled in eligible educational institutions and for the families who are saving for or already paying higher education costs or are repaying student loans. The individual may be able to claim a tuition deduction up to a certain amount from his or her taxable income for a qualified educational expenses paid during a certain fiscal year or may be able to deduct interest that he or she pay on a qualified student loan. Various reasons are accustomed for education tax benefits and this tax strategy gaining increasingly importance over the federal higher education tax policy. The purpose of such studies is to determine how the incidence of this tax policy is allocated among the consumers and the educational institutions, which sector will bear the excess burden of the taxes and find out the arguments in favor and against the policy. The political benefits of government sponsored tax benefit for higher education are clear as well.This is evidenced in part by the fact that so many states have picked up on the concept in such a short time. More precisely the federal income tax law does not give an allowance for personal costs of higher education rather tuition, fees and other costs can be used toreduce federal income tax liability.

1. Introduction

Higher education is a cherished desire for all, but the main hindrance is the skyrocketing tuition and other education related expenses that force people to change their decision. Supporting higher education in various forms (such as loans and grants/aid) is an old concept. For example, the first scholarship was established by Lady Anne Radcliffe Mowlson at Harvard University in 1643 and the first student loan program initiated at the same institution in 1840.[1] However, to make it more affordable for taxpayers and to increase the number of enrollments, both the federal government andstate governmenthave taken various initiatives. Of them education tax benefits have become an increasingly important component of federal higher education policy.Presently, fourteen tax benefits are available for college students andtheir parents to help pay for higher education. The available tax benefits are anassortment of credits,deductions, exclusions, and other incentives. The benefits can be placed into one of three general categories: incentives for current year expenses, preferential tax treatment of student loans, and incentives for savings for college. Significant tax benefits may apply to taxpayers who are repaying student loans or currently paying for post-secondary education. Therefore, it is important to keep organized records to take advantage of these tax benefits.The Joint Committee on Taxation (JCT) estimates the cost to the federal government of education tax benefits—the revenue foregone from offering these benefits—to be $78.9 billion between 2011 and 2015.[2] In this paper we will discuss about the tuition and fees deduction and the interest deduction on student loan that is allowed under the Internal Revenue Service (IRS) tax code. A deduction on tuition and fees means reduces the amount of individual's income that is subject to tax, thus generally reducing the amount of tax that a person may have to pay. Individual taxpayers can deduct the cost of college tuition for themselves, their spouses and their dependents. This tax deduction can reduce individual taxable income by up to $4,000 (the equivalent of up to an $800 reduction in their tax liability, depending on federal income tax bracket). In other words, the tuition and fees deduction is a federal income tax adjustment that reduces the amount of income that is taxable. It is not the same as a tax credit (A tax credit reduces the amount of taxes that a person owes). The deduction is available for any person (except of non-resident alien) who paid tuition and other required fees for attending college, or any other post-secondary school. Parents can deduct tuition for their kids as long as the parents claim the student as a dependent. However, the deduction is

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[1] History of Student Financial Aid; http://www.finaid.org/educators/history.phtml

[2] Margot L. Crandall-Hollick (Sept. 25,2012) Higher Education Tax Benefits: Brief Overview and Budgetary Effects; Congressional Research Service; CRS Report for Congress

not available for married couples who file separate tax returns. The analysis isolates several of the purposes a higher education tax benefit might serve-perfecting the definition of taxable income;improvingtax equity; subsidizing education; redistributingincome, wealth or educational opportunity; correcting misallocation ofeducation resources-and examines the issues and approaches eachpurpose suggests.[3] This paper is an outcome of desk-work and based on secondary sources.

2. Historical Background of Tax Deduction

Tuition tax deduction proposals are not new. In the late 1960s and early 1970s, tuition deduction proposals were introduced, in both federal and state arenas, as measures to rescue the private schools. Private schools were, at that time, threatened by declining enrollments and increasing operation costs.[4] Many feared that private schools might collapse. Governmental intervention might protect parental choice to preserve their constitutional right to select private as well as public education alternatives and private schools performed a valuable public service by delivering education to a sizeable number of students.The government continued subsidizing the private schoolsthrough provisions that protected or extended tax exemptions, tax deductible donations, and general safety and security services such as police and fire protection. However, in the 1980s, tuition tax deduction proposals have been advanced as measures to rescue the public schools.According to Harvard Law Review in 1960, 60 per cent of American families had an income of less than $6,000 before taxes. In this same period the typical annual expenditure of a college student varied from about $1,000 to over $2,000.[5]Low family income, then, probably is a significant factor in preventing students from attending college. And of those who begin college but drop out after the first year, the principal cause is financial matters. The solution to the students' problem could come about either through a reduction of the expenses which must be borne, as through reducing tuition or tax expenses for parents, or through increasing the availability of scholarships and loans, perhaps through incentives to private giving. Leslie (1976) inspects that with the passage of the Education Amendments of 1972, the considerable national interest in higher education tax allowances temporarily abated.[6]The emergent idea that carried at that time, however, was a credit against tax liability, or a "tax credit," for ordinary higher education expenses. Whereas increased educational tax deductions and exemptions would have significantly aided those in high tax brackets, tax credit proposals would have aided primarily those of more modest means. Caroline Hoxby (1998) investigates the economic effects of provisions related to higher education in the Taxpayer Relief Act of 1997.

The paper summarizes the major initiatives: Hope Tax Credits, Tax Credits for Lifelong Learning, Education IRAs, and tax deductibility of interest on student loans. The paper describes the incentives that these provisions generate for attending college and discusses the question of whether the people who most need to attend college are the ones most likely to be induced to attend by the new initiatives.[7]She then synthesizes the existing literature on how federal government funds for higher education affect the tuition charged by colleges and universities, and it assesses the likely consequences of the new provisions for tuition. At the end the paper unveiled the probable effects of these initiatives on family saving and on the degree of effort and planning that students put into college. In an early paper Daniel McGarry (1973)[8] revealed that several reasons are accountable why tuition costs for higher education should be included among allowable deductions in calculating income tax. He anticipated that paying tuition costs for higher education is a contribution to the public welfare, whether such costs are paid for indirectly as taxes or directly as tuition, and whether they are paid for the education of children at large or for the education of one's own children. Public higher education is supported by the state precisely because it is a public welfare activity. According to him Tax deductions and tax credits are often provided to encourage businesses and investments that are beneficial to the economy and to the public. More

[3]John K. McNulty Tax Policy and Tuition Credit Legislation: Federal Income Tax Allowances for Personal Costsof Higher Education; California Law Review, Vol. 61, No. 1, (1973); pp. 1-80.

[4] Betty Malen and Jennifer Kranz The Effect of Tuition-Tax-Credit Deduction Proposals on Social Values: An Analysis of Probable Costs and Consequences; Journal of Education Finance, Vol. 15, No. 2, (1989); pp. 244-268; University of Illinois Press.

[5] The Harvard Law Review Association (1962);Federal Tax Incentives for Higher Education; Harvard Law Review, Vol. 76, No. 2 (Dec.1962), pp. 369-387

[6] Larry L Leslie (1976); Higher Education Tax Allowances: An Analysis; The Journal of Higher Education, Vol. 47, No. 5 (Sep. - Oct., 1976), Ohio State University Press, pp. 497-522.

[7] Caroline M. Hoxby Tax Incentives for Higher Education; Tax Policy and the Economy, Vol. 12 (1998), pp. 49-81; The University of Chicago Press, (1998).

[8] Daniel D. McGarryThe Case for Tax Deductibility for College Tuition;The Phi Delta Kappan, Vol. 54, No. 6, (1973).

recently, 2 additional tax benefits were enacted, bringing the total number of education tax benefits to 15, although only 14 are in effect in a given year, since the Hope Tax Credit was temporarily replaced by the American Opportunity Tax Credit (AOTC) for the 2009 and 2010 school years. These are an above-the-line deduction[9] for higher education expenses (the "tuition and fees" deduction) was authorized by the Economic Growth and Tax Relief Reconciliation Act of 2001 (P.L. 107-16) and the Hope Credit was enacted as part of the American Recovery and Reinvestment Act of 2009 (ARRA; P.L. 111-5).[10]The other important Acts that have been approved by the US senate regarding to this deduction benefits are Higher Education Reconciliation Act of 2005 (HERA 2005), College Cost Reduction and Access Act of 2007, Ensuring Continued Access to Student Loans Act of 2008 (P.L. 110-227), The Higher Education Opportunity Act of 2008 (PL 110-315) and The Health Care and Education Reconciliation Act of 2010 (P.L. 111-152) etc. While the tuition and fees deduction has been around since 2002, this deduction which was set to expire at the end of the year 2013 has been extended. Individual are allowed to claim in 2014 the Tuition and Fees Deduction on their 2013 tax return.

3. Eligibility Criteria for Tuition and Fees Deduction

The tuition deduction is not restricted based on what year of college the individuals are in, or if he/she is a part-time or full-time student. Taking even one class can qualify a person for this deduction. Besides there are other reasons for which a person must have qualified higher education expenses:

- Deduction can be incurred during enrollment in at least one course of postsecondary education or professional development at an eligible institution of higher education.
- Individual's modified adjusted gross income (MAGI) must be in 2013:
  - $65,000 or less (single) / $130,000 or less (married filing jointly) for the full deduction
  - $80,000 or less (single) / $160,000 or less (married filing jointly) for a partial deduction
- Qualified education expenses include: tuition, required course related expenses (books, supplies, equipment), and mandatory student activity fees (less the amount of certain scholarships and grants that the student may have received).
- A person may not claim both an education tax credit and the Tuition and Fees Deduction for the same student for the same year. However, he/she may claim a credit for one student and the Tuition and Fees Deduction for the other.
- An individual may claim this deduction for themselves, their spouse, or someone whom they claim as a dependent on their tax return. However, if they are claimed as a dependent on another person's tax return (e.g., someone's parents' tax return), only the person who claims him/her can apply for the deduction.[11]
- An individual may not claim this deduction if his/her filing status is "married filing separately."
- The individual may not claim this deduction if he/she has deducted tuition and fees expenses under any other provision (such as a business expense).

4. QUALIFIED STUDENT LOAN INTEREST DEDUCTION

Qualified student loan is a loan that one can take out solely to pay qualified education expenses that are:

- For the person, their spouse, or a person who was the dependent of that person when an individual took out the loan.
- Paid or incurred within a reasonable period of time before or after the person took out the loan.
- For education provided during an academic period for an eligible student.

Generally, personal interest that an individual pays, other than certain mortgage interest, is not deductible on their tax return. However, if a person's modified adjusted gross income (MAGI) is less than $75,000 ($150,000 if filing a joint return), there is a special deduction allowed for paying interest on a student loan (also known as an education loan) used for higher education.[12] Student loan interest is interest that a person paid during the year on a qualified student loan. It includes both required and voluntary interest payments.For most taxpayers, MAGI are the adjusted gross income as figured on their federal income tax return before subtracting any deduction for student loan interest. This deduction can reduce the amount

[9] Above-the-line deductions, unlike itemized deductions, are available to all tax filers. Taxpayers who claim the standard deduction cannot benefit from itemized deductions

[10]Margot L. Crandall-Hollick (Sept. 25,2012) Higher Education Tax Benefits: Brief Overview and Budgetary Effects; Congressional Research Service; CRS Report for Congress

[11] See also http://www.irs.gov/publications/p970/ch06.html and http://www.irs.gov/taxtopics/tc457.html

[12]See also http://www.irs.gov/publications/p970/ch04.html and http://www.ohe.state.mn.us/mPg.cfm?pageID=115

of their income subject to tax by up to $2,500.The student loan interest deduction is taken as an adjustment to income. This means the individual can claim this deduction even if he/she does not itemize deductions on Form 1040's Schedule A.Loans from the following sources are not qualified student loans:

- A related person.
- A qualified employer plan

For purposes of the student loan interest deduction, following expenses are the total costs of attending an eligible educational institution, including graduate school. They include amounts paid for the following items:

- Tuition and fees.
- Room and board.
- Books, supplies and equipment.
- Other necessary expenses (such as transportation)

When calculating a person's deduction, he/she has to remember to include the following as education loan interest:

- Loan origination fees (usually a percentage of the amount borrowed).
- Capitalized interest (the unpaid interest on a student loan that is added to the loan's outstanding principal balance).
- Interest on revolving lines of credit (provided the line of credit is used only to pay for qualified education expenses).
- Interest on refinanced student loans (both consolidated and collapsed loans)

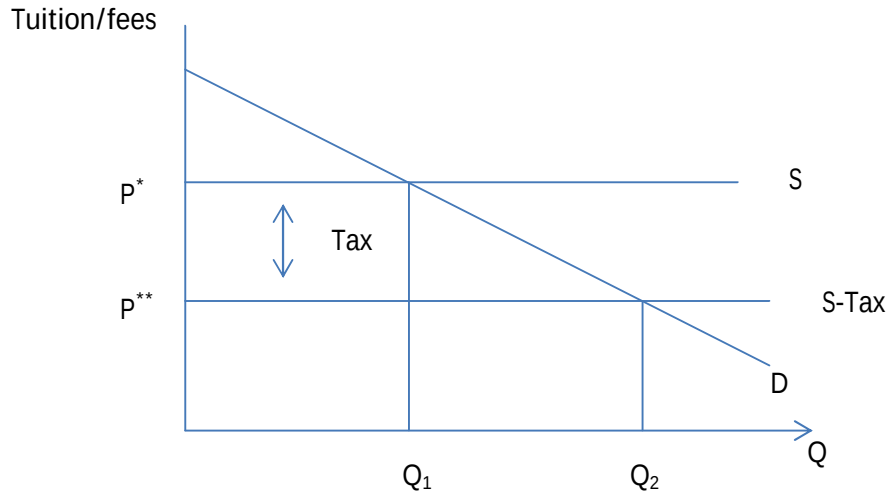
Generally, one can claim this deduction if all four of the following requirements are met:

- Individual's filing status is any filing status other than married filing separately
- No one else is claiming an exemption for the individual on his or her tax return.
- The individual has to pay interest on a qualified student loan.
- The person is legally obligated to pay interest on a qualified student loan.

5. ECONOMIC INCIDENCE OF THE POLICY

Economic incidence or the final tax advantages will be inherited by the individuals who get this tuition and fees deduction under the tax benefits for higher education policy. The government will lose the tax revenue under this benefit. The tax revenue that government will lose is exactly equal to the area of consumer surpluses with incorporating now the area of the deadweight losseswhich supposed to be occurredas the efficiency loss if there would be a positive taxation. This substance is illustrated in the following figure:

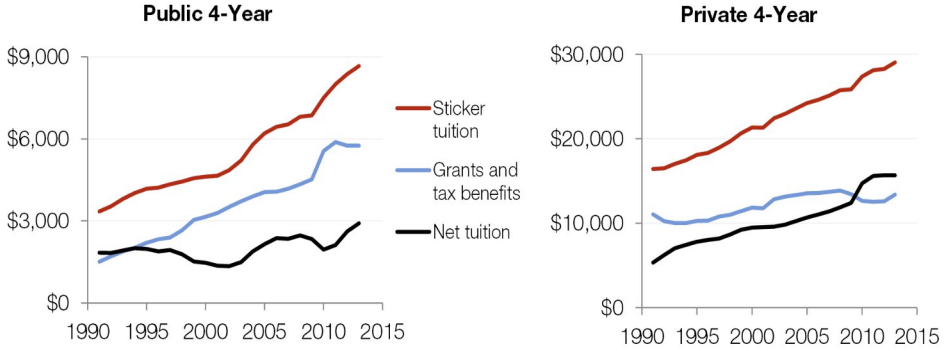
Figure1:Incidence of tax deduction over enrollment



Some economic experts have argued that the graduate students also can avoid the indirect burden of the tax in the form of reduce tuition and fees.This will in turn influence the individual for enrollment to the graduate college. Nonetheless the higher education institutions would raise their tuition and other charges since the tax benefit lowers the cost of beneficiaries. Few studies demonstrate that college enrollment in the U.S. has grown rapidly since the mid-1980s, with almost 20 million undergraduates enrolled each

year.The vast majority of students (73 percent) attend public institutions, ranging from local community colleges to large research institutions.18 percent of students attend private non-profit schools, a category which includes private universities, liberal arts colleges, and small religious institutions. Though for-profit schools have existed for decades, they have recently become a larger share of postsecondary education and have experienced rapid growth in enrollment. At present9 percent of students are enrolled at for-profit schools. Beginning in the 1990s, increased availability of financial aid has helped offset increases in posted tuition, resulting in fewer students paying the full posted price. While average posted tuition (excluding room and board) at instate, four-year and public schools increased from $3,350 to $8,660 between 1991 and 2013, "net tuition", which is posted tuition minus average grants and tax benefits for those who received aid, increased from just $1,840 to $2,910.[13] The College Board reports that while posted tuition has increased steadily since 1997, increases in net tuition have been more moderate. Posted tuition (excluding room and board) at a four-year, public school steadily increased from approximately $3,350 in 1991 to $8,660 in the 2012-2013 school year. Net tuition grew from $1,840 to $2,910 over that entire period. The following figure 2 will demonstrates a clear idea about the trend:

Figure 2: Changes in Posted Tuition Compared to Net Tuition



Source:Trends in College Pricing 2012; The Economics of Higher Education: A report prepared by the Department of The Treasury with The Department of Education (December, 2012)

Here "net tuition"[14] is calculated as posted tuition minus grants and tax benefits. Prices are in constant dollars measured in the year 2012. Figures do not include room and board. The combination of growing tuition and accumulating aid intensifies the difference in actual amount paid between those who receive grants and those who do not.

6. Economic Arguments in Favour of the Policy

Higher education is a precarious mechanism for individual socio-economic advancement and an important stimulus of economic mobility. Moreover, a well-educated workforce is vital to every nation's future economic growth. American companies and businesses require a highly skilled workforce to meet the demands of today's increasingly competitive, global economy. While postsecondary education has become increasingly important, there have also been growing concerns about the cost and affordability of higher education.Research universities also devote significant resources to knowledge creation and innovation, which benefits not just the university and its students, but also the general public.Therefore, the tax benefits for the education related expenses offered by the federal government have the following favorable arguments:

- The economic returns in the form of higher education remain high and provide a pathway for individual economic mobility. Society provided a significant subsidy to young people through the widespread availability of inexpensive public higher education
- Over the past several decades, a substantial shift in the overall funding of higher education has been introduced from state assistance in the forms of grants and subsidies to increased tuition borne by students

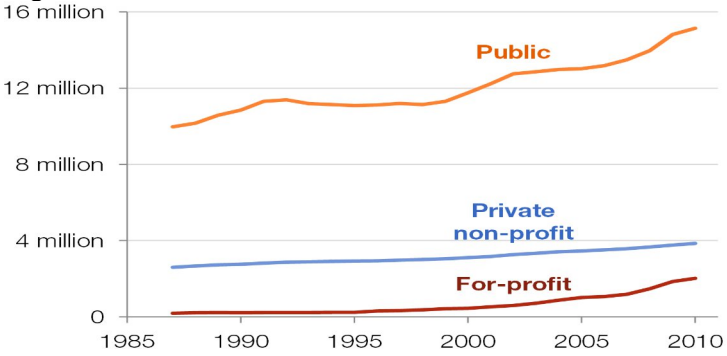
[13] Thomas D. Snyder & Sally A. Dillow Digest of Education Statistics 2011 (NCES 2012-001); National Center for Education S tatistics; Institute of Education Sciences, U.S. Department of Education. Washington, DC, (2012).

[14] Net tuition also nets out private and employer scholarships. These data are not directly collected by the Department of Education; the College Board estimates these values based on survey data from scholarship providers.

- The Federal Administration has offset some of those increased costs with recent increases in educational support through tuition and fees deduction, interest deduction on student loan and the American Opportunity Tax Credit
- The financial benefits of earning a college degree are well-established; higher education may also bring non-financial benefits to graduates as well as benefits to the economy at large. Report reveals thatcollege graduates retains in better health, mortality rates are lower and have high civic engagement, and are less likely to draw on the social safety net
- The permutation of decreased state subsidies for higher education and increased federal spending on financial aid and tuitiondeduction represents a shift in responsibility for paying for college toward a greater responsibility on students, families, and the federal government

Enrollments at public, private non-profit, and private for-profit institutions have grown since the mid-1980s, as shown in the following figure 3. Here the growth in college enrollment is driven by increases in both the total number of college-aged individuals and the propensity of high school graduates to attend college.In 1990, the population of 18 to 24 year olds was approximately 27 million; by 2010 the size of this demographic group was almost 31 million. The Department of Education (ED) estimates that of the 2.9 million people who finished high school in 2010, 68.1 percent (approximately 2.2 million) enrolled in college that same year.[15]

Figure3: Total Enrollment over Time



Source: Trends in College Pricing 2012; The Economics of Higher Education: A report prepared by the Department of The Treasury with The Department of Education (December, 2012)[16]

One decade earlier, in 2001, only 61.8 percent of recent graduates enrolled in college right out of high school (1.6 million of 2.5 million).Today, the vast majority of students (73 percent, or 14.8 million out of 20.4 million) attend a public school. Private non-profit institutions account for 18 percent of students (3.8 million), and 9 percent attend a private, for-profit institution (1.9 million).

7. Arguments against Tax Benefits

The tax benefits available are either, a tax credit, deduction, exemption, or exclusion. While these terms are sometimes used interchangeably, they are different. In the context of socio-economic and historical perspectives economists argue that the tax deduction which is the individual taxable income reduction by up to $4,000 is not sufficient enough for the mounting tuition and educational expenses. Therefore, how much benefit will they achieve from this kind of deduction is questionable. The following are the reverse arguments for this kind of policy that are frequent from the view points of the economists:

- Deductions reduce a taxpayer's tax liability, but only by a percentage of the amount deducted depending on the taxpayer's highest marginal tax bracket. Hence, deductions are generally less valuable than a given dollar amount in tax credits.
- Would have allowed deductions only for tuition, fees, and books, while others wanted to extend the benefit to all types of college expenses, including meals, lodging, and travel costs. Yet another type of proposal would have provided an additional personal exemption for full-time students.

[15] Census Bureau (1990, 2010a). While the number of 18 to 24 year olds increased in the past two decades, young adults make up a slightly smaller fraction of the total population today (9.9 percent) than in 1990 (10.8 percent)

[16] Digest of Education Statistics (DES) 2011 (Snyder &Dillow, 2012). Figure includes both undergraduate and graduate students; graduate students constitute between 10 and 15 percent of total enrollment.

- Treasury's historical arguments against the deductions of taxable income. Most plans involved considerable revenue loss. Troublesome under any circumstances, US Treasury argued that such losses would also tend to reduce other resources devoted to education.
- In most cases, Treasury argued, the tax cut would be too small to be a deciding factor in whether or not to attend a college. Universities, moreover, were likely to raise tuition in response to the new allowance, further undermining its effectiveness.
- New allowances for education expenses would complicate tax laws and administration, Treasury contended, particularly hampering efforts to simplify individual income tax forms and create complexity and bothering taxpayers with addition sub-forms.

8. Economic Distortions caused by the Policy

Economists often criticize special tax exemptions, credits and deductions because they make people do things for tax reasons that otherwise make no economic sense—something economists call "economic distortion." But economic distortion is an abstract concept. It's hard to illustrate to journalists and others how millions of tiny tax-induced distortions in the economy can total up to a huge economic loss for the nation as a whole, reducing everyone's well-being. Of course, tuition and fees deduction and the interest deductions on a qualified student loan make sense as financial moves for individual taxpayers. But from the perspective of the economy as a whole, they represent actions that are driven by distortionary tax policy rather than sound economic reasoning. All that effort spent trying to minimize tax burdens undoubtedly represents real economic waste- waste that Members of Congress inadvertently encourage through the propagation of distortionary credits, deductions and exemptions throughout the tax code.Once a policy is adopted it can never be stopped especially anything related to tax cut or deduction. In the future new demand will be placed for more of tax deductions on higher education. The families who bear these opportunities for higher education will be better off in future than those who didn't have a chance to get these benefits. As a result the "Pareto optimality" will no longer be observed and hence 'the theory of first best' also not achieved. If one takes a general equilibrium perspective, it is not clear who benefits from government incentives for tuition and fees deduction to higher education. From tax incidence analysis we know that the inelastic side of the market reaps the benefits, regardless of whether the tax deductions are allocated to the demand or supply side of the market. In fact, universities have absorbed the massive increases of enrolment in education without much trouble in many countries. This suggests that supply is quite elastic. One is tempted to conclude that the larger part of the incidence of education tax benefits falls on the students despite the fact that in most countries universities receive the government contributions. But in reality graduate schools also increase tuitions, may be that captures some of the benefits. It is important to note that the tax benefits may become more progressive with time. The income phase-out levels are defined in nominal dollars, and there is no provision to index the benchmarks to inflation or changes in income. Therefore, greater numbers of upper-income families will become ineligible for a tax benefit with each year. Moreover, the relative distribution may change as families from different backgrounds become more aware of the benefit.[17]

9. Supporters of the Policy

It is hardly believed that political parties are the main supporter of the policy not only for greater interest of promoting higher education but also for their interest on favorable voting atmosphere. Almost all of the past presidents of the United States commenced and stimulating education tax benefits in different ways. When first introduced by former President Clinton during a June 1996commencement speech at Princeton University, the tax credits were to utedas a step toward making "the 13th and 14th years of education as universal to all Americans as the first 12 are today" (Greenwood 1996). However, the proposal also reflected Clinton's intention to provide targeted tax reliefto the middle class(Purdum 1996). As a model for the proposal, Clinton used the Georgia Helping Outstanding Pupils Educationally (HOPE)Scholarship. This politically popular program had been instrumental ingetting Governor Zell Miller reelected by appealing to the concerns of middle class voters (Applebome 1996).In a similar fashion, Clinton set program earnings limits that targeted middle-income families and promotedthe credits as a reward to students who worked hard in school. Furthermore, as a tax benefit, the proposal was viewed as being more helpful to the typical middle-class family than a tax cut (Purdum 1996).To justify the middle-

[17] Bridget Terry Long, The Impact of Federal Tax Credits for Higher Education Expenses; Harvard Graduate School of Education and faculty research fellow of the National Bureau of Economic Research, (2012).

income target, government officials assert that the tax credits serve a need since the middle class makes up a large proportion of college participants but is excluded from other federal grant programs (Stolland Stedman 2001). In response to recent trends, such as the rise in posted tuition, the Obama Administration has also implemented several new policies to provide relief for students and their families.In 2010 legislation, IBR (income-based-repayment) plan was made more generous starting in 2014, with a lower maximum on payments (10 percent instead of 15 percent) and forgiveness after 20 years (instead of 25 years). And in fall 2011, the Administration announced its new "Pay as You Earn" program that would provide similar benefits to new borrowers starting in 2012.[18]Other than that non- profit organizations, charitable institutions and NGOs are also supporter of this policy. Families with dependents are the major beneficiaries' of the policy no doubt about that they will like the policy and place their support to the next government who upholds this policy to a greater extent.

10. Conclusion

Higher education tax benefits are receiving renewed attention at the federal level. Although tax credit legislation has passed the Senate on several occasions, each time deletion has occurred in conference. Previously, legislation has been offered in an attempt to overcome the shortcomings of preceding bills, while going a considerable distance in meeting the principal tax deductions goals of aiding middle income students and private institutions. Nevertheless Federal tax benefits reduce financial burdens the most for students and families who are expected to pay the most, as determined by the federal need analysis used in student financial aid programs. The federal Hope tax credit, the Lifetime Learning tax credit and the tuition and fee deductions assist student and families in paying for postsecondary education. Unlike student financial aid programs and practices, federal tax benefits are reimbursed though the filing of federal individual income taxes after students and families have incurred qualifying out-of-pocket postsecondary education expenses.[19] This education tax benefits and student financial aid are not mutually exclusive as some students and families receive federal tax benefits, federal Pell Grants and State Grants.

[18] The Economics of Higher Education; A Report prepared by the Department of TheTreasury with the Department of Education; December 2012

[19]Jack Rayburn (October 2008); Federal Tax Credits and the Federal Tuition and Fee Deduction; Minnesota State Grant Review, Minnesota Office of Higher Education.

Implementation of Income Tax Laws in Bangladesh: A Critical Analysis of Contemporary Trends and Issues

Muhammod Shaheen Chowdhury[©]

Abstract

Income tax is an important source of mobilizing internal resources of an economy. This article precisely reviews the major problem areas in implementing income tax laws in Bangladesh and suggests some innovative and effective ways to improve the state of compliance of tax legislations. It figures out the overall taxation structure in Bangladesh and determines how the burden of personal and corporate income taxes is ascertained. It also focuses on the scope of tax amnesty and different weaknesses in the existing taxation system. The paper then suggests, in appropriate cases, some ways out, guidelines etc. to prevent tax evasion and the non-compliance of income tax laws in order to increase the volume of tax collections in Bangladesh. The findings and recommendations presented here might constitute the bedrocks for a better income tax system in Bangladesh and to make her tax net broader, revenue buoyant and equitable.

Introduction

Tax revenue is one of the major sources of mobilizing internal resources of an economy to meet a country's revenue and development expenditures with a view to accomplishing some economic and social objectives, such as redistribution of income, price stabilization and discouraging harmful consumption. Governments levy taxes for distribution of tax burden among individuals or classes of individuals involved in taxable activities, or to redistribute economic resources among the people. The term 'tax' has been derived from the French word *taxe* and etymologically, the Latin word *taxare* is related to the term 'tax', which means 'to charge'. Tax is 'a contribution exacted by the state'. It is a non-penal but compulsory and unrequited transfer of resources from private to public sector, levied on the basis of predetermined criteria. Taxes differ from other sources of revenue in that they are compulsory charges and are unrequited - i.e., they are not paid in exchange for some specific thing, such as the sale of public property or the issue of public debt.[1] According to Article 152(1) of the Constitution of Bangladesh, “taxation” includes the imposition of any tax, rate, duty or impost, whether general, local or special, and “tax” shall be construed accordingly. Under the provision of article 83 of the Constitution, "no tax shall be levied or collected except by or under the authority of an Act of Parliament". The imposition, regulation, alteration, remission or repeal of any tax is dealt with by the 'Money Bill' introduced in the Parliament (*Art 81, the Constitution of Bangladesh*).

The taxation system of a democratic country predominantly reflects the values of its citizenry or the people in power. In order to create a healthy and rational taxation system, a nation must comprehensively determine some core issues, such as, the distribution of the tax burden- who will pay taxes and how much they will pay- and how the taxes collected will be spent. In countries where the public does not have a significant amount of influence over the system of taxation, that system may be more of a reflection of the values of those in power. While taxes are presumably collected for the sake of the welfare of taxpayers as a whole, the liability of the individual taxpayer is independent of any benefit received. The trends and issues of taxes is a fundamental question in determining fiscal policies of a country. The study of tax incidence is the study of the effects of tax policies on the distribution of economic welfare.[2] It is the study of who bears the economic burden of tax, that is, who is legally responsible for paying the tax. Broadly put, it is the positive analysis of the impact of taxes on the distribution of welfare within a society.[3]

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[1] Vide: http://dictionary.reference.com/browse/tax; http://www.thefreedictionary.com/tax ; http://www.investorwords.com/4879/tax.html and http://en.wikipedia.org/wiki/Tax ; all accessed on 30 Sep, 2013.

[2] Kotlikoff, L.J. and Summers, L.H. (1987) *Tax Incidence*, Handbook of Public Economics, Chapter 16, pp 1043 – 1092, edited by A.J. Auerbach and M. Fledstein (North – Holland).

[3] Fullerton, D. and Gilbert E. Metcalf (2002) *Tax Incidence*, *NBER working paper series,* Working paper no 8829, Cambridge, MA 02138 . Also, http://en.wikipedia.org/wiki/Tax ; accessed on 30 September, 2013

It begins with the very basic insight that the person who is under a legal obligation to pay taxes may not be the person whose welfare is reduced by the presence of the tax. The statutory incidence of tax refers to the distribution of tax payments based on the legal obligation to remit taxes to the government. The economic incidence of a tax is the change in the distribution of private real income produced by a tax. It differs from the statutory incidence because of changes in taxpayers' behavior and consequent changes in equilibrium prices.[4]

Objectives of the Study

The revenue structure of Bangladesh used to rely on taxes from indirect sources for long time and has been characterized by heavy import and excise duties. However, due to globalization and other factors, such scenarios have started to change and the ratio margin between direct and indirect taxes has been becoming very closer. It has become preferential for the Government to collect more money from income taxes which share almost all taxes coming through direct sources. The principal objective of the article is to critically examine the trends and issues of income tax in Bangladesh and how to improve the scenario in order to build up an effective tax management system. To accomplish this, following specific objectives are to be covered:

a) To determine how the burden of individual and corporate income taxes is allocated among different taxpayers in Bangladesh.

b) To critically analyze income tax regulations regarding different aspects like collection of taxes, scope of tax amnesty and implementation of income tax laws etc.

c) To make a critical evaluation of the problems and weaknesses of income tax collection in Bangladesh.

d) To propose innovative and effective ways out (legal, administrative, economic or fiscal reforms) to broaden the horizons of income tax and increase collection of income taxes.

Revenue Structure of Bangladesh

The National Board of Revenue (NBR) is the apex authority for tax administration in Bangladesh and collects almost 82% of total revenue for the country (*Bangladesh Economic Review 2012*). It was established by the President's Order No. 76 of 1972 and is under overall administrative control of the Internal Resources Division (IRD) of the Ministry of Finance (MoF), Government of the Republic of Bangladesh.[5] The Secretary, IRD is the ex-officio Chairman of the NBR. It is responsible for formulation and continuous appraisal of tax-policies and tax-laws, negotiating tax treaties with foreign governments and participating in inter-ministerial deliberations on economic issues having a bearing on fiscal policies and tax administration. It is divided into three following wings: a) Customs & Excise, b) Value Added Tax, and c) Income Tax. The main responsibility of the NBR is to collect domestic revenue (primarily**,** Import Duties and Taxes, VAT and Income Tax) for the government. Other responsibilities include administration of all matters related to taxes, duties and other tax producing fees.[6]

The national board of revenue (NBR) collects around 93% of total taxes or 80% of total public revenues.[7] The NBR portion of total taxes includes customs duty, value added tax (VAT), supplementary duty (SD), excise duty, income tax, foreign travel tax, electricity duty, wealth tax (collected as a surcharge of income tax since fiscal year 1999-2000), air ticket tax, advertisement tax, gift tax and miscellaneous insignificant taxes. Other taxes (amounting to around 7% of total taxes or 5% of total public revenues) are often referred to as 'non-NBR portion' of tax revenue. These taxes include narcotics duty (collected by the Department of Narcotics Control, Ministry of Home Affairs), land revenue (administered by the Ministry of Land and collected at local *tahsil* offices, numbered on average & one in every two *Union Parishads*), non-judicial stamp (collected under the Ministry of Finance), registration fee (collected by the

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[4] Tapan K Sarker, *"*Incidence of income taxation in Bangladesh*"*, p.2*; Web:* www.citeseerx.ist.psu.edu/.../download? accessed: 10/06/2013

[5] MoF has 4 Divisions, headed by 4 permanent Secretaries to the Government, namely, the Finance Division, the Internal Resources Division (IRD), the Banking Division and the Economic Relations Division (ERD).

[6] National Board of Revenue, web: http://www.nbr-bd.org/about.html , accessed: 20 June 2013

[7] Vide, Bangladesh Economic Review 2012. Contribution to tax revenue was 99.16% of total revenue collection as against 0.84% from non-tax revenue in 1972-73 FY. During that time NBR collected 97.12% of total revenue receipts. In 2009-10, out of total revenue collection of the government, share of tax revenue was 83.11% and 16.89% came from non-tax revenue and 79.59% had been collected through the NBR. Vide, web: http://www.nbr-bd.org/about.html , accessed: 20 June 2013

Registration Directorate of the Ministry of Law, Justice and Parliamentary Affairs) and motor vehicle tax (collected under the Ministry of Communication).[8]

The tax structures in Bangladesh like most of the taxation systems in the world are classified into two broad categories, viz., direct & indirect taxes. Direct taxes consist of taxes on income (income tax, corporation tax) and taxes on property (wealth tax, gift tax, estate duty, capital gain tax, urban property tax, land revenue/land development tax, registration and non-judicial stamp, immoveable property tax). Indirect taxes consist of customs duty, excise duty, motor vehicle tax, narcotics and liquor duty, VAT, SD, foreign travel tax, TT, electricity duty, advertisement tax, etc. Because direct taxes represent nearly 30% of total taxes, tax-structure is still heavily dependent on indirect taxes, which are usually of regressive nature. Of the direct taxes, around 80% come from income tax, the rests are drawn from non-judicial stamp, land revenue, registration and other minor direct taxes[9]. Indirect taxes (representing above 70% of total taxes by the end of 2012 FY), which are still the primary source of internal resources in Bangladesh, are mainly import-dependent. Around 67% of indirect taxes are collected at import stage by customs authorities as customs duty (38.0% of indirect tax or 30.7% of total tax), Value Added Tax (24.3% of indirect tax or 19.6% of total tax), and Supplementary Duty (4.7% of indirect tax or 3.8% of total tax). The remaining of indirect taxes (representing around 26.64% of total taxes) include taxes collected on domestic production, consumption or transactions such as VAT (11.4%), SD (11.6%), excise duty (1.5%), foreign travel tax (0.7%), electricity duty (0.6%), motor vehicle tax (0.7%), narcotics duty (0.2%), TT (0.03%), air ticket tax (0.01%) and advertisement tax (0.001%). Public revenue also comes from non-tax receipts such as surplus of sector corporations, financial institutions, railways, postal department, telegraph and telephone, judicial stamp, etc, and these non-tax revenues represent around 19% of total revenues.[10]

The total internal resource generation due to revenue earnings has been accounted for 11% of the gross domestic product (GDP) of Bangladesh in 2009-2010 fiscal years. Tax revenue in general has generally contributed 80% towards the total revenue earning of the country in the recent years. Average annual growth of total tax revenue for the FY1982-91 period was 13.8%; it came down to 11.8% during FY 1992-01. However, the average annual growth picked up between FY2002-10 to 14.2%. The recent buoyancy in revenue that led to higher tax to GDP ratio of domestic based taxes relative to international trade based taxes is also attributable to various reforms undertaken on the domestic tax front.[11] The share of income taxes contributes almost to the entire direct taxes. Although revenue collection from income taxes has been increasing since the late 90s of the last century, it is still insignificant corresponding to the total tax revenue. The share of direct taxes has averaged a little improvement albeit not attained expected consistency as needed.[12]

An analysis of periodic averages of direct and indirect taxes in Bangladesh shows that the share of taxes on domestic goods and services hovered around a quarter of total tax revenue. Customs duty (import tariff) used to be the pre-eminent contributor to the revenue envelope in the early 1980s- accounting for 35.4% of the total tax revenue (FY 73-80) and 32.6% in 1990s. Import duty has been declined throughout the last decade though still maintaining major share of taxes on foreign trade and more than 30 percent of the total tax revenue. Excise taxes declined very sharply as taken over by VAT since late nineties. VAT at import stage is earning an average of 20 percent tax revenue. The total revenue from VAT is increasing steadily which seems the only positive sign for the country. Dependency on customs duty after the introduction of VAT declined steadily to 16.8% in the recent decade, and to 14.8% in FY 2010-11.[13] Thus in order to respond to the challenges of globalization and rapid shrinking of tariffs, it seems necessary, as viewed by experts, to overhaul the tax structure and to concentrate

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[8] Mansur and Yunus , "An Evaluation of the Tax System in Bangladesh", Log in: http://www.theigc.org/sites/default/files/sessions/bangladesh_gw2011_allpresentations.pdf , accessed on: 12/10/2013

[9] See the report from: http://www.nbr-bd.org/nbr_annual_report_2010-2011/Part-2-A.pdf

[10] *Supra* note-1; Also see: http://www.nbr-bd.org/nbr_annual_report_2010-2011/sharony/Saroni-3.pdf

[11] Policy research Institute of Bangladesh, web: http://www.theigc.org/sites/default/files/sessions/bangladesh_gw2011_allpresentations.pdf

[12] Annual Report of the National Board of Revenue (2009-2010) / web: http://www.nbr-bd.org/nbr_annual_report_2009-2010/part-1.pdf,

[13] *Supra* note-11; Also, web: http://www.nbr-bd.org/Revenue-Development_Report-2010-11.pdf

more on widening the tax base for VAT and income taxes.[14]

Income Taxation System in Bangladesh

Income tax (which is imposed on 'total income' of the taxpayers) in Bangladesh is regulated by the following laws and regulations: a) Article 83 of the Constitution of Bangladesh, b) The Income Tax Ordinance, 1984, c) Income Tax Rules, d) Statutory Rules And Orders (SRO), e) The Finance Act passed by the Parliament in every year, f) Rules, explanations made by the NBR under section 185 of the Income Tax Ordinance, 1984. The main legal source of taxation in Bangladesh is Article 83 of the Constitution which requires an enabling Act of the Parliament to impose taxes on the taxpayers. Income Tax officer imposes tax on the assessee according to the Income Tax Ordinance, 1984. Under section 44 of the Ordinance, the Deputy Commissioner of Taxes and any higher tax officer can allow tax exemption according to the procedures laid down in Schedule 6. Part A of the Schedule 6 provides a list of income which are non-assessable. Tax should be calculated by excluding these income from the list of total income. Again, Part B of the 6th Schedule lays down a bunch of investment sectors where an assessee can invest his/her income and get tax rebate due to those investments. For example, investment in insurance, deposit pension scheme, relief fund of the Prime Minister etc.[15]

Taxpayers under the Income Tax Ordinance 1984 are classified as individuals, partnership firms, Hindu undivided families (HUF), associations of persons (AOP), companies (publicly traded and private), local authorities, and other artificial juridical persons. Tax rates and scope of taxable income differ on the basis of residential status of an assessee (resident or non-resident).Taxpayers can submit tax return under 'self-assessment' or 'normal' scheme. In the classified income tax return, an assessee has to show his/her total taxable income under 7 heads of domestic income[16] and 1 head of foreign income. Individuals having income from salary, wages and/or self-employment can use a eight-page tax return to be submitted only under 'self-assessment' scheme, where only 3 heads of income are to be shown - 2 heads for domestic 'salary' income (gross and taxable) and other head for all other domestic/foreign incomes. Tax-base for income taxation is 'annual total income' computed with consideration of a number of 'exclusions' provided in Part-A, Sixth Schedule of the ITO. The Government is empowered to supplement the statutory laws by circulating Statutory Rules and Orders (S.R.O.). The National Board of Revenue has overall jurisdiction to interpret the provisions of the Laws and Regulations for clarification in imposing taxes. Besides, under section 82BB a new provision has been introduced in the Ordinance providing an option for universal self assessment. According to this, the tax officer will accept the return of the asseessee without any question if submitted under universal self-assessment system. However, the authority can audit any tax return which will not exceed 3-4% of the total tax files submitted under section 82BB.[17]

Calculation of taxable income may be determined under accounting principles used in the jurisdiction, which may be modified or replaced by the relevant principles of tax laws. The incidence of taxation varies by system, and some systems may be viewed as progressive or regressive. Rates of tax may vary or be constant (flat) by income level. Many systems allow individuals certain personal allowances and other non-business reductions to taxable income. Personal income tax is often collected on a pay-as-you-earn basis, with small corrections made soon after the end of the tax year. These corrections take one of two forms: payments to the government, for taxpayers who have not paid enough during the tax year; and tax refunds from the government for those who have overpaid. Income tax systems will often have deductions available that lessen the total tax liability by reducing total taxable income. They may allow losses from one type of income to be counted against another. For example, a loss on the stock market may be deducted against taxes paid on wages. Some tax systems may isolate the loss, so that business losses can only be deducted against business tax by carrying forward the loss to later tax years.[18]

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[14] *Ibid*

[15] See, Schedule 6 of the Income Tax Ordinance 1984.

[16] Under the Pakistan taxation system there are 6 heads of income, http://www.asiatradehub.com/pakistan/tax1.asp

[17] See: http://www.nbr-bd.org/income_tax.htm
Also, http://www.bangladesh.gov.bd/index.php?Itemid=27&id=13&option=com_content&task=category (30 Sep 2013).

[18] Please see, http://en.wikipedia.org/wiki/Tax; accessed on 30 Sep, 2013

In Bangladesh, there is a filing threshold of minimum annual total income (zero-tax threshold as mentioned in the respective Finance Act) applicable for individuals (including non-resident Bangladeshis), partnership firms, HUF, AOP and assessees other than companies and local authorities. In case an entity of this group has a total annual income less than this level, he or she is not required to submit tax return but if someone's income is higher, he is to pay a minimum tax of Tk 3,000.[19] A progressive slab rate of taxation is applicable for these income taxpayers and maximum collection is done at source under withholding tax system.[20] For the AY 2013-14, the income tax rate for net income upto Tk 2,20,000 is 0%. Above this threshold to next 3,00,000 taka of income, tax level is 10% and for income upto next 4,00,000/- it is 15%. Persons having income above this to next 3,00,000/- taka the payable tax is 20% and for any further income, the tax rate is 25%. Women and senior citizens aged above 65 enjoy zero tax limit for income up to 2,50,000/- and the figure is taka 3,00,000/-for disabled taxpayers.[21] A tax credit at 15% rate is allowed on approved investments/donations,[22] total of which cannot exceed Tk 1,50,00,000 (tk 15 millions), but in no case 30% of total income or the actual investment, whichever is less. Besides, every individual assessee having disclosed net accumulated asset exceeding Tk 2,00,00,000 (20 millions) but upto tk 10,00,00,000 (100 millions) is subject to an additional surcharge[23] of 10% of total income tax payable. For net wealth exceeding Tk 100 million, the rate of surcharge is 15%.[24] There is no filing threshold for non-individual taxpayers. For publicly traded companies (ie, listed with stock exchanges) paying dividends, tax rate is 27.5% and for company not publicly traded, tax rate is 37.5%. In case of individual non-resident assessees (other than non-resident Bangladeshi), total income is subject to a tax rate of 25%. Bank, Insurance and Financial Institutions are taxed at 42.5% rate whereas Mobile phone operators are subject to highest possible tax (45%).[25] Income tax in Bangladesh is mostly collected as withholding tax (deducted at source) and there are a good number of transaction-points where tax is deducted or collected at source by the persons paying the income or bill.[26]

Types of Income Taxpayers in Bangladesh

Income taxpayers in Bangladesh can be categorized into three main groups. The elite group consists of corporate taxpayers who are about 3.02% of the total taxpayers. The next group consists of wage earners or salaried taxpayers and shares about 18.81%. The largest and the last group consists taxpayers of remaining all others and mainly those who have income from business and profession and shares about 78.17%. Corporate sector though has a poor number of tax payers has been paying so far almost two third of total income taxes. The contribution of corporate taxes is always higher than other sectors in the direct tax revenue. It has been contributing an average of 66% of total taxes from direct sources. Again about 60% of the corporate income taxes (40% of total income tax receipts) come from a small number of foreign companies in Bangladesh. Among the listed companies only 1.15 percent of them pay about 53.28 percent taxes and top 40 percent of them pay the entire taxes collected from this sector. [27] The nature and extent of tax incidence due to personal and corporation income taxes are different. In case of personal income taxes, the burden is unevenly distributed among the registered tax payers. In reality a major portion of taxes is paid by a small group of people with higher marginal rates. About 73% of personal income taxes shared by only 13% taxpayers. Interestingly, about 46% of registered taxpayers pay almost 99.9% of taxes and the rest 54% share very insignificant (only 0.08%) tax liability. The effective tax rate is more progressive in the urban sector than in the rural sector because of the character of the dominant tax in each sector - a proportional land tax in agriculture and a progressive income tax in the urban sector. The per capita tax burden increased over time - from only Tk 23 in 1972-73 to around Tk 1,000 in 1995-96, and to little over Tk 1,400 in 2000-01.[28]

Incidence of Corporation Income Taxes in Bangladesh

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[19] Section 75, the Income Tax Ordinance-1984. *Also,* refer to the Finance Act 2013

[20] Income tax guideline of the NBR: http://www.nbr-bd.org/IncomeTax/Return_Form_Fill_up%20_Guidline_040911.pdf

[21] Vide, The Finance Act 2013.

[22] Schedule 6, Part-B of the Income Tax Ordinance, 1984.

[23] A surcharge is an extra fee added onto another fee or charge, typically added to an existing tax. Surcharge of income tax has been introduced in Bangladesh by repealing the Wealth-tax Act 1963 in 1999.

[24] Poripotro-1 (Income Tax)/2013, Vide: http://www.nbr-bd.org/IncomeTax/circular_paripatra_2013-14.pdf

[25] *Ibid*.

[26] *Ibid*

[27] *Supra* note 11.

[28] Banglapedia: www.banglapedia.search.com.bd

It is widely known that very few people pay income taxes in Bangladesh. Major share of income taxes come from the corporate sector and there is always an uneasy feeling having its higher rates. It has been said that, about 100 foreign investors pay 60 percent of the total revenue to the exchequer in Bangladesh. The contribution of corporate taxes is always higher than other sectors in the direct tax revenue. Unlike personal income taxes, corporate incomes are taxed under flat rates for different types of corporations. Corporations are categorized into three groups. The first and major group consists of publicly traded companies or companies listed to the stock markets. Considering its capital inflows and impact on shareholders the tax rate is lower. The second group consists of other non-listed corporations and liable to pay tax at the rate of 42 percent. Banks, insurance company and financial institutions are included into third category and usually pays higher tax rate of 45 percent.[29]

Listed companies enjoy some extra privileges in Bangladesh being entitled to 10% rebate on net payable taxes if they declare dividend at 20 percent or higher. A number of companies are reluctant in paying dividends to the shareholders and retain their earnings for payment of tax. As a result, not only the shareholders are deprived, the general investors are also discouraged from investing in capital market. It seems imperative that the government have to adopt some pragmatic measures to deal with such problem. It is really necessary to reduce the corporate tax rates to level for improved tax compliance and also to promote investment and industrialization. The challenge is thus now to obtain an optimal rate of taxes for the corporate sector that might not be hindering the country's economic growth.

The burden of corporation tax is also shared among the different sub-sectors or groups of privately limited companies (including both industrial and non-industrial). In Bangladesh about 15.86% of taxpayers under privately owned companies (*private limited companies*) are paying the major share of 72.01% taxes. The top 25% of them pay almost 84% of taxes earned through this sector. However, about 52% of the private limited companies pay only 3.25%. Interestingly, about 13% of them pay no taxes to the government showing negative income and revealed as loss cases. About 60% of such losses incurring (*taxes escaping?*) companies are non-industrial. The scenario is more or less same for the listed companies who are actually the main sector of corporate taxpayers. In Bangladesh company income is taxed twice, once tax is paid by the company on its profit, and then again it is slapped on the shareholders who receive dividends out of such profits at rates applicable on them. Companies are required to deduct income tax at 10% on dividends paid to its shareholders. [30]

It appears to be a genuine concern for the government that how those corporations can be brought into the ambit of taxation. It has become necessary to reduce the corporate tax rate to a tolerable level for improved tax compliance and also to promote investment and industrialization. Corporate tax rates in Bangladesh rank among the highest in the world causing many disincentives for the investors.[31] Many countries are using income tax as an incentive to allure investment; both by reducing tax rate and simplifying the taxation laws. To encourage investment and employment creation China has reduced corporate income tax rate at 25%-20% for smaller companies and 15% for high tech companies while India proposed 25% tax rate on corporate income. Since corporations pay taxes in flat rates no question arises due to its degree of progressiveness. The reasons identified behind such eccentric distribution of tax burden are, unlimited tax exemptions and tax holidays, tax incentives, poor tax base, inequality of taxing urban and rural sectors, special privileges to the public sectors, repeated tax amnesty etc.[32] Another reason is that the government has to rely mostly on corporate taxes to collect required tax revenue without affecting the lower income groups. On the contrary, corporations tend to show their low level of income by manipulating accounting information. Since majority of the taxpayers in corporate sector pay insignificant amount of taxes, it is really a challenge for the government to

[29] An analysis of recent Finance Acts downloaded from: http://incometaxhelplinebangladesh.blogspot.co.nz/2011/01/doing-business-in-bangladesh.html

[30] Badrul Ahsan, "Income tax in Bangladesh and global trend", Web: www.thefinancialexpress-bd.com/more.php?news_id=93701 ; accessed on: 02/09/2013

[31] The rate was about 40 percent in 1992. In FY 2000, corporate tax rate for listed companies has been declined to 30 percent, for non-listed companies' percent and for the banks and financial institutions the rate is unchanged at 40 percent.

[32] *Supra* note -30. Also see, Bangladesh Revenue Reforms Commission Report, The Daily Star, January 14, 2004.

reduce the existing level of corporate tax rate further. Cleaning the tax base by reducing the tax exemptions might be important policy measure to cope with such problem.[33]

There arises a controversy, where the corporation tax rate exceeds the highest personal income tax rates by a substantial amount. That usually happens in many countries including in Bangladesh. This is almost ten percent higher in case of corporation income for the last ten years. A question arises as to who actually pays the corporation income tax. Many economists believe that the tax is actually borne largely by consumers and workers, not by the owners of the corporation. Indeed, one of the reasons why the tax remained so controversial is this widespread debate about who bears the tax. In Bangladesh, the revenue authority has been putting steady effort to soften the tax burden for this sector, however, that does not meet with the expectation.[34]

Problems and Weaknesses in the Existing Taxation System

The heavy reliance on indirect taxation has been treated as one of the main obstacles in attaining economic progress in developing countries including Bangladesh. A huge segment of the population living in acute poverty and disparity is also evident in income distribution. Tax burden is ultimately shared by a limited number of individual taxpayers and corporations. Thus attaining a broad based and optimal taxation system is a much desirable task for the government. Reforms and simplification of tax structure in Bangladesh is a recent phenomenon. Since the last decade or more it has been considered on priority basis by the National Board of Revenue, corporate bodies, stock exchanges, other government bodies, local and foreign investors, donors and academia etc. Notwithstanding various fiscal reforms of the recent past, Bangladesh Tax system continues to suffer from a number of major weaknesses[35]:

1) Low level of revenue mobilization,
2) Regressive nature of taxation (especially VAT, corporate taxes),
3) Low tax base,
4) High degree of tax evasion,
5) Limited administrative capacity,
6) Resource constraints (human and logistics),
7) Cumbersome legal procedures.

The bulk of collection of income tax in Bangladesh is still very low compared to its total revenue earnings. The present state of her income tax base has no satisfactory contribution to the national exchequer. Thus, it is highly important to broaden income tax net for reasons of equity. In Bangladesh, the government pays income tax for its employees considering the fact that they are underpaid. However, in case of private sectors, such payments are considered income, which creates additional tax burden for the employees of the private firms. This is in a sense discriminatory and obviously encourages the employees of private firms to avoid or evade taxes. So, in reality very few people share the burden of income taxes and thus it is a real problem for the government to distribute the tax incidence in a fair manner.[36]

The major concerns for poor tax base can be categorized into three broad segments: a) problems caused by the tax authority during assessment, b) problems caused by the assesses and c) problems created at the time of collection of taxes. Lack of trust between the tax department and the tax payers is one of the major stumbling blocks for developing a healthy tax culture in the country.[37] However, various factors are responsible for weak tax network in Bangladesh some of which are mentioned as below:

a) Bangladesh urgently needs to ensure standard education, health care, clean water, sanitation etc. for its people. However, this could not be done due to the government failure, concentration of wealth to some individuals and corporations, poor enforcement of the existing legal and regulatory framework etc. The current system in Bangladesh does not provide sufficient legal, institutional and economic motivation

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[33] Opinion of a high tax official (Commissioner of Taxes) who preferred to be anonymous.
[34] *Supra* note 30
[35] *Supra* note 11. Similar picture came out from the interviews of income tax officials, tax professionals and taxpayers.
[36] Muhammod Shaheen Chowdhury "*Implementation of Taxation Laws in Bangladesh: In Search of an Innovative and Effective Mechanism for Increasing the Number of Tax Payers*", (2011) an unpublished report, research financed by the University of Chittagong, Bangladesh.
[37] Opinion of Mr. Alamgir Hossain, ITP made in an interview with the author, January 2013

for taxpayers to pay more taxes to the government treasury. The country is unable to raise enough resources through taxes and the tax-GDP ratio has never reached its desired level. The revised budgets of 1999-2000 and 2000-01 estimated the ratio at 8.6%. The budgeted expenditure of 2001-02 was Tk 447.65 billion against projected total revenues of Tk 272.39 billion ie, the overall deficit was Tk 175.26 billion. The revenue receipts included tax revenue of Tk 220.23 billion (13% higher than that in the preceding year) and non-tax revenue of Tk 52.16 billion (11% higher than that in the preceding year). The tax revenues covered only 40% of total expenditures. The scenario has not significantly changed in the subsequent years.[38]

c) Allegedly, it is very difficult to convince the assessing officers (*they are unjustly skeptical!*) by filing even true return of income. It is a very formidable trend of tax assessing officers (say, Deputy Commissioner of Taxes, Assistant Commissioner of Taxes) that they want the assessees to show higher income than that of previous years. A person genuinely showing lesser income than the earlier year does not get proper remedy and the assessing officer determines higher taxes assuming excessive income level.[39] As a result, assesses seem to avoid taxes or pay lower taxes that they are liable to pay. Even they show lower income to avoid higher taxes. Tax practitioners and tax payers complain that officers do not act judicially and there is sheer absence of justice, equity and good conscience in their decisions. They opine that if the DCTs apply their judicial mind in assessing the tax files, tax payers will be more willing to pay income taxes regularly.[40]

On the other hand, tax officers complain that the asseessees always tend to conceal their income. It is practically impossible on the part of the Department to identify actual income of a taxpayer unless he/she discloses the real income. Therefore, the authority has to depend to the statements submitted by the income tax payer. Besides, due to political interference in all sectors, tax officials cannot exercise their power to search Bank accounts of the suspected tax payers. Influential people maintain huge amount of bank balance but they pay a very meager amount of tax. If their bank accounts are searched by any Officer, there are apprehensions that the concerned officer will be harassed personally by the taxpayer. There are numbers of cases in which tax officers had been embarrassed by the politically powerful tax payers whose bank accounts were sought to be searched.[41]

Another tax negativing matter is the principle of burden of proof. According to the law, the burden of proving any fact lies on the party who wants to establish it. However, when prosecuted, tax payers take defence of this principle and tax authority cannot prove the cases absolutely. Thus, benefit of doubt goes in favour of the assessee although he/she has un-disclosed income. Many cases have been stayed by the High Court Division of the Supreme Court by writ petitions filed by the Tax payers. The Department has no regular pool of legally trained officers or lawyers to combat the legal suits filed in the court. Legal matters are handled through the legal counsels hired on ad-hoc basis. Therefore, the government loses revenue in many fit cases.[42] Due to poor staffing and non-co-operation of the assessee, tax department always fail to collect whole amount of taxes that seem to be collected from the tax payers. The most effective method to collect income tax is withholding tax which contributes 80% of total income tax collected over the years.[43]

d) According to section 35 of the Income Tax Ordinance, 1984 a corporate assessee has to submit, along with the return, books of accounts and true audit reports. Interestingly, assessing officers, who are mostly graduated with non-commerce background, cannot understand the books of accounts. They tend to complete the assessment without considering the nature of business, volume of business, books of accounts, audit reports etc. submitted by the assessee. The assessing officers directly reject the

[38] Year-wise revenue reports of the NBR
[39] Vide, *Supra* note 36.
[40] Personal interview with a number of tax payers and tax lawyers.
[41] Opinion expressed by the Tax officers while being interviewed in January 2013.
[42] According to one respondent, the amount of revenue loss in income tax is around 10,000 (ten thousand) crore taka and overall revenue loss is more than 30,000 crore taka. Interview taken in October, 2012.
[43] *Ibid*

assessee's statement of accounts and it is immaterial how genuine those documents may be.[44] In many cases it has been found that assesses show little awareness about their rights and responsibilities. The average taxpayers do not possess significant level of information, understanding and sophistication required to exert pressure on the taxes department to change its behaviour. The number of taxpayers with sufficient knowledge and skills to understand taxation rules and regulations and to hold the tax authority react rationally is very low.[45]

e) With a view to simplify tax assessment procedure and thus to encourage voluntary compliance of tax regulations, many countries have adopted self-assessment system (shortly, 'SAS') in computing tax liabilities. In a SAS, a taxpayer is required to assess his tax liability using a tax return form in which he declares his gross income, allowable deductions etc. This tax return must then be filed with the tax authority together with a payment for the tax liability computed in said return. The basic feature of a SAS is that it is the taxpayer rather than the tax authority that is responsible for the assessment of tax liability. The procedure for assessment of income tax in Bangladesh is the combination of both SAS and official assessment system.[46] Under the present system, the taxpayer has to report his correct income and pay tax accordingly, and s/he may be subject to an audit. When a tax return is selected for an audit process, it will undergo what is basically an official assessment system. However, SAS has failed to fulfill the expectation of the tax department in Bangladesh as the amount of taxes collected through this process has been very low. As a matter of fact, the SAS in Bangladesh encourages under-reporting and tax evasion. Studies have identified the main impediments as the lack of tax education among the taxpayers, non-compliance with proper accounting standards followed by poor public relation activities and inadequate penalty provisions for errant taxpayers.[47]

f) In Bangladesh having a population of 160 millions, the number of registered tax payers is only 3.0 million (which is less than 2% of the total population). Tax base is too narrow and tax laws are full of exemptions and allowances. Not all registered tax payers in Bangladesh pay income taxes due to various exemptions, allowances and tax holidays within the system. Actual tax payers paying income taxes are roughly 02 million or 1.20% of the total population.[48] As mentioned above,[49] various factors are liable for such eccentric and unreasonable burden of taxes. Non-compliance and non-enforcement of taxation rules by both the taxpayers and the tax department have very tantalizing effects on the steady collection of income taxes in Bangladesh. Apart from the regulatory enforcements, developed countries have adopted various measures for voluntary compliance of taxation rules. For example, public relations (to build a tax conscious environment among taxpayers and the public), tax education, tax consultation and guidance and examinations.[50] These are equally applicable in the jurisdictions of developing countries including Bangladesh.[51]

Taxing Agricultural Income

Agriculture is still the largest sector in most developing countries. Thus taxation of the agricultural sector has historically served as an important policy instrument in the process of development for many

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[44] Opinion of Mr. Nayeem Uddin, Executive Director, Finance, Eastern Shipping & Logistics Ltd., Chittagong, Bangladesh; July 2012.

[45] *Supra* note 36.

[46] SAS was first experimentally introduced in Bangladesh in 1981 in order to relieve marginal taxpayers from statutory formalities and associated hazards involved in an official assessment system. The SAS was expanded and introduced on a large scale in 1991.

[47] Report of the International Bureau of Fiscal Documentation (IBFD), AISA-PACIFIC TAX BULLETIN Vol. 9, No. 6 JUNE 2003. Also, an analysis of the year-wise reports of the National Board of Revenue (2000/01-2010/11).

[48] Annual Report of the National Board of Revenue (2009-2010) / web: http://www.nbr-bd.org/nbr_annual_report_2009-2010/part-1.pdf, According to the Annual Report of the NBR total number of registered tax payers were 2.5 million (less than 2% of total population) in 2001-2002 and actual tax payers were 1million (0.66% of total population). The present figure shows a remarkable progress in the number of tax payers compared to previous years.

[49] *Supra* note-30.

[50] Report of the International Bureau of Fiscal Documentation (IBFD), AISA-PACIFIC TAX BULLETIN Vol.

[51] The governments in Bangladesh had started modernizing the tax administration and taxation systems in the country during the last 10 years in keeping pace with internationally standard practices. But these are still far from being adequate for developing a highly effective tax structure. However, the significant 'icebreaking' factor is stepping into the digitalization of taxing system and its administration.

countries. The incentives and distributional use of taxation may be utilized to redirect agricultural production, encourage more efficient use of land, accomplish changes in the land tenure, promote new productive investment in agriculture, and stimulate movement of redundant labor from agriculture to non-agriculture employment. Agricultural taxation is thus the chosen instrument charged with the vital task of transferring surplus food, labor and capital to the non-agriculture sector, as well as with reallocating resources within agriculture to increase the transferable surplus. Taxes on agriculture are also needed to restrain a rise in rural food consumption which would increase urban food prices and hence the rate of inflation.[52] Agriculture sector in Bangladesh provides employment for around 60% of the population and contributes only 25% of the GDP but virtually pays little in the form of income tax. The sector pays much less tax[53] due to predominance of the small farmers and the landless and also due to additional income tax incentives to this sector such as tax-holiday to farm-owners and allowance of extra non-assessable income of Tk 40,000 to farmers having exclusive agricultural income.[54]

Though the majority of the rural populations live on subsistence farming, there are yet a good number of well-to-do farmers who can and, on equity ground, should pay taxes. There are many affluent people having agriculture income who avoid taxes showing their entire income as a means of agriculture. A question arises whether the agriculture sector in Bangladesh will remain untaxed or not and if yes –for how long. If 60% population of a country who are engaged in agricultural sector are kept untaxed for uncertain period will undoubtedly impede broadening of the much desired tax base.[55]
It is also found that the effective rate of taxes is more progressive in the urban sector than in the rural sector because of the character of the dominant tax in each sector – a proportional land tax in agriculture and a progressive income tax in the urban sector. It seems that the dominance of land tax in the agricultural sector and income tax in the urban sector need to be overcome as quickly as possible so that the tax burden is equitably shared by the rural and urban sectors. Since the land distribution is widely unequal, it is recommended that top agricultural landowners (who are enjoying major tax exemptions) should be taxed on the basis of potential income preferably as a kind of presumptive tax. Other way could be to reconsider their income as per their statement or estimating their income based on landownership and market rates. A taxation reform commission in India recommended the same for the contexts of that country.[56]

Another alternative to introduce such tax would be based on an international method of taxing agriculture followed by Agriculture Income Standard (AIS) as adopted by the Japanese tax system. This follows a tax filing standard for the farmers designed to give convenience in calculating agriculture income, computing balance on books.[57] In determining the standard, taxes could be based on both land area and/or revenue earned through agriculture. There might have some problem in its implementation and, however, if such revenue could be handed back to the local government authorities (district, thana, union parishad etc.) that would supplement their budgeted development expenses.[58]

Progressivity of Tax Rates
Study shows that tax liability and degree of progressiveness of income tax rates in Bangladesh have been fluctuating over the years for lower and middle-income earners and have remained static for

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[52] R.M. Bird, *Taxing Agricultural Land in Developing Countries*, Harvard University Press, Cambridge, Massachusetts, USA(1974)
[53] The current tax burden on agricultural income in Bangladesh has been estimated as 0.25%
[54] Part-A, Schedule 6 of the Income Tax Ordinance, 1984
[55] *Supra* note 30
[56] Kelkar Tax Commission Report, India, 2002, See in web: http://www.taxindiaonline.com/RC2/pdfdocs/wnew/Kelkar_Committee_Report_September2002.pdf , accessed on 17 March 2010
[57] The method of balance computation could be the principle for agricultural income calculation. Where,
{Taxable Income = (Gross Revenue – Necessary expenses)}
Vide, Tapan K. Sarker, "*Who Bears The Burden Of Taxes In Developing Countries ? A Case of Income Taxation in Bangladesh*", Pakistan Economic and Social Review, Volume 44, No. 2 (Winter 2006), p: 203
Also, "*Japan's Urban Agriculture: Cultivating Sustainability and Well-being*", web: http://unu.edu/publications/articles/japan-s-urban-agriculture-what-does-the-future-hold.html
[58] *Supra* note 4 at p.26

the higher income groups.[59] The effects are twofold: first, it impacts negatively on expanding the income tax net, and secondly, it leads to shifting the tax liability only to a limited number of taxpayers (*middle and higher-income groups*). Since 1990, efforts have been made to reduce the average tax rates for especially the lower income people and for the middle and high-income earners it worked too slowly.[60] It is thus recommended to distribute the tax burden among all the taxpayers in such a manner that might reduce the average tax rates of middle and higher income people.

Narrow Tax Base

The tax-to-GDP ratio in Bangladesh is among the lowest in the world. Improving this ratio margin turns out to be a crucial condition for achieving the targeted economic development. The low *per capita* income and the existing structure of GDP in Bangladesh impose serious limitation of raising tax revenue.[61] Only 0.54 percent of the populations were within the tax net in 1999 and the ratio was only 0.25 percent in 1977. In the year 2002 the ratio had raised into 0.94 percent. In 2009-10, the figure has raised up to 1.87%. It denotes slow growth of the tax net up to 2002; however, the rate had been a bit faster between 2002 to 2010. Introduction of spot assessment system and simplification of self-assessment system (introducing universal self-assessment and keeping scope for audit of 3-4% of tax files) have played pivotal role in the process. Use of modern IT tools in the taxation system and introducing taxpayer services seems very important in endeavoring better income tax administration. Apart from the administrative deficiencies responsible for the low base, there are also legal and conceptual limitations of the term 'income' which contributes to the diminution of the tax base.[62] Survey of potential taxpayers is one of the most effective tools to expand the tax base in developing countries like Bangladesh.[63] The government has already taken some measures to identify new tax payers, such as, arranging road shows at home and abroad, holding country-wide income tax fairs, introducing e-TIN etc. It would be too early to make any critical assessment of these measures.

Re-organizing of all Income Tax Exemptions

Exemptions, deductions, and allowances (otherwise known as 'tax expenditures'[64]) play an important role in the tax system in providing incentives for savings and capital formation in the private sector. They also meet other socio-economic needs of the community. Nevertheless, they erode the tax base, which often necessitates the application of high marginal rates of tax. This in turn dampens the spirit of work and enterprise among the people, and also encourages evasion of tax and thereby undermines public morality. It is presumed that there is significant amount of 'untaxed income' in Bangladesh.[65] One of the goals of the tax policy is to direct investment to socially and economically desirable sectors. In the context of Bangladesh repeated opportunities have been provided for tax amnesty on 'untaxed income' but failed to generate desired response from the public due to absence of proper direction in the tax policies. The governments declared from time to time to accept

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[59] *Supra* note 36.

[60] Analysis of Annual Reports of the NBR.

[61] The tax base in Bangladesh is admittedly very low measured in terms of the number of taxpayers. Tax revenue as a percentage of GDP vary greatly around a global average of 19%. It indicates that countries with higher GDP tend to have higher tax to GDP ratios, demonstrating that higher income is associated with more than proportionately higher tax revenue. On average, high-income countries have tax revenue as a percentage of GDP of around 22%, compared to 18% in middle-income countries and 14% in low-income countries. Some low-income countries have relatively high tax-to- GDP ratios due to resource tax revenues (e.g. Angola) or relatively efficient tax administration (e.g. Kenya, Brazil) whereas some middle-income countries have lower tax-to-GDP ratios (e.g. Malaysia) which reflect a more tax-friendly policy choice.For details, please refer to: Hazel Granger, "Economics Topic Guide Taxation and Revenue", EPS PEAKS, 2013, web: http://en.wikipedia.org/wiki/Tax

[62] Hussain, S. (1999) Taxation in Bangladesh: Measures for Improving the Income-Tax System (unpublished); Taxation Inquiry Commission Report, 1979; Budget Speech, 2002, Report of the NBR for 2009-10 FY.

[63] Sarker and Kitamura "Technical Assistance in Fiscal Policy and Tax Administration in Developing Countries: The State of Nature in Bangladesh", Asia-Pacific Tax Bulletin, Vol. **8**, No. 9, (2002) pp 278 – 288.

[64] For Details, please see, Zohurul and Nurul (2008) "Tax Expenditure: The Bangladesh Perspective", The Bangladesh Accountant, July-September.

[65] Finance Minister's Budget Speech, 2002 (for FY 2002-2003)

any amount of undeclared income or black money unconditionally. It might have some positive effect by enhancing private investment and through resolving unemployment to some extent. But such practice when goes perpetually might have detrimental impact on the society as a whole.[66]

By default, an underground economy exists because of the government's so many taxes and regulations. Therefore, it seems to make sense that the more the taxes and regulations, the larger the underground economy is likely to be.[67] In view of this, the study recommends a broad-based tax system with lower rate schedule but having only fewer exemptions and deductions, rather than a system having a narrow base with steep marginal rates. Tax exemptions make a group of taxpayers always better off [68] while the burden of tax usually shifts to someone else. A lot of investments remain untaxed due to tax amnesty. Substantial numbers of taxpayers whose business income remain in losses and are subject to set off for several years also remain outside actual tax net. Therefore, an endeavor of one stroke cleaning up of all possible income tax exemptions including the standard deductions followed by reduced tax rates might be a potential option for the government.[69] Having considered these factors, the government of Bangladesh should reform laws and regulations as to do away with such provisions.

Tax Holiday and Tax Incentives

Tax holiday is a kind of tax amnesty scheme granted by a government to the newly set up industries in order to promote long-term industrialization and generate capital investments in the country. There are forceful arguments for and against continuing this facility. The existing tax law permits industrial undertaking, tourist industry or physical *Infra*structure facility (including 'expansion unit' thereof) to enjoy 'tax holiday' for 5 , 7 or 10 years (5 years for Dhaka and Chittagong divisions, except the three districts of Chittagong hill tracts, 7 years for other regions and 10 years for physical *Infra*structures), subject to fulfillment of certain conditions.[70] Alternatively, they can be allowed 'accelerated depreciation'. Subject to fulfillment of the stipulated conditions, newly established private hospitals can be allowed a tax holiday of 5 years. In general, half of the export income is non-assessable and thus not included in the tax-base. But industries established in the export processing zone enjoy special tax treatments such as tax holiday of 10 years for pioneering industries, and treating 50% of export income non-assessable even after the expiry of tax holiday. Tax holiday had generally been enjoyed by fishery, poultry, poultry feed production, seed production, marketing of locally produced seed, livestock farm, dairy farm, frog farm, horticulture, plantation of mulberry tree, cocoon farm, mushroom farm and floriculture.[71]
At present, the number of industries enjoying tax holidays is just below three thousand[72] and the existing provision gives incentives for the said industries a kind of perpetual tax holiday for the extension unit of an industrial undertaking. It is alleged that the current facility of granting tax holiday to extension unit has been grossly abused. Such facilities have not been able to foster industrial growth in different regions of the country. In many cases such tax holiday facility was availed for an artificially created extension unit without really setting up a new unit, by merely showing transfer of machineries of the existing unit to the said artificial unit. In some instances industrial undertakings on expiry of tax holiday usually set-up new extension units under tax holiday, where they divert their income of the taxable unit through a mechanism of internal transfer pricing in a bid to use the system as a vehicle for perpetual tax holiday.[73] Such a perpetuating provision for tax exemption

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[66] Opinion held by senior tax officials (Commissioner of Taxes) when interviewed in December 2012.
[67] Chu, Davoodi and Gupta, "Income Distribution and Tax and Government Social Spending Policies in Developing Countries", UNU/WIDER Working Paper no: 214, http://www.wider.unu.edu/publications/working-papers/previous/en_GB/wp-214/_files/82530864955599471/default/wp214.pdf , accessed on : 21/08/2013
[68] They always remain in higher income groups and share a little burden of taxes at lower marginal rates. In case of Bangladesh, such taxpayers are small and medium traders and manufacturers.
[69] J. Slemrod & J. Bakija. *Taxing Ourselves, A Citizens Guide to the Great Debate over Tax Reform*, Second Edition, MIT Press, (1998).
[70] Sections 46A, 46B, 46C of the Income Tax Ordinance, 1984. Also, vide, *Supra* note-24
[71] M.S. Ullah, "Tax Justice in Bangladesh", http://excludedvoices.wordpress.com/2010/08/21/tax-justice-in-bangladesh/ , date: 24/10/2013
[72] For detailed up-to-date data about the tax holiday and tax amnesty scheme in Bangladesh, please see NBR Yearly Reports.
[73] S. Hussain, *Taxation in Bangladesh: Measures for Improving the Income-Tax System* (unpublished), (1999)

creates distortion in taxation mechanism and against the norms of equity and neutrality. A lot of black money is being laundered into the market through this mechanism.

It is thus important to restrict such unbound opportunities for the sake of better future of the country. The benefits of the tax holiday are being enjoyed mainly by the garment industries. Their growth has enhanced due to external factors. Even if the incentive of tax holiday were not given, the garment industry would have grown up and the state would have earned quite a substantial amount of revenue from the industry. Thus the revenue foregone does not appear to be fiscally efficient.[74] Other industries like software business, poultry, fisheries and agro processing businesses also have some grounding in the overall business in Bangladesh. One potential remedy should be to allow an initial support to the priority sectors and then bringing back them under the purview of taxation. Since entire withdrawal of tax holiday and incentives for such new and extended units might be difficult for the government in the interest of rapid industrialization, there might have a trade off in taxing such industrial undertakings at reduced rate.[75]

Inequality of Taxing in Urban and Rural Sectors

There is a common belief that the tax structure in Bangladesh is biased against the poorer class, especially in the rural areas. On the other hand, there is also the view often expressed by a section of the community, particularly in the urban sector, that the present tax structure weighs heavily against the business and entrepreneur class. It is due to the fact that the effective tax rate is higher in the urban sector than in the rural sector because of the difference in the nature of tax and the intensity at which such tax is imposed on the two sectors, and the structure of consumption and income between urban and rural sectors. The commission's report[76] presented the relative tax burden of the two sectors from direct taxes. The average burden of direct taxes on urban sector was 0.31 percent as against 0.14 percent in the rural sector. It shows that the effective tax rate in the urban sector was 2.21 times higher than that of the rural sector in 1979. Over the years the situation remained the same and in fact still the extreme majority of taxpayers are urban people. This happens because the urban sector is more monetized and the government has more control over the urban sector.[77] Such an inequality should be resolved and taken into account in the continuing tax reforms.

Inequality between Private and Public and Private Sectors in Taxing Wages

In Bangladesh, the government pays income taxes of its employees considering the fact that they are underpaid. However, if a private employer pays income tax for its employees, such payments are considered income, which creates additional tax burden for the employee of the private firms. This seems discriminatory, that encourages employees of private firms to avoid or evade taxes. So, in reality very few people share the burden of income taxes in Bangladesh and thus it is a real problem for the government to distribute the tax incidence in a fair manner.[78] Such discriminations create social inequality and distortion in the tax system of the country with negative impact on her tax-GDP ratio and hindering the expansion of tax base as well. Since governments of the developing countries solely run the development activities, the bureaucrats hold extra power that enhance abuse of power and lead them to corruption. The corruption indices published by the UNDP[79] resembles those applicable for Bangladesh. When such public servants are kept outside the purview of

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[74] Waresi, S.A. (1998), "*Tax Holiday as a Fiscal Incentive in Bangladesh in Tax Chronicle"*, Special Edition, Vol.3, Issue 5, Dhaka, Bangladesh. In FY 1999-2000, total number of tax holiday cases was 1531 and the estimated loss of revenue was about 2500 million taka that was estimated at about 9.6% of total income-tax earnings of that year.

[75] *Supra* note 4 at p. 9.

[76] Taxation Inquiry Commission Report, 1979

[77] *Supra* note 67

[78] *Supra* Note 4 at p. 19.

[79] Updates on UNDP Work on Anti-Corruption, 2008, Web: http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/2008-annual-report-anti-corruption--in-development/Anti-Corruption_Annual%20Report_2008.pdf, Also see, http://www.undp.org.bd/info/HQ%20Publications/RHDR_Full_Report_Tackling_Corruption_Transforming_Lives.pdf , published in 2008. Date accessed: 09 Dec 2012

taxation it works as some sort of incentive for them to become corrupt. The problem obviously lies unresolved due to the existing poor salary structure of the government employees that usually not frequently adjusted with the current higher inflation rate. Improving existing salary structure as a means to protect corruption has been adopted by many other developing countries like China and India.[80] Bangladesh should comply with these standards so as to ensure respect and adherence to good governance and transparency by the civil servants. In that case rightsizing the government with maximizing salary level is much desired.

Recommendations and Conclusion

The paper has endeavored to unveil the existing incidences of personal and corporate income taxes under the Bangladesh taxation system. While doing so, it has critically examined the core issues concerning sustainable income tax management in the country. After careful study of the relevant literature and interviews with the respective quarters, it may be resolved that attaining an optimal income tax system is a difficult and unenviable task, albeit crucial for the country's expected economic growth. Like many other developing countries, income taxation system in Bangladesh is characterized as poorly administered, and corrupts prone. The tax revenue to GDP ratio here is still low in comparison with South Asian Countries. A long-term sustainable solution to enhance transparency, promote growth, improve tax compliance and thus to increase tax to GDP ratio are much desirable issues in the context of Bangladesh. It is found that the country's direct taxes have been heavily skewed against salary-earners and corporate sector. Small business, service and farm incomes manage to slip through the tax net effortlessly. Establishing an information management system, composite digital databank, setting up of a simple and broad based tax system are crucial to the development of a better tax administration. It would be wise to adopt the public relation activities (tax counseling) undertaken by many developed countries. I agree with the proposition that any tax reform must go hand in hand with cutting wasteful government consumption; so that taxpayers do not feel they are sitting ducks for the exchequer to rip them off. Thus the government must be very cautious in taxing people in order to justify the burden of taxes. However, in spite of all limitations, the volume of tax collection in Bangladesh has increased over the years. A number of reformative and remedial measures adopted by the governments of different regimes to shape a people friendly tax structure are being seen in the orbit. The ever tormenting political instability and corruption still remain as the real threat to uphold revenue justice in the country. I sincerely believe, lights will soon be seen at the dead end of the dark tunnel.

[80] Indian Civil Service salary scale shows a Pay Band: Rs 15600-39100 which is more than double the scale fixed for Bangladeshi government officers. Web: http://thriller.hubpages.com/hub/IAS-Salary *Also see*, John P. Burns, Civil Service Reform in China, OECD Journal on Budgeting, Volume 7 – No. 1, 2007; date accessed: 06 August 2013.

wkï AwaKvi : ‡cÖwÿZ Bmjvg I wkï AwaKvi mb`

‡gvt †gvi‡k`yj Avjg©

mvims‡ÿc

Bmjvg gvbe RvwZi Rb¨ GKwU Kj¨vYgq Rxeb weavb| Bmjvgx kixqZ GKRb gvby‡li Rb¥ †_‡K g„Zz¨ ch©šÍ hveZxq e¨e¯’v †i‡L‡Q| gvbe Rxe‡bi g~j wfwË n‡”Q ˆkkeKvj | ZvB Bmjvg ˆkkeKv‡ji e¨vcv‡i AZ¨waK ¸iæZ¡ cÖ`vb K‡i‡Q| KviY, wkïivB RvwZi fwel¨Z KY©avi| cweÎ KziAv‡bi cÖvq 12wU myivq Ges 100wU nvw`‡m wkï AwaKv‡ii K_v ejv n‡q‡Q| wkï‡K m¤ú`i*ƒ*‡c M‡o †Zvjvi Rb¨ Bmjvg wkï AwaKvimg~n h_vh_fv‡e ev¯Ívq‡bi Rb¨I wb‡`©k cÖ`vb K‡i‡Q| eZ©gv‡b wkï AwaKv‡ii welqwU wek¦e¨vcx ¯^xK…Z| wkï‡`i AwaKvi cÖwZôvi Rb¨ me‡P‡q †mv”Pvi AvšÍR©vwZK msMVb n‡”Q RvwZmsN| GwU wkï‡`i AwaKvi wbwðZ Kivi j‡ÿ¨ 1989 mv‡j wkï AwaKvi mb` cÖYqb K‡i| G mb‡`i wewfbœ Aby‡”Q‡` wkïi hveZxq AwaKv‡ii K_v ejv n‡q‡Q| wkï AwaKv‡ii e¨vcv‡i †h Aby‡”Q`¸‡jv G mb‡` wea„Z n‡q‡Q Zv Bmjvg cÖ`Ë wkï AwaKv‡iiB cÖwZdjb| Av‡jvP¨ cÖe‡Ü Bmjvg I wkï AwaKvi mb‡`i †cÖwÿ‡Z wkï AwaKvimg~n Av‡jvPbv Kiv n‡q‡Q|

1. f~wgKv

Bmjvg GKwU c~Y©v½ Rxeb e¨e¯’v| gvby‡li Rb¥ †_‡K g„Zy¨ ch©šÍ mKj ¯Í‡ii Rb¨ Kj¨vYKi wb‡`©kbv Bmjv‡g i‡q‡Q| ‰kkeKvj gvbeRxe‡bi GKwU ¸iæZ¡c~Y© ch©vq| Bmjvg ˆkkeKv‡ji e¨vcv‡i AZ¨vwaK ¸iæZ¡ cÖ`vb K‡i‡Q| wkï AwaKvi wel‡q Bmjv‡gi `„wófw½ AbyKiYxq I AbymiYxq| gvbe wkï‡K cÖK…Z m¤ú`, mgv‡Ri Rb¨ AbyKiYxq Av`k© I gvbe Kj¨v‡Y wb‡ew`ZcÖvY mybvMwiK wn‡m‡e M‡o †Zvjvi Rb¨ Bmjvg ZvwM` w`‡q‡Q| Avi G Rb¨ cÖ‡qvRb mywPwšÍZ I mycwiKwíZfv‡e wkïi Rb¥ cÖwµqvwU m¤úbœ Kiv, jvjb-cvjb Ges wkïi AwaKvimg~n h_vh_fv‡e ev¯Ívqb| wkï‡K cÖK…Z gvbyl wn‡m‡e M‡o †Zvjvi Rb¨ Bmjvg Zvi cwiev‡ii Dci eûmsL¨K AwaKvi wba©viY K‡i w`‡q‡Q| RvwZmsN wkï AwaKvi mb‡`i 54wU Aby‡”Q‡`I wkïi Kj¨vY wbwðZ Kivmn mKj cÖKvi †kvlY, ˆelg¨, Ae‡njv Ges wbh©vZb †_‡K Zv‡`i iÿv Kivi K_v ejv n‡q‡Q| 1994 mv‡ji RvZxq wkïbxwZ Ges 2013 mv‡ji wkï AvB‡bI wkï‡`i hveZxq AwaKv‡ii K_v wea„Z n‡q‡Q| Av‡jvP¨ cÖe‡Ü Bmjvg I wkï AwaKvi mb‡`i ‡cÖwÿ‡Z wkï AwaKvimg~n Dc¯’vcb Kiv n‡q‡Q|

© ‡gvt †gvi‡k`yj Avjg, cÖfvlK, Bmjv‡gi BwZnvm I ms¯‹…wZ wefvM, PÆMÖvg wek¦we`¨vjq

2. wkïi msÁv

RvwZmsN wkï AwaKvi mb` Abymv‡i, 18 eQ‡ii wb‡P me gvbe mšÍvb‡K wkï ejv nq|[1] RvwZmsN wkï AwaKvi mb` cÖ‡Z¨K †`‡ki wbR¯^ AvBb I cÖ_v‡K ¯^xK…wZ †`q|[2] 2013 mv‡ji wkï AvBb Abyhvqx, AbwaK 18 eQi eqm ch©šÍ mKj e¨w³‡K wkï ejv nq|[3] 1994 mv‡j cÖKvwkZ RvZxq wkïbxwZ Abyhvqx, evsjv‡`‡ki Av_©-mvgvwRK †cÖÿvc‡U wkïi eqm 15 eQi wba©vwiZ n‡q‡Q|[4] G‡`‡ki †ek wKQz AvB‡b wkïi wewfbœ eqmmxgv wba©vwiZ n‡q‡Q| mvevjKZ¡ AvBb, 1875 Gi 3 aviv Abyhvqx, 18 eQi eqm bv nIqv ch©šÍ e¨w³ bvevjK wn‡m‡e MY¨ n‡e| kÖg AvBb, 2006 Gi 63 aviv Abyhvqx, 14 eQ‡ii Kg eqmx‡`i wkï wn‡m‡e MY¨ Kiv nq| Avevi, G AvB‡bi 8 aviv Abyhvqx, 14 †_‡K 18 eQi eqm c~Y© bv nIqv ch©šÍ e¨w³‡K wK‡kvi wn‡m‡e wPwýZ Kiv nq| evj¨weevn wb‡iva AvBb, 1929 Gi 2(K) aviv Abyhvqx, cyyiæ‡liv 21 eQi Ges bvixiv 18 eQi eq‡mi Av‡M we‡q Ki‡Z cvi‡e bv| Gi ‡P‡q Kg eqmxiv we‡qi Rb¨ bvevjK wn‡m‡e MY¨ n‡e| bvix I wkï wbh©vZb `gb AvBb (ms‡kvab), 2003 Gi 2(U) aviv Abyhvqx, wkï ej‡Z AbwaK 16 eQi eq¯‹ †h †Kvb e¨w³‡K eySvq| †`vKvb I cÖwZôvb AvBb, 1965 Gi 2(L) aviv Abyhvqx, wkï ej‡Z 12 eQi c~Y© nqwb Ggb e¨w³‡K eySvq| AwffveK I cÖwZcvj¨ AvBb, 1890 Abyhvqx, cyiæl cÖvßeq¯‹ we‡ewPZ n‡e 21 eQi c~Y© n‡j Avi bvix mvevjK n‡e 18 eQi eqm c~Y© n‡j|[5] Bmjvgx kixq‡Zi weavb Abyhvqx, eqtmwÜi mv‡_ mv‡_ †Q‡j‡g‡q‡`i ˆkkeKv‡ji cwimgvwß N‡U| Z‡e Gi mywbwÏ©ó eqmmxgv wb‡q Bmjvgx wPšÍvwe`M‡Yi g‡a¨ wfbœ wfbœ gZ cwijwÿZ nq| cweÎ KziAv‡b wkïi eqmmxgv m¤ú‡K© ejv n‡q‡Q, ÔÔhLb Zviv we‡qi eq‡m DcbxZ nq|Ó[6] G Avqv‡Zi e¨vL¨vq Zvdmx‡i gvÔAv‡idzj KziAv‡b ejv n‡q‡Q, ÔÔev‡jM nIqv eq‡mi mxgvi mv‡_ m¤ú„³ bq eis ev‡jM nIqvi †hme jÿY i‡q‡Q †mmeB aZ©e¨| myZivs wkï hLb we‡q Kivi †hvM¨Zv jvf Ki‡e ZLbB Zv‡K ev‡jM MY¨ Kiv n‡e| G †hvM¨Zv †Kvb †Kvb †Q‡j‡g‡qi g‡a¨ 13/14 eQi eq‡mI cÖKvk †c‡Z cv‡i| Z‡e hw` †Kvb evjK-evwjKvi g‡a¨ ev‡jM nIqvi jÿY Av‡`Š cÖKvk bv cvq Z‡e †m‡ÿ‡Î eqm MYbv K‡iB Zv‡K ev‡jM e‡j ai‡Z n‡e|Ó[7]

3. wkï AwaKvi

gnvb Avjøvn wkï‡K hxbvZ ev †mŠ›`h©[8], wbÔAvgvZ ev AbyMÖn[9] Ges PÿzkxZjKvix[10] e‡j AvL¨vwqZ K‡i‡Qb| wkïmšÍvb‡K cweÎ KziAv‡b m¤ú` e‡j AvL¨vwqZ Kiv n‡q‡Q| ÔÔab-m¤ú` I mšÍvb-mšÍwZ cvw_©e Rxe‡bi †kvfv we‡kl|Ó[11] ab-m¤ú` n‡"Q Rxeb evuPv‡bvi Dcvq Avi mšÍvb-mšÍwZ n‡"Q esk Z_v gvbe cÖRvwZ iÿvi gva¨g| wkï AwaKvi kã„"Q mvaviYZ ¯^íeqmx †Q‡j †g‡q‡`i Pvwn`v †evSv‡bvi Rb¨ e¨eüZ nq| ZvQvov G kã„"Q Ggb GKwU Av‡eMgq I AivR‰bwZK welq‡K Zz‡j a‡i hv Ae¨ewnZfv‡e mnvbyf~wZi D‡`ªK K‡i|[12] wkï AwaKvi iÿvq ivóªxq A½xKvi g~jZ wZbwU `vwqZ¡ †_‡K D™¢~ZÑm¤§vb, myiÿv Ges ev¯Íevqb| Bs‡iRx‡Z ejv n‡q‡Q- the tripartite obligations to respect, protect and fulfill.[13] Rb¥MZ I eskMZ cweÎZv iÿv, gv‡qi M‡f© wkïi weKvk, my›`i bvg, gvZ…`y» cvb, jvjb-cvjb, Rxe‡bi wbivcËv, kvixwiK I gvbwmK weKvk, wkÿv

I wPwKrmv jvf, Avw_©K wbivcËv, wj½‡f‡` mge¨envi, gZvgZ cÖKv‡ki ¯^vaxbZv, †Ljva~jv I we‡bv`b BZ¨vw` wkï AwaKvi e‡j cwiMwYZ|

4. RvwZmsN wkï AwaKvi mb‡`i cwiPq

wkï‡`i AwaKvi cÖwZôvi Rb¨ m‡e‡P‡q †mv”Pvi AvšÍR©vwZK ms¯’v ÔRvwZmsNÕ| 1989 mv‡ji 20 b‡f¤^i RvwZmsN mvaviY cwil‡`i Awa‡ek‡b wkï‡`i AwaKvi wbwðZ Kivi j‡ÿ¨ cÖ_g Ôwkï AwaKvi mb`Õ Avbyôvwb Kfv‡e DÌvwcZ Ges me©m¤§wZµ‡g Zv M„nxZ nq| c‡ii eQi A_©vr 1990 mv‡ji 2 †m‡Þ¤^i GwU AvšÍR©vwZK AvB‡bi As‡k cwiYZ nq| c„w_exi mKj wkïi Kj¨vY wbwðZKi‡Yi j‡ÿ¨ cÖYxZ GB mb‡` †gvU 54wU Aby‡”Q` i‡q‡Q| Aby‡”Q`mg~n‡K Avevi 3wU c‡e© wef³ Kiv n‡q‡Q| 1g c‡e© 1 n‡Z 41 ch©šÍ 41wU Aby‡”Q‡` i‡q‡Q wkïi msÁv, wkïi cÖvc¨ AwaKvi, AskMÖnYKvix ivóª I Ab¨vb¨ mgvRKj¨vYg~jK cÖwZôv‡bi `vq-`vwqZ¡| 2q c‡e© 42 †_‡K 45 ch©šÍ 4wU Aby‡”Q‡` wkï AwaKvi wbwðZ Kivi Rb¨ KwgwU MVb I Kg© cÖwµqv Ges 3q c‡e© 46 †_‡K 54 ch©šÍ 9wU Aby‡”Q‡` iÿYv‡eÿY, MÖnY-eR©bmn Ab¨vb¨ Avbylw½K welq ewY©Z n‡q‡Q|[14] G mb‡`i wkï AwaKvi †NvlYvq ejv n‡q‡Q, ÔÔwkïi kvixwiK I gvbwmK Acwic°Zvi Kvi‡Y Zvi R‡b¥i Av‡M I c‡i Zvi Rb¨ Dchy³ AvBbMZ myiÿvmn we‡kl iÿvKeP I hZœ wbwðZ Kiv cÖ‡qvRb|[15]

5. Bmjvg I RvwZmsN wkï AwaKvi mb‡`i cwi‡cÖwÿ‡Z wkï AwaKvi

Bmjvgx kixqZ GKRb gvby‡li Rb¥ ‡_‡K g„Zz¨ ch©šÍ Zvi hveZxq e¨e¯’v †i‡L‡Q|[16] wkï‡K m¤ú`i*f*‡c M‡o †Zvjvi Rb¨ Bmjvg wkï AwaKv‡ii e¨vcv‡i AZ¨vwaK ¸iæZ¡ w`‡q‡Q| wkïi PwiÎ MVb I gvbwmK weKv‡ki Rb¨ cvwievwiK Rxe‡bi †Kvb weKí †bB| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔAvi Avjøvn †Zvgv‡`i ‡_‡KB †Zvgv‡`i †Rvov m„wó K‡i‡Qb Ges †Zvgv‡`i hyMj n‡Z †Zvgv‡`i Rb¨ cyÎ I †cŠÎMY‡K m„wó K‡i‡Qb|Ó[17] wkï PwiÎevb nIqvi Rb¨ Avjøvn ZvAvjvi wbKU †`vqv cÖv_©bv Kivi e¨vcv‡i cweÎ KziAv‡b ejv n‡q‡Q, ÔÔ†n Avgv‡`i cÖwZcvjK! Avcwb Avgv‡`i ¯¿x‡`i cÿ n‡Z I Avgv‡`i mšÍvb-mšÍwZ‡`i cÿ †_‡K Avgv‡`i‡K Pÿzi kxZjZv `vb Kiæb|Ó[18] wkïivB GKw`b mgv‡R cÖwZwôZ n‡q Zvi wcZv-gvZv‡K gh©v`vi Avm‡b emvq| ïay ZvB bq, wcZv-gvZv ciKv‡jI jvfevb n‡Z cv‡i Ggb GKwU m¤ú` n‡”Q Zvi mšÍvb| g„Zz¨ cieZ©x Rxe‡bI †m Zvi Rb¨ †`vqv Ki‡e| gnvbex (mv.) e‡j‡Qb, ÔÔgvbyl hLb gviv hvq, Zvi mg¯Í †bK Avgj eÜ n‡q hvq| wZbwU Avg‡ji mIqve Zvi Rb¨ Rvix _v‡K- 1| m`Kv‡q Rvwiqv, 2| Ggb Bjg hv †_‡K gvbyl DcK…Z nq, Ges 3| Ggb †bK mšÍvb ‡h Zvi Rb¨ †`vqv K‡i|Ó[19] gnvbex (mv.) wkï‡`i AZ¨šÍ ‡¯œen Ki‡Zb I fvjevm‡Zb| wZwb e‡jb, ÔÔ‡Zvgiv †Zvgv‡`i mšÍvb‡`i hZœ wb‡e Ges Zv‡`i Av`e Kvq`v wkÿv w`‡e|Ó[20] ZvQvov wkï‡`i fvjevmv Ges Zv‡`i cÖwZ `qv †`Lv‡bvi e¨vcv‡iI wZwb ZvwM` w`‡q‡Qb| Bmjvg †h wkïi Rb¥ gyûZ© †_‡KB Zvi AwaKvimg~n wbwðZ K‡i‡Q Zv bq, eis wkïi R‡b¥i c~e© †_‡KB Bmjvg Zvi AwaKvimg~n wPwýZ K‡i h_vh_fv‡e Av`vq Kivi cÖwZI wb‡`©k w`‡q‡Q|[21] wcZv-gvZv‡K mšÍv‡bi cÖwZ `vwqZ¡kxj nIqvi

e¨vcv‡i gnvbex (mv.) e‡j‡Qb, ÔÔ‡Zvgv‡`i cÖ‡Z¨‡KB GK GKRb `vwqZ¡kxj, †Zvgiv mK‡jB e¨w³MZfv‡e Aaxb¯Í‡`i Rb¨ `vqx n‡e| wcZv Zvi msmv‡i mK‡ji Rb¨ `vqx Ges AvIZvaxb hviv Av‡Q Zv‡`i m¤ú‡K© Zv‡K wRÁvmv Kiv n‡e| ¯¿x Zvi ¯^vgxi msmv‡ii Rb¨ `vqx| Zvi msmv‡ii mK‡ji wel‡q Zv‡K wRÁvmv Kiv n‡e|Ó[22] wb‡¤œ Bmjvg I RvwZmsN wkï AwaKvi mb‡`i cwi‡cÖwÿ‡Z wkï AwaKvimg~n Dc¯’vcb Kiv nj:

5.1 Rb¥MZ I eskMZ cweÎZv iÿvi AwaKvi

wkïi Rb¥MZ I eskMZ cweÎZv iÿvi e¨vcv‡i Bmjvg ZvwM` w`‡q‡Q| Rb¥MZ ˆeaZv wkïi b¨vh¨ AwaKvi e‡j Bmjv‡g wPwýZ n‡q‡Q| A‰ea mšÍvb Rb¥ bv †`qvi Rb¨ Bmjvg K‡Vvi bxwZ Aej¤^b K‡i‡Q Ges A‰ea †hŠbwgjb‡K cvc I kvw¯Í‡hvM¨ Aciva e‡j D‡jøL K‡i‡Q| wkï GKwU cweÎ eskavivq Rb¥MÖn‡Yi AwaKvi Bmjvg msiÿY K‡i| gnvbex (mv.) e‡j‡Qb, ÔÔ‡Kv_vq †Zvgvi exh© ¯’vcb Ki‡e Zv wPšÍv-fvebv K‡i w¯’i K‡i bvI| eskaviv †hb mwVK _v‡K|Ó[23] wkï‡K wcZv-gvZvi wgwkÖZ exh© †_‡K m„wó Kiv n‡q‡Q| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔAvwg gvbyl‡K m„wó K‡iwQ wgkÖ ïµwe›`y †_‡K|Ó[24] Rb¥MZ ˆeaZv Bmjv‡g cwievi MV‡bi g~j wfwË| cÖvK& Bmjvgx hy‡Mi b¨vq eZ©gv‡bI eû wkï Rb¥`vZvi cwiPq QvovB †eu‡P _v‡K| mšÍv‡bi ˆeaZvi c~e©kZ© n‡”Q weevn| weevn n‡”Q bvix-cyiæ‡li ˆeawgjb I ˆeafv‡e wkï Rb¥`v‡bi GKwU cÖwµqv|[25] RvwZmsN wkï AwaKvi mb‡`I wkïi Rb¥MZ I eskMZ cweÎZv iÿvi AwaKv‡ii K_v ejv n‡q‡Q| G mb` Abyhvqx, ÔÔwkïi RvZxqZv, bvg I cvwievwiK m¤úK©, AvBbm¤§Z cwiwPwZ iÿvq wkïi AwaKv‡ii cÖkœwU‡K AskMÖnYKvix ivóª msiÿY Ki‡e|Ó[26]

5.2 gvZ…M‡f© wkï weKwkZ nIqvi AwaKvi

wkï my¯’fv‡e hv‡Z Rb¥MÖnY Ki‡Z cv‡i †m AwaKvi Bmjvg w`‡q‡Q| wkï hv‡Z gvZ…M‡f© my¯’fv‡e weKwkZ n‡Z cv‡i †mRb¨ Mf©eZx gv‡qi cÖwZ hZœevb n‡Z Bmjvg ZvwM` w`‡q‡Q| GKwU my¯’ wkï Rb¥`v‡bi Rb¨ gv‡K Aek¨B my¯’ n‡Z n‡e| gv cywónxb n‡j wkï cywónxb n‡e GUvB ¯^vfvweK| Mfv©e¯’vq wkï cwic~Y©fv‡e weKwkZ nIqvi Rb¨ gv‡K mylg I evowZ Lvevi w`‡Z n‡e| G Lvevi gv‡qi ¯^vfvweK Lv`¨ n‡Z 200-300 K¨vjwi †ewk n‡e| Rbbx Mf©ve¯’vq hv‡Z fvj Lvevi cvq Ges Zvi gb-‡gRvR fvj _v‡K †mw`‡K jÿ¨ ivL‡Z n‡e| Zv‡K fvix KvR †_‡K weiZ ivL‡Z n‡e Ges `ytL-‡e`bvi wkKvi n‡Z †`qv hv‡e bv|[27] †ivRvi mgq Mf©eZx gv‡q‡`i Zv gIKz‡di A_© nj gv‡qi cvkvcvwk M‡f©i mšÍvbwU‡K †hb †Kvb Lv`¨ msK‡U wbcwZZ n‡Z bv nq| RvwZmsN wkï AwaKvi mb‡` Mf©eZx gv‡q‡`i Rb¨ Dchy³ ¯^v¯’¨‡mev wbwðZ Kivi K_v ejv n‡q‡Q|[28]

5.3 my›`i bvg cvIqvi AwaKvi

my›`i bvg wkïi GKwU Ab¨Zg AwaKvi| gvby‡li Rxe‡b bv‡gi cÖfve i‡q‡Q| wcZv-gvZvi cÖwZ mšÍv‡bi GKwU ¸iæZ¡c~Y© AwaKvi nj, R‡b¥i ci Zvi Rb¨ GKwU my›`i bvg ivLv| wkïi bvg ivLvi e¨vcv‡i wcZv gvZvi †Kvb ai‡bi Ae‡njv Pj‡e bv|

nv`x‡m D‡jøL Av‡Q, ÔÔ†Zvgiv my›`i bvg ivLÓ|[29] wkï‡K weK…Z bv‡g bv WvKvi Rb¨I Bmjv‡g wb‡`©k i‡q‡Q| Avjøvn cÖ_g gvbe nhiZ Av`g (Av.)-‡K cÖ_‡g bvg wkÿv w`‡q bv‡gi ¸iæZ¡ evwo‡q w`‡q‡Qb|[30] cweÎ KziAv‡b ejv n‡q‡Q, ÔÔAvjøvni my›`iZg bvg Av‡Q, †m bv‡g Zvu‡K WvK|Ó[31] mšÍv‡bi bv‡gi mv‡_ wcZvi bvg mshy³ Kivi e¨vcv‡i cweÎ KziAv‡b ejv n‡q‡Q, ÔÔZv‡`i wcZv‡`i bv‡gB Zv‡`i‡K WvK, †mUvB Avjøvni wbKU AZ¨šÍ b¨vqmsMZ|Ó[32] ‡kl wePv‡ii w`‡bI gvbyl Zv‡`i bv‡g I wcZvi bv‡g cwiwPZ n‡e| gvbe wkïi bvg †h ïay †kl wePv‡ii w`‡bB Avek¨K Zv bq, gvbe Rxe‡bi cy‡iv mgq bv‡gi GKvšÍ cÖ‡qvRb| eZ©gv‡b mviv c„w_exe¨vcx wkïi Rb¥wbeÜb-Gi cÖPjb n‡q‡Q| GwU wkïi GKwU mvgvwRK AwaKvi| Avi G Rb¨ wkïi R‡b¥i mv‡_ mv‡_B GKwU my›`i bvg ivLv cÖ‡qvRb| RvwZmsN wkï AwaKvi mb‡`I wkïi bvg I Rb¥wbeÜ‡bi AwaKv‡ii K_v D‡jøL Kiv n‡q‡Q| G mb` Abyhvqx, ÔÔR‡b¥i mv‡_ mv‡_ wkïi R‡b¥i wbewÜKiY Ki‡Z n‡e| R‡b¥i mv‡_ GKwU bvg, bvMwiKZ¡ Ges hZ`~i m¤¢e wkïi wcZv-gvZvi cwiPq Rvbevi AwaKvi Ges Zv‡`i Kv‡Q cÖwZcvwjZ nIqvi AwaKvi _vK‡e|[33]

5.4 gvZ…`y» cv‡bi AwaKvi

Bmjvg wkï‡K gv‡qi `y» cvb Kiv‡bvi Rb¨ DrmvwnZ K‡i‡Q| wkïi Rb¨ gvZ…`y‡»i †Kvb weKí †bB| wPwKrmv weÁvbI G wm×v‡šÍ DcbxZ n‡q‡Q †h, wkïi Rb¨ gv‡qi `yaB m‡e©vËg I wbivc` Lvevi| gv‡qi `y‡a Ggb me Dcv`vb i‡q‡Q, hv wkï‡K A‡bK ai‡bi msµgY n‡Z iÿv K‡i| gv‡qi `ya wkïi cywó mvab K‡i Ges kvixwiK I gvbwmK weKv‡k mvnvh¨ K‡i| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔRbbxMY c~Y© `yB eQi Zv‡`i mšÍvb‡`i ¯Íb¨`vb Ki‡e|Ó[34] cweÎ KziAv‡bi Ab¨Î ejv n‡q‡Q, Avwg gvbyl‡K Zvi wcZv-gvZvi e¨vcv‡i bQxnZ KiwQ ‡h, Zvi gv K‡ói ci Kó mn¨ K‡i Zv‡K †c‡U aviY K‡i‡Q| Avi Zv‡K `ya Qvov‡Z `yB eQi †j‡M‡Q|[35] Z‡e `y»cvqx wkïi †Kvb ÿwZ nIqvi m¤¢vebv bv _vK‡j ¯^vgx-¯¿x Av‡jvPbvi gva¨‡g wbwÏ©ó mgq c~Y© nIqvi c~‡e© `ya Qvwo‡q wb‡Z cvi‡e| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔhw` ¯^vgx-¯¿x DfqB cvi¯úwiK Av‡jvPbvi wfwË‡Z `ya Qvwo‡q wb‡Z Pvq, †m‡ÿ‡Î Zv‡`i †Kvb ¸bvn& n‡e bv|Ó[36] gnvbex (mv.) wkïi gvZ…`y» cv‡bi AwaKv‡ii K_v we‡ePbv K‡i G mgq ¯¿x mnevm wbwl× Ki‡Z †P‡qwQ‡jb| wZwb e‡jb, ÔÔ`y»cvqx wkïi gv‡qi mv‡_ ¯^vgxi mnevm wbwl× Ki‡Z ‡P‡qwQjvg, wKš‘ cvim¨ I †ivgK‡`i m¤ú‡K© Avgv‡K Rvbv‡bv nj †h, Zviv G KvR Ki‡jI Zv‡`i mšÍvb‡`i †Kvb ÿwZ n‡”Q bv|Ó[37] wcZvi `vwqZ¡ n‡”Q wkï‡K `ya cvb Kiv‡bvi mg‡q gv‡K Zvi wkïi `y» cvb m¤úK©xq hveZxq cÖ‡qvRbxq e¯‘ mieivn Kiv| gv‡qi `y» `v‡bi kw³ I mvg_©¨ _vKve¯’vq Zvi cwie‡Z© avÎxi gva¨‡g wkï‡K `y» cv‡bi e¨e¯’vKiY Bmjvg mg_©b K‡i bv| G cÖm‡½ cweÎ KziAv‡b ejv n‡q‡Q, ÔÔAvwg gymvi Rbbxi AšÍ‡i G Bjnvg Kijvg †h, Zzwg Zv‡K `y» `vb Ki| Z‡e hw` Zvi wbivcËvi wel‡q fq nq Zvn‡j Zv‡K b`x‡Z fvwm‡q `vI|Ó[38] gnvbex (mv.) ¯Íb`vbKv‡j gwnjv‡`i Mf©eZx nIqv †_‡K wbiærmvwnZ K‡i‡Qb| G cªm‡½ wZwb e‡jb, ÔÔ†Zvgiv †Zvgv‡`i mšÍvb‡`I †Mvcb cš’vq aŸsm Ki‡e bv| †Kbbv,

`y»cvqx wkï‡K ¯Íb`v‡bi mgq cwim‡i ¯¿x mnevm Ki‡j wkïi ÿwZ n‡Z cv‡i|Ó[39] ZvQvov wkï‡K `ya LvIqv‡bv mgqKvj ch©šÍ ¯¿xwgjb P~ovšÍfv‡e wbwl× Kiv n‡j ¯^vgx‡`i Kó nZ Ges G‡Z wek„•Ljv m„wó nIqviI m¤¢vebv wQj|Ó[40] e¯‘Z, gvZ…`y» wkïi Rb¨ wbqvgZ ¯^i*f*c| wkï f~wgó nIqvi c~‡e©B Avjøvn gv‡qi ¯Í‡b wkïi Lv`¨ wn‡m‡e `ya m„wó K‡ib| wkï‡K ey‡Ki `ya LvIqv‡j GKw`‡K wkï cwiwgZ cwigvY cywó †c‡q ¯^vfvweK I my›`ifv‡e †e‡o I‡V, Aciw`‡K gvI mšÍv‡bi g‡a¨ gayi m¤úK© M‡o D‡V| Gi cÖfve wkïi cieZ©x Rxeb‡KI cÖfvweZ K‡i| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔwZwb †Zvgv‡K m„wó K‡i‡Qb, AZtci †Zvgv‡K myVvg K‡i‡Qb Ges mymvgÄm¨ K‡i‡Qb|Ó[41] gv‡qi `ya me©cÖKvi †iv‡Mi cÖwZ‡ivaK kw³ wn‡m‡e KvR K‡i|[42] RvwZmsN wkï AwaKvi mb‡`I wkï‡K gv‡qi ey‡Ki `ya cvb Kiv‡bvi welqwU D‡jøL Kiv n‡q‡Q|[43]

5.5 Avjv`v weQvbvq wb`ªvi AwaKvi

wkïi GKwU ‚iæZ¡c~Y© AwaKvi n‡”Q GKwU wbwÏ©ó eq‡m Zvi Rb¨ Avjv`v kh¨vi e¨e¯’v Kiv| gnvbex (mv.) e‡j‡Qb, ÔÔmvZ eQi eq‡m wkï‡K bvgvh covi wb‡`©k `vI, `k eQi n‡q ‡M‡j bvgvh bv co‡j Zv‡K cÖnvi Ki Ges Zv‡`i kh¨v c„_K K‡i `vI|Ó[44] c„_K kh¨vi e¨e¯’v ej‡Z GKB K‡ÿ wfbœ kh¨v A_ev c„_K K‡ÿ n‡Z cv‡i| wkï‡`i Rb¨ Avjv`v weQvbv e¨e¯’v Kivi K_v RvwZmsN wkï AwaKvi mb‡` mivmwi D‡jøL †bB| Z‡e G mb‡`i 16(1) Aby‡”Q‡` wkïi wbR¯^ †MvcbxqZv, cwievi Ges evm¯’vb A_ev †hvMv‡hv‡Mi cÖwZ Ab¨vqfv‡e n¯Í‡ÿc Ki‡Z wb‡la Kiv n‡q‡Q|

5.6 Rxe‡bi wbivcËvi AwaKvi

Bmjvg wkïi Rxe‡bi wbivcËvi AwaKvi wbwðZ K‡i‡Q| wkïi Rxe‡bi wbivcËv ev †eu‡P _vKvi AwaKvi ej‡Z Ggbme †gŠwjK wRwb‡mi Dci Zvi AwaKvi‡K eySvq hv Zvi Rxeb‡K evuwP‡q iv‡L| †hgb: ¯^v¯’¨ †mev, cywóKi Lv`¨, weï× cvwb I ¯^v¯’¨m¤§Z cwi‡ek|[45] cweÎ KziAv‡b ejv n‡q‡Q, ÔÔAvjøvn †h cÖvY nZ¨v Kiv A‰ea K‡i w`‡q‡Qb Zv‡K Ab¨vqfv‡e nZ¨v Ki bv|Ó[46] cweÎ KziAv‡bi Ab¨Î ejv n‡q‡Q, ÔÔ‡KD KvD‡K nZ¨v Ki‡j ‡m †hb `ywbqvi mKj gvbyl‡KB nZ¨v Kij, Avi †KD Kv‡iv cÖvY iÿv Ki‡j †m †hb `ywbqvi mKj gvby‡li cÖvY iÿv Kij|Ó[47] cÖvK& Bmjvgx hy‡M Kb¨v mšÍvb‡K RxešÍ Kei †`qv nZ| Bmjvg G‡K gnvcvc e‡j †NvlYv K‡i‡Q| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔZv‡`i KvD‡K hLb Kb¨v mšÍvb R‡b¥i mymsev` †`qv nq, ZLb Zv‡`i †Pnviv Kv‡jv n‡q hvq Ges Zviv Amnbxq gb¯Ív‡c wK¬ó nq| Zv‡K †h msev` †`qv nq, Zv †m MøvwbKi g‡b K‡i| †m AvZ¥xq-¯^Rb †_‡KI AvZ¥‡Mvcb K‡i| †m ZLb wPšÍv Ki‡Z _v‡K G Acgvb m‡Ë¡I †m wK Zv‡K RxweZ ivL‡e bv RxešÍ cyu‡Z †dj‡e| mveavb! G ai‡bi wPšÍv I wm×všÍ AwZ RNb¨ Ges wbK…ó|Ó[48] AÁZvi hy‡M `vwi‡`ª¨i f‡q A‡b‡KB mšÍvb‡`i nZ¨v KiZ| Bmjvg G‡K K‡Vvifv‡e wbwl× K‡i‡Q| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔ`vwi‡`ª¨i Kvi‡Y †Zvgv‡`i mšÍvb‡`i‡K nZ¨v Ki‡e bv| Avwg †Zvgv‡`i‡K Ges Zv‡`i‡K wiwhK w`‡q _vwK|Ó[49] mšÍvb nZ¨vi cwiYvg m¤ú‡K©

cweÎ KziAv‡b ejv n‡q‡Q, ÔÔhviv wb‡R‡`i mšÍvb‡`i‡K nZ¨v Kij Zviv LyeB ÿwZMÖ¯’|Ó[50] cweÎ KziAv‡b ejv n‡q‡Q, ÔÔAek¨B ÿwZMÖ¯’ n‡q‡Q Zviv hviv †Kvb Ávb e¨vZxZ wb‡e©v‡ai b¨vq Zv‡`i wkï mšÍvb‡`i nZ¨v K‡i‡Q|Ó[51] wkï n‡”Q wcZv-gvZvi wbKU iwÿZ AvgvbZ| cweÎ KziAv‡b D‡jøL Av‡Q, ÔÔH w`b hLb RxešÍ mgvwa¯’ Kb¨v‡K wRÁvmv Kiv n‡e, wK Aciv‡a Zv‡K nZ¨v Kiv n‡qwQj?Ó[52] nhiZ Ave`yjøvn(iv.) †_‡K ewY©Z nv`x‡m Av‡Q, me‡P‡q eo cvc †KvbwU? Zvui G cÖ‡kœi DË‡i gnvbex (mv.) e‡jb, ÔÔAvjøvni mv‡_ wkiK, hw`I wZwbB †Zvgv‡`i‡K m„wó K‡i‡Qb|Ó Gici †KvbwU? DË‡i wZwb e‡jb, ÔÔ‡Zvgv‡`i Lv‡`¨i fvM emv‡e GB f‡q †Zvgiv mšÍvb‡`i‡K nZ¨v Ki|Ó[53] RvwZmsN wkï AwaKvi mb‡`I wkïi †eu‡P _vKvi AwaKv‡ii welqwU ejv n‡q‡Q| G mb` Abyhvqx, ÔÔcÖwZwU wkïi †eu‡P _vKvi Rb¥MZ AwaKvi msiÿ‡Yi Rb¨ AskMÖnYKvix ivóªmg~n Kvh©Ki e¨e¯’v MÖnY Ki‡e|Ó[54]

5.7 ˆbwZK wkÿv I PwiÎ MV‡bi AwaKvi

AvR‡Ki wkïB fwel¨Z KY©avi| wkï‡`i‡K DbœZ Pwi‡Îi AwaKvix I Av`k©evb K‡i M‡o Zzj‡Z cvi‡j Av`k© mgvR wewbg©vY m¤¢e| hw` mšÍv‡bi PwiÎ bó nq, Z‡e †m wb‡RB ïay ÿwZMÖ¯’ nq bv eis G ÿwZi cÖfve cwievi, mgvR Z_v iv‡óªi Dci cwie¨ß nq| Kv‡R wkïi PwiÎ MV‡bi e¨vcv‡i wcZv-gvZv‡K m‡PZb _vKv Avek¨K|[55] `yóz Pwi‡Îi cÖwZ N„Yvi g‡bvfve m„wó Ki‡Z n‡e Ges DbœZ PwiÎ Øviv Zv‡`i‡K weKwkZ Ki‡Z n‡e| wkïi ˆbwZK wkÿvi mye¨e¯’v Kivi Rb¨ wcZv-gvZv‡K gnvbex (mv.) wb‡`©k w`‡q‡Qb| wZwb e‡j‡Qb, ÔÔwcZvi Dci wkï mšÍv‡bi wZbwU AwaKvi i‡q‡Q| R‡b¥i ci Zvi GKwU DËg bvg ivLv, eyw× n‡j Zv‡K ˆbwZK wkÿv †`Iqv Ges ev‡jM n‡j weevn †`Iqv|Ó[56] DËgi*ƒ*‡c Zv‡`i Av`e-Kvq`v, wkóvPvi wkÿv w`‡Z n‡e| Pjv-‡div, DVv-emv, K_v-evZ©v, AvPvi-AvPiY hv‡Z kvjxb nq, †mB wkÿv w`‡Z n‡e| nhiZ †jvKgvb (Av.) Zvui cyÎ‡K †hfv‡e wkÿv w`‡qwQ‡jb cweÎ KziAv‡b Zv D‡jøL Kiv n‡q‡Q| ÔÔAnsKviekZ Zzwg AeÁv Ki‡e bv Ges c„w_ex‡Z D×Zfv‡e wePiY Ki‡e bv| KviY Avjøvn †Kvb D×Z, AnsKvix‡K cQ› K‡ib bv| Zzwg c`‡ÿc Ki‡e mshZfv‡e Ges Zzwg †Zvgvi KÚ¯^i wbPz Ki‡e, ¯^‡ii g‡a¨ M`©‡fi ¯^iB me©v‡cÿv AcÖxwZKi|Ó[57] wkï‡`i ˆbwZK Z_v ag©xq wkÿv I AvLjvK Dbœq‡bi Rb¨ cÖ‡qvRbxq wkÿvi e¨e¯’v Kiv wcZv-gvZvi `vwqZ¡| wkïi g‡a¨ g~j¨‡eva m„wó Kiv, ag©xq Abykvmb †g‡b Pjv Ges mZZv I b¨vqcivqYZvi cÖwZ DØy× Kiv wcZv-gvZvi ˆbwZK `vwqZ¡| RvwZmsN wkï AwaKvi mb`I wkï‡K ˆbwZK wkÿv cÖ`v‡bi e¨vcv‡i ¸iæZ¡ cÖ`vb K‡i‡Q| G mb` Abyhvqx, ÔÔcÖwZwU wkïi kvixwiK, gvbwmK, AvwZ¥K, ˆbwZK Ges mvgvwRK Dbœq‡bi Rb¨ DbœZ Rxeb gv‡bi e¨e¯’vi cÖwZ AskMÖnYKvix ivóªmg~n Kvh©Ki e¨e¯’v MÖnY Ki‡e |Ó[58]

5.8 wkÿvjv‡fi AwaKvi

wkï‡`i wkÿvi cÖwZ Bmjvg ¸iæZ¡v‡ivc K‡i‡Q| gnvbex (mv.) e‡jb, ÔÔ‡Kvb wcZv Zvi mšÍvb‡K wkÿv-`xÿv `vb A‡cÿv DËg †Kvb wKQz `vb Ki‡Z cv‡i bv|Ó[59]

Bmjvg wkÿvjv‡fi cÖwZ ïay Drmvn †hvMvq wb, eis cÖ‡Z¨K bi-bvixi Dci ÁvbvR©b dih K‡i w`‡q‡Q| Bmjv‡g ÁvbvR©b‡K m‡e©vËg Bev`Z e‡j D‡jøL Kiv n‡q‡Q| Bmjvg wkï‡K wkÿv-`xÿv I Ávb-Mwigvq cÖK…Z gvbyl Ges mybvMwiK wnmv‡e M‡o †Zvjvi wb‡`©k cÖ`vb K‡i‡Q| gnvbex(mv.) e‡j‡Qb, ÔÔ‡Zvgv‡`i wkï‡`i Ávb`vb Ki| †Kbbv, Zviv †Zvgv‡`i cieZ©x hy‡Mi Rb¨ m„ó|Ó[60] GKwU RvwZ Zvi BwZnvm I HwZn¨ wb‡q wU‡K _vKvi c~e©kZ© n‡"Q wkÿv-`xÿv I Ávb-weÁv‡bi AwaKvix nIqv| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔ hv‡K wnKgZ cÖ`vb Kiv nq, Zv‡K cÖf~Z Kj¨vY `vb Kiv nq|Ó[61] wkÿv gvbe wkï‡K AÁvbZvi AÜKvi †_‡K gy³ K‡i| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔwZwbB D¤§xw`‡Mi g‡a¨ Zv‡`i GKRb‡K cvwV‡q‡Qb ivm~ji*ƒ*‡c †h Zv‡`i wbKU Ave□wË K□i Zuvi AvqvZ, Zv□i□K cweÎ K□i Ges wkÿv □q wKZve I wnKgZ; B‡Zvc~‡e© †Zv Zviv wQj †Nvi weåvwšÍ‡Z|Ó[62] RvwZmsN wkï AwaKvi mb‡`I wkïi wkÿvjv‡fi AwaKvi‡K ¸iæZ¡ w`‡q‡Q| G mb‡` ejv n‡q‡Q, ÔÔAksMÖnYKvix ivóª mgvb my‡hv‡Mi wfwË‡Z wkïi wkÿvjv‡fi AwaKvi‡K ¯^xKvi Ki‡e Ges GB AwaKvi‡K AwaK ev¯Íevq‡bi Rb¨ c`‡ÿc MÖnY Ki‡e|Ó[63]

5.9 Avw_©K wbðqZv cvIqvi AwaKvi

mšÍvb Kg©ÿg nIqvi c~e© ch©šÍ wcZv-gvZvi wbKU wbf©ikxj _v‡K| mšÍvb jvj‡bi Rb¨ †h A_© e¨q Kiv nq Bmjv‡g †mwU‡K DËg †bK Avgj e‡j MY¨ Kiv nq| wcZv-gvZvi `vwqZ¡ n‡"Q Avw_©K mvg_©¨ Abyhvqx wkïi Rxeb hvÎvi DbœZgvb wbwðZ Kiv| cweÎ KziAv‡b D‡jøL Av‡Q, ÔÔZv‡`i fq Kiv DwPZ, Zviv hw` Amnvq mšÍvb †i‡L `ywbqv †_‡K P‡j hvq, Z‡e g„Zz¨i mgq mšÍvb‡`i m¤ú‡K© Zv‡K AvksKv I DwØMœ Ki‡e|Ó[64] wb‡Ri mšÍvb‡K A‡b¨i `qv-`vwÿ‡Y¨i Dci †d‡j hvIqvi †P‡q Afvegy³ †i‡L hvIqv DËg| wbR cwievi I mšÍv‡bi Rb¨ A_© e¨q‡K Avjøvni c‡_ wRnv`, †Mvjvg Avhv`, wKsev Mixe wgmKx‡bi jvj‡bi Rb¨ A_© e¨‡qi †P‡qI DËg ejv n‡q‡Q| nhiZ Avey ûivqiv (iv.) †_‡K ewY©Z nv`x‡m Av‡Q, gynv¤§` (mv.) e‡j‡Qb, ÔÔGKw`bvi µxZ`vm gy³ Kivi Rb¨ e¨q K‡iQ, GKw`bvi wgmKx‡bi Rb¨ e¨q K‡iQ Ges GKw`bvi wb‡Ri cwiev‡ii Rb¨ e¨q K‡iQ| Gme¸‡jvi gv‡S IB w`bv‡ii mvIqve me‡P‡q †ewk, hv †Zvgvi cwiev‡ii Rb¨ e¨q K‡iQ|Ó[65] wkïi jvjb-cvjb I weKv‡ki Rb¨ wcZv-gvZv Dfq‡K `vwqZ¡cvj‡bi Rb¨ RvwZmsN wkï AwaKvi mb‡` ejv n‡q‡Q| G mb` Abyhvqx, ÔÔwkïi jvjb-cvjb I weKv‡ki Rb¨ wcZv-gvZv Df‡qi `vwqZ¡‡K mwµq K‡i Zzj‡Z AskMÖnYKvix ivóª D‡`¨vMx n‡e|Ó[66]

5.10 mge¨envi cvIqvi AwaKvi

‡¯œn fvjevmv, Av`i-hZœ-†mvnv‡Mi †ÿ‡Î wcZv-gvZvi Kv‡Q cyÎ I Kb¨v Df‡qB mge¨envi cvIqvi AwaKvi iv‡L| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔ‡Zvgiv Avjøvn‡K fq Ki Ges mšÍvb‡`i e¨vcv‡i Bbmvd Kv‡qg Ki|Ó[67] gvbe mgv‡R Kb¨vmšÍv‡bi †P‡q cyÎmšÍvb Rb¥ wb‡j AwaK Avbw›`Z nIqvi cÖeYZv we`¨gvb|[68] Bmjvg G ai‡bi msKxY© gvbwmKZv N„Yv K‡i| gnvbex (mv.) e‡jb, hvi Kb¨vmšÍvb i‡q‡Q, A_P

Zv‡K RxešÍ Kei †`q wb, Zv‡K jvwÃZ K‡iwb, wKsev Zvi Zzjbvq cyÎmšÍvb‡K †ewk †¯œn K‡i wb, Avjøvn Zv‡K Rvbœv‡Z cÖ‡ek Kiv‡eb|Ó[69] GgbwK weaev wKsev ZvjvKcÖvß Kb¨vi hw` †`Lv-ïbvi †KD bv _v‡K eis wcZvi N‡i wd‡i Av‡m Zvn‡j wcZvi `vwqZ¡ nj Zvi Rxe‡bi hveZxq `vwqZ¡ cvjb Kiv| Bmjv‡g G‡K m‡e©vËg m`Kv e‡j D‡jøL Kiv n‡q‡Q| cweÎ KziAv‡b ejv n‡q‡Q, ÔÔcyiæl‡`i Rb¨ †mB m¤ú‡`i Ask i‡q‡Q hv wcZv-gvZv I AvZ¥xq-¯^Rb †i‡L †M‡Q Ges bvix‡`i Rb¨I †mB m¤ú‡`i Ask i‡q‡Q hv wcZv-gvZv I AvZ¥xq-¯^RbMY †i‡L †M‡Q, Aí †nvK Avi ‡ewk †nvK Ges G Ask Avjøvn KZ…©K wbav©wiZ|Ó[70] RvwZmsN wkï AwaKvi mb‡`I wj½‡f‡` wkïi cÖwZ ˆelg¨g~jK AvPiY bv Kivi welqwU Dc¯’vwcZ n‡q‡Q|[71] evsjv‡`‡ki msweav‡b AvB‡bi `„wó‡Z bvix-cyiæ‡li mgZv ¯^xK…Z n‡q‡Q|[72] G msweav‡bi Ab¨Î bvix cyiæl †f‡` †Kvb bvMwi‡Ki cÖwZ ˆelg¨ cÖ`k©b bv Kivi Rb¨ ejv n‡q‡Q|[73] bvix ev wkï‡`i AMÖMwZi Rb¨ we‡kl weavb cÖYq‡bi welqI G msweav‡b ejv n‡q‡Q|[74]

5.11 my¯’Zv I kvixwiK weKv‡ki AwaKvi

Bmjvg cÖwZwU wkï‡K my¯’fv‡e †eu‡P _vKvi AwaKvi cÖ`vb K‡i‡Q| wkï mšÍv‡bi my¯’Zv I kvixwiK weKv‡ki cÖwZ wcZv-gvZvi †Lqvj ivLv Riæix| gnvb Avjøvn †ivM I wPwKrmv DfqB `vb K‡i‡Qb| Kv‡RB wkïiv Amy¯’ n‡j gv-evevi DwPZ cÖ‡qvRbxq wPwKrmvi e¨e¯’v Kiv| mvg_©¨ _vKv m‡Ë¡I wcZv-gvZv hw` Amy¯’ wkïmšÍv‡bi wPwKrmv bv K‡i Zvn‡j Zviv ¸bvnMvi I Acivax wn‡m‡e we‡ewPZ n‡e| RvwZmsN wkï AwaKvi mb‡` wkïi my¯’Zv I kvixwiK weKv‡ki AwaKv‡ii K_v ejv n‡q‡Q| G mb` Abyhvqx, ÔÔwkïi m‡ev©”P AR©b‡hvM¨ gv‡bi ¯^v¯’¨, †iv‡Mi wPwKrmv, ¯^v¯’¨ cybiæ×v‡ii myweav jv‡fi AwaKvi‡K AskMÖnYKvix ivóª ¯^xKvi Ki‡e| G ai‡bi †mevi AwaKvi †_‡K †Kvb wkï hv‡Z ewÂZ bv nq Zv wbwðZ Kivi Rb¨ AskMÖnYKvix ivóª me©vZ¥K †Póv Ki‡e|Ó[75]

5.12 †Ljva~jv I we‡bv`‡bi AwaKvi

†Ljva~jv I we‡bv`b wkïi Ab¨Zg AwaKvi| †Ljva~jv wkïi kvixwiK MVb gReyZ K‡i| Avi we‡bv`b wkïi gvbwmK weKv‡k mnvqZv K‡i| Bmjvg †Ljva~jv I we‡bv`b‡K DrmvwnZ K‡i‡Q| gnvbex (mv.) e‡j‡Qb, wcZv-gvZvi cÖwZ mšÍv‡bi AwaKvi nj, Zviv mšÍvb‡K †jLvcov, mvZvi wkÿv Ges Zxi›`vR n‡Z wkÿv w`‡e| wZwb nhiZ Avqkv (iv.)-Gi mv‡_ GK‡Î gjøhy× cÖZ¨ÿ K‡i‡Qb| †Kvb mdi n‡Z ‡divi c‡_ wkï‡`i mv‡_ †`Lv n‡j Zv‡`i wZwb mv`‡i Af¨_©bv Ki‡Zb Ges D‡Vi mvg‡b-wcQ‡b ewm‡q DU Pvjv‡Zb| GgbwK mdi n‡Z †divi c‡_ K¬všÍ-kÖvšÍ Ae¯’v‡ZI wZwb wkï‡`i Avb›` w`‡Z wØav K‡ib wb| gnvbex (m.)-Gi AvPiY cÖgvY K‡i †h, wkï‡`i mv‡_ †Ljvq Ask ‡bIqv ev Zv‡`i †Lj‡Z †`Iqv DwPZ| myZivs Bmjv‡gi `„wó‡Z GwU wkï‡`i GKwU AwaKvi| RvwZmsN wkï AwaKvi mb‡`I wkïi †Ljva~jv I we‡bv`‡bi AwaKvi‡K ¸iæZ¡ w`‡q‡Q| G mb` Abyhvqx, ÔÔeq‡mi mv‡_ m½wZ †i‡L wkïi wekÖvg, Aemi hvcb, eqm Abyhvqx †Ljva~jv,

we‡bv`bg~jK Kg©m~Px Ges mvs¯‹…wZK, myKzgvi wk‡í AskMÖn‡Yi Aeva AwaKvi cÖ`v‡bi Rb¨ AskMÖnYKvix ivóªmg~n Kvh©Ki e¨e¯'v MÖnY Ki‡e|[76]

5.13 nvjvj Avq †_‡K cÖwZcvwjZ nIqvi AwaKvi

Bmjv‡gi `„wó‡Z nvjvj Dcv‡q RxweKv wbe©vn Kivi IqvwRe| Avi wcZv-gvZvi DwPZ nvjvj Avq †_‡K mšÍvb‡`i jvjb-cvjb Kiv| cyÎmšÍvb ev‡jM bv nIqv ch©šÍ Ges Kb¨vmšÍvb weevn bv †`Iqv ch©šÍ Zv‡K fiY-‡cvlY wcZvi Ici eZ©vq|[77] wcZv `wi`ª n‡jI Zvi mšÍvb‡`i fiY-‡cvlY w`‡Z eva¨| mšÍvbiv Zv‡`i gvZvi wbKU wKsev Zv‡`i gvZvg‡ni wbKU _vK‡jI wcZv Zv‡`i fiY-‡cvl‡Yi LiP w`‡Z eva¨|[78] cweÎ KziAv‡b D‡jøL Av‡Q, ÕÔRb‡Ki KZ©e¨ h_vixwZ Zv‡`i fiY-‡cvlY Kiv| KvD‡K Zvi mva¨vZxZ Kvh©fvi †`qv nq bv|Ó[79] cweÎ KziAv‡bi Ab¨Î ejv n‡q‡Q,ÔÔmvjvZ mgvß n‡j †Zvgiv c„w_ex‡Z Qwo‡q co‡e Ges Avjøvni AbyMÖn mÜvb Ki‡e I Avjøvn‡K AwaK ¯§iY Ki‡e, hv‡Z †Zvgiv mdjKvg nI|Ó[80] G AvqvZ Øviv eySv‡bv n‡q‡Q, KvwqK kÖg Øviv DcvwR©Z A_© mšÍvb‡`i fiY-‡cvl‡Y e¨q Ki‡Z n‡e| gnvbex (mv.) e¨w³i wbR nv‡Z Kv‡Ri wewbg‡q DcvR©b‡K DËg e‡j D‡jøL K‡i‡Qb| RvwZmsN wkï AwaKvi mb‡`I wkï‡`i fiY-‡cvl‡Yi K_v ejv n‡q‡Q| G mb‡`i 27(4) Aby‡"Q` Abyhvqx, ÔÔAskMÖnYKvix ivóªmg~n †`‡ki †fZ‡i ev evB‡i wkïi evev-gv ev wkïi fiY-‡cvl‡Y wb‡qvwRZ e¨w³‡`i KvQ †_‡K fiY-‡cvlY Av`vq wbwðZ Kivi Rb¨ h_vh_ e¨e¯'v MÖnY Ki‡e|Ó Z‡e nvjvj Avq †_‡K wkïi jvjb-cvj‡bi welqwU RvwZmsN wkï AwaKvi mb‡` D‡jøL †bB|

5.14 gZvgZ cÖKv‡ki AwaKvi

Bmjvg wkïi gZvgZ cÖKv‡ki AwaKvi‡K mg_©b K‡i| e¨w³MZ gZvgZ cÖKvk ev †Kvb wm×všÍ MÖn‡Yi †ÿ‡Î wkï‡`i AskMÖn‡Yi AwaKvi‡K Bmjvg ïay ¯^xK…wZB †`q wb, eis DrmvwnZ K‡i‡Q| e¨w³MZ gZvgZ I wm×všÍ MÖn‡Y AskMÖn‡Yi gva¨‡g wkïi gvbwmK weKvk mvwaZ nq| GwU wkï‡K D™¢~Z mgm¨vw` †gvKvwejvq mnvqZv K‡i| RvwZmsN wkï AwaKvi mb‡`i PviwU g~jbxwZi g‡a¨ GKwU n‡"Q wkï‡`i gZvg‡Zi cÖwZ m¤§vb cÖ`k©b| G g~jbxwZ Abyhvqx wb‡R‡`i gZvgZ MV‡bi Dc‡hvMx wkï‡`i Zv‡`i m¤úwK©Z mKj wel‡q Aev‡a gZ cÖKv‡ki AwaKvi i‡q‡Q| RvwZmsN wkï AwaKvi mb` Abyhvqx, gZvgZ MV‡b cwicK¡ wkï wbR¯^ gZvgZ Ges aviYv cÖKv‡k Aeva ¯^vaxbZvi AwaKvix|[81] G mb‡`i Aci Aby‡"Q` Abyhvqx, wkïi ¯^vaxbfv‡e fve cÖKv‡ki AwaKvi _vK‡e|[82] evsjv‡`‡ki msweav‡bI cÖ‡Z¨K bvMwi‡Ki evK& I fve cÖKv‡ki ¯^vaxbZvi AwaKvi cÖ`vb Kiv n‡q‡Q|[83]

5.15 m¤úwËi DËivwaKvix nIqvi AwaKvi

wcZv-gvZvi m¤úwËi DËivwaKvix nIqvi AwaKvi wkï mšÍv‡bi i‡q‡Q| gnvb Avjøvn G cÖm‡½ e‡jb, ÔÔZviv †hb fq K‡i †h, Amnvq mšÍvb wcQ‡b †Q‡o †M‡j ZvivI Zv‡`i m¤ú‡K© DwØMœ nZ| myZivs Zviv †hb Avjøvn‡K fq K‡i Ges m½Z K_v e‡j|Ó[84] G Avqv‡Zi we¯ÍvwiZ e¨vL¨vi ci Be‡b Rvixi Zvevix †h gZ cÖKvk

K‡ib Zv nj, †KD g„Zz¨kh¨vq _vKve¯’vq Imxq‡Zi gva¨‡g m¤úwË e›U‡bi †ÿ‡Î †hb Aek¨B wbR mšÍvb‡`i K_v †Lqvj iv‡L| Zv‡K Amnvq Ae¯’vq m¤úwË †_‡K ewÂZ K‡i g„Zz¨kh¨vi Av‡k cv‡k Ae¯’vbKvix AvZ¥xq-¯^Rb ev BqvwZg-wgmKxb‡K m¤úwËi GK-Z…Zxqvs‡ki AwaK m¤úwË ImxqZ bv K‡i|[85] myZivs Zv‡`i wb‡Ri AcÖvßeq¯‹ wkï mšÍvb‡`i ewÂZ Kivi †Kvb AwaKvi Bmjvg wcZv-gvZv‡K †`q wb| RvwZmsN wkï AwaKvi mb‡`I wkï‡`i cÖvc¨ AwaKvi †_‡K ewÂZ bv Kivi K_v ejv n‡q‡Q| G mb‡`i 8(2) Aby‡”Q` Abyhvqx, ÔÔ‡Kv_vI ‡Kvb wkï Zvi wbR¯^ cwiPq †_‡K hw` AvswkK A_ev m¤ú~Y© †eAvBwbfv‡e ewÂZ nq Zvn‡j AskMÖnYKvix ivóªmg~n hZ ZvovZvwo m¤¢e †mB cwiPq cybtcÖwZôvq mnvqZv Ki‡e Ges wkï‡K iÿvi e¨e¯’v Ki‡e|Ó

5.16 †¯œen-fvjevmv cvIqvi AwaKvi

Bmjvg wkï‡`i †¯œen-fvjevmv cvIqvi AwaKvi wbwðZ K‡i‡Q| gynv¤§` (mv.) ‡NvlYv K‡i‡Qb, †h eo‡`i m¤§vb K‡i bv Ges †QvU‡`i ‡¯œen K‡i bv, †m Avgv‡`i mgvRfz³ bq|[86] wZwb wkï‡`i cÖPÐ fvjevm‡Zb| G cÖm‡½ Avgi web mvwq¨` (iv.) eY©bv K‡i‡Qb, ÔÔAvjøvni ivm~j (mv.) A‡cÿv Ab¨ KvD‡KI wkï‡`i cÖwZ AwaKZi m`q AvPiY Ki‡Z Avwg †`wL wb|Ó[87] gnvbex (mv.)-Gi Rxe‡b wkï‡`i cÖwZ fvjevmvi AmsL¨ D`vniY i‡q‡Q| †gŠmy‡gi cÖ_g dj †KD Zvu‡K Dcnvi w`‡j wZwb Zv mg‡eZ wkï‡`i g‡a¨ me©Kwbô‡K w`‡q w`‡Zb|[88] wkïiv Zvui Kv‡Q G‡j wZwb m‡¯œ‡n Zv‡`i Mv‡j Av`i Ki‡Zb| wkï‡`i e¨w³‡Z¡i c~Y© I ¯^v”Q›` weKv‡ki Rb¨ wkïi cvwievwiK cwi‡e‡k †e‡o IVv cÖ‡qvRb, †h cwi‡e‡k _vK‡e myL, fvjevmv I mg‡SvZv|[89] RvwZmsN wkï AwaKvi mb‡`I wkï‡`i †¯œen-fvjevmv cvIqvi AwaKv‡ii K_v ejv n‡q‡Q| wkï‡`i mv‡_ `ye©¨envi Ki‡Z G mb‡` wb‡la Kiv n‡q‡Q| G mb‡`i 19(1) Aby‡”Q` Abyhvqx, ÔÔAskMÖnYKvix ivóª, wcZvgvZv, AvBbvbyM AwffveK ev wkï cwiPh©vq wb‡qvwRZ Ab¨ †Kvb e¨w³i ZË¡veav‡b _vKvi Ae¯’vq wkï‡K AvNvZ ev AZ¨vPvi, Ae‡njv ev Ag‡bv‡hvMx AvPiY, `ye©¨envi ev †kvlY Ges †hŠb AZ¨vPvimn me kvixwiK I gvbwmK wbh©vZb †_‡K iÿvi Rb¨ h_vh_ AvBbvbyM, cÖkvmwbK, mvgvwRK Ges wkÿvMZ e¨e¯’v MÖnY Ki‡e|Ó

5.17 wkïi cÖ‡qvRb‡K AMÖvwaKvi cÖ`vb

Bmjvg wkïi cÖ‡qvRb‡K AMÖvwaKvi w`‡q‡Q| gnvbex (mv.) wkï‡`i Rb¨ Kó`vqK n‡e Ggb †Kvb KvR KLbB Ki‡Zb bv| wkï‡`i Kvbœv wZwb mn¨ Ki‡Z cvi‡Zb bv| †Kvb wkïi Kvbœv ïb‡Z †c‡j wZwb bvgvh mswÿß Ki‡Zb| gnvbex (mv.) bvgvhiZ Ae¯’vq wkï Bgvg nvmvb ev Bgvg ûmvBb Zvui wc‡V P‡o em‡j wmR`v `xN© Ki‡Zb, hv‡Z Zviv c‡o wM‡q e¨v_v bv cvq| GK`v gnvbex (mv.) `yÕwU wkï‡K †`Šov‡`Šwo Ki‡Z Ki‡Z cv wcQ‡j c‡o †h‡Z †`‡L gmwR‡`i wg¤^i †_‡K †b‡g G‡m wkï `yÕwU‡K †Kv‡j Zz‡j wb‡qwQ‡jb| Gfv‡e Bmjvg me©ve¯’vq wkïi cÖ‡qvRb‡K me©vwaK ‚iæ‡Z¡i mv‡_ we‡ePbv Ki‡Z wb‡`©k w`‡q‡Q| RvwZmsN wkï AwaKvi mb‡`i g~jbxwZ‚‡jvi GKwU n‡”Q wkïi ¯^v_©‡K

AMÖvwaKvi cÖ`vb| RvwZmsN wkï AwaKvi mb‡` ejv n‡q‡Q, ÔÔmiKvwi Ges †e-miKvwi mgvRKj¨vY cÖwZôvb, Av`vjZ, cÖkvmb ev AvBb cÖYqbKvix e¨w³eM© †h-B †nvK bv †Kb wkïwelqK †h †Kvb ai‡bi Kvh©µ‡g wkïi ¯^v_©B n‡e cÖ_g I cÖavb we‡ePbvi welq|Ó[90]

5.18 `ye©j I Amnvq wkïi AwaKvi msiÿY

DØv¯‘ wkï, cwievi †_‡K wew”Qbœ wkï Ges ‡kvlY, wbh©vZb I Ae‡njvi wkKvi nIqvi m¤¢vebv i‡q‡Q Ggb wkï‡`i AwaKvi msiÿ‡Yi wel‡q Bmjv‡g ZvwM` i‡q‡Q|[91] wkï‡`i gviai, SzuwKc~Y© Kv‡R wb‡qvM, †hŠb wbh©vZb, GwmW wb‡ÿc, AvZ¥nZ¨v, Av¯^vfvweK g„Zz¨, AcniY, wewµ nIqv Ges bvbv Kvi‡Y ˆel‡g¨i wkKvi nIqv †_‡K iÿv Kiv Riæix|[92] wcZ…nxb mšÍvbiv cÖvßeq‡m †cŠQuvi c~e© ch©šÍ BqvZxg wn‡m‡e cwiMwYZ| G BqvZxg‡`i jvjb cvj‡bi fvi Zvi wbKUvZ¥xq ev mgv‡Ri Dci evZ©vq| mšÍv‡bi e¨vcv‡i Zvi wcZv-gvZv‡K ‡hgb Revew`wn Ki‡Z nq, †Zgwb BqvZx‡gi e¨vcv‡i wbKUvZ¥xq I mgv‡Ri †jvKRb‡K Avjøvni Kv‡Q Revew`wn Ki‡Z n‡e| gynv¤§` (mv.) wb‡RI BqvZxg wQ‡jb| BqvZx‡gi cÖwZ Zvi †¯œen-fvjevmvI †ewk wQj| gynv¤§` (mv.) wb‡Ri kvnv`vZ I ga¨gv Av½yj GKwÎZ K‡i †`wL‡q wZwb I BqvZxg jvjbKvix Rvbœv‡Z Gfv‡e GK‡Î _vKvi K_v e‡j‡Qb| G‡Z eySv hvq, Bmjvg Amnvq I `ye©j wkïi AwaKvi iÿvi e¨vcv‡i LyeB m‡PZb| RvwZmsN wkï AwaKvi mb`I `ye©j I Amnvq wkïi AwaKvi msiÿY K‡i‡Q| G mb` Abyhvqx, ÔÔgvbwmK ev kvixwiKfv‡e c½y wkï Ggb cwi‡e‡k evm Ki‡e, †h cwi‡e‡k ‡m myôz Ges cwic~Y© Rxeb‡K Dc‡fvM Ki‡Z cvi‡e Ges Zvi gh©v`v wbwðZ n‡e|Ó[93] evsjv‡`‡ki msweav‡bI wkïi mKj cÖKvi Kó`vqK Rei`w¯Í kÖg wbwl× Kiv n‡q‡Q|[94]

Dcmsnvi

Bmjvg wkïi Rxe‡bi wbivcËv, Abœ, e¯¿, evm¯’vb, wPwKrmv I wkÿvi wbðqZv weavb K‡i| AvR wkï AwaKvi I wkïi mvwe©K weKv‡ki welqwU wek¦e¨vcx ¯^xK…Z| RvwZmsN wkï AwaKvi mb`wU BwZnv‡m me‡P‡q e¨vcKfv‡e M„nxZ gvbevwaKvi Pzw³| G mb‡`i wewfbœ Aby‡”Q‡` wkï Kj¨vY wbwðZ Kivmn mKj cÖKvi †kvlY, ˆelg¨, Ae‡njv Ges wbh©vZb †_‡K Zv‡`i iÿv Kivi K_v ejv n‡q‡Q| wkï AwaKv‡ii e¨vcv‡i †h Aby‡”Q`¸‡jv G mb‡` wea„Z n‡q‡Q Zv Bmjvg cÖ`Ë wkï AwaKv‡iiB cÖwZdjb| cÖwZwU wkïiB gvZ…Mf© n‡Z Avi¤¢ K‡i †hŠeb cÖvwßi c~e© ch©šÍ cÖwZcvwjZ nIqvi AwaKvi Bmjvg msiÿY K‡i| MYcÖRvZš¿x evsjv‡`‡ki msweav‡bI wkï‡`i hveZxq AwaKv‡ii K_v ejv n‡q‡Q| wKš‘ GZ`m‡Ë¡I wkï AcinY, wkï cvPvi, wkï kÖg, wkï‡`i kvixwiK, gvbwmK I †hŠb wbh©vZbmn GwmW wb‡ÿc eZ©gvb mg‡qi wbZ¨‰bwgwËK NUbv| cwÎKvi cvZv Lyj‡jB cÖwZwbqZ G mKj wbh©vZ‡bi Lei cvIqv hvq| Avgiv hw` Bmjvg I RvwZmsN wkï AwaKvi mb`cÖ`Ë AwaKvimg~n h_vh_fv‡e ev¯Íevqb Kwi Ges wkï‡`i `vwqZ¡ I KZ©‡e¨i e¨vcv‡i m‡PZb nB, Zvn‡j GmKj wbh©vZb eÜ Kiv A‡bKvs‡kB m¤¢e|

Z_¨wb‡`©k

1. *RvwZmsN wkï AwaKvi mb`*, 1989, Aby‡”Q`- 1|
2. *evsjv wcwWqv*, LÐ-9,(XvKv:evsjv‡`k GwkqvwUK †mvmvBwU), 2003, c„.385|
3. *wkï AvBb*, 2013, aviv- 4|
4. *RvZxq wkï bxwZ*, gwnjv I wkï welqK gš¿Yvjq, MYcÖRvZš¿x evsjv‡`k miKvi, wW‡m¤^i 1994|
5. *wi‡cv‡U©i Rb¨ bxwZ-‰bwZKZv cÖm½ wkï*, BDwb‡md evsjv‡`k, XvKv b‡f¤^i, 2010, c„. 9|
6. *Avj KziAvb*, m~iv-wbmv (4), AvqvZ- 6|
7. gvIjvbv gydZx gynv¤§` kdx, *Zvdmx‡i gvÔAv‡idzj †KviAvb*, wØZxq LÐ, Ab~: gvIjvbv gwnDÏxb Lvb, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), Ryb 1994, c„. 287|
8. *Avj KziAvb*, m~iv-Kvn&d (18), AvqvZ- 46|
9. *Z‡`e*, m~iv-Bmiv (17), AvqvZ- 6|
10. *Z‡`e*, m~iv-‡dviK¡vb (25), AvqvZ- 74|
11. *Z‡`e*, m~iv-Kvn&d (18), AvqvZ- 46|
12. ‡Z‡im e^{a}u‡k, *evsjv‡`‡k wkï AwaKvi nviv‡bv ˆkke: Zvi BwZK_v*, Ab~: ˆmq` AvwRRyj nK, (XvKv: BDwbfvwm©wU †cÖm wjwg‡UW), 1997, c„. 42|
13. Henry Shue, *Basic Rights-Subsistence, Affluence and US Foreign Policy,* (New Jersey: Princeton University Press),1980.
14. gvngy` Rvgvj, *wkï AwaKvi I Bmjvg*, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), GwcÖj 2004, c„.17|
15. *wkïi Dc‡hvMx wek¦*, BDwb‡md, XvKv, †g 2003, c„. 96|
16. mvB‡q` Aveyj †nv‡mb Avjx b`fx, *Bmjvg: ag©: mgvR: ms¯‹…wZ*, (XvKv: Rwgq‡Z kvn& IqvjxDjøvn GKv‡Wgx), 1999, c„. 92|
17. *Avj KzivAvb*, m~iv-bvn&j (16), AvqvZ- 72|
18. *Z‡`e*, m~iv-‡dviK¡vb (25), AvqvZ- 74|
19. BqvnBqv web kixd Avb-bffx, *wiqv`ym& mv‡jnxb*, 3q LÐ, Ab~: Avt gvbœvb Zvwje, (XvKv: evsjv‡`k Bmjvgx †m›Uvi), 1996, c„. 225|
20. eyLvix, *mnxn Avj-eyLvix*, 1g LÐ, (w`jøx: KzZzeLvbv ikxw`qvn), Zv.we., c„.787|
21. *Bmjv‡g wkï cwiPh©v*, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), 1987, c„. 19|
22. eyLvix, *mwnn Avj-eyLvix*, wKZve Avj-Rygyqv, (KwjKvZv: iwk` †nvmvBb GÐ mÝ), 1973, c„. 122|
23. Be‡b gvRvn&, *mybvb Bewb gvhvn*, wKZve Avj-wbKvn, (KwjKvZv: ekxi †nvmvBb GÐ mÝ), 1973, c„. 142|
24. *Avj KziAvb*, m~iv-`vn&i (76), AvqvZ- 2|
25. †gvnv¤§` Aveyj Kv‡mg f~uBqv, *hyM-wRÁvmv I cwievi*, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), 1987, c„. 1|
26. *RvwZmsN wkï AwaKvi mb`*, Aby‡”Q`- 8(1)|
27. MvRx kvgQyi ingvb, *Bmjv‡g bvix I wkï cÖm½*, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), 1981, c„. 271|
28. *RvwZmsN wkï AwaKvi mb`*, Aby‡”Q`- 24(2)(N)|

29. Avey `vD`, *mybv‡b Avey `vD`*, Ab~: myjvBgvb Bewbj Avm-Avm wmwR¯Ívbx, Aa¨vq-Avm mvjvZ, (w`jøx: gvKZvev‡q ikxw`qv), Zv.we., c„. 52|
30. *Avj-KziAvb*, m~iv-evKv¡ivn& (2), AvqvZ- 31|
31. *Z‡`e*, m~iv-AvÕivd (7), AvqvZ- 180|
32. *Z‡`e*, m~iv-Avn&hve (33), AvqvZ- 5|
33. *RvwZmsN wkï AwaKvi mb`*, Aby‡”Q`- 7(1)|
34. *Avj-KziAvb*, m~iv-evKv¡ivn& (2), AvqvZ- 233|
35. *Z‡`e*, m~iv-‡jvKgvb (31), AvqvZ- 14|
36. *Z‡`e*, m~iv-evKv¡ivn& (2), AvqvZ- 233|
37. Avey `vD`, *c~‡e©v³*, c„. 61|
38. *Avj-KziAvb*, m~iv-K¡vQvQ (28), AvqvZ- 7|
39. Bgvg gymwjg, *mnxn gymwjg*, wKZve Avj wbKvn&, 1g LÐ, (w`jøx: KzZyeLvbv ikxw`qv), Zv.we., c„.446|
40. Avjøvgv BDmyd Avj KviRvfx, *Bmjv‡g nvjvj I nviv‡gi weavb*, Ab~: gvIjvbv gynv¤§` Avãyi inxg, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), c„. 264|
41. *Avj-KziAvb*, m~iv-Bb&wdZ¡vi (82), AvqvZ- 7|
42. gvngy` Rvgvj, *c~‡e©v³*, c„. 42|
43. *RvwZmsN wkï AwaKvi mb`*, Aby‡”Q`- 24(2)(O)|
44. Avey `vD`, *c~‡e©v³*, c„. 71|
45. *^`bw›`b Rxe‡b Bmjvg*, m¤úv`bv cwil`, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), 2000, c„. 155|
46. *Avj-KziAvb*, m~iv-`vnvi (76), AvqvZ- 2|
47. *Z‡`e*, m~iv-gvwq`vn& (5), AvqvZ- 32|
48. *Z‡`e*, m~iv-bvn&j (16), AvqvZ- 59|
49. *Z‡`e*, m~iv-Avb&AvÕg (6), AvqvZ- 151|
50. *Z‡`e*, m~iv-Avb&AvÕg (6), AvqvZ- 140|
51. *Z‡`e*, m~iv-evKv¡ivn& (2), AvqvZ- 228|
52. *Z‡`e*, m~iv-ZvKfxi (81), AvqvZ- 9|
53. eyLvix, *c~‡e©v³*, c„. 887|
54. *RvwZmsN wkï AwaKvi mb`*, Aby‡”Q`- 6(1)|
55. ^`bw›`b Rxe‡b Bmjvg, *c~‡e©v³*, c„. 158|
56. *mxivZ wek¦‡Kvl*, `kg LÐ, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), 2005, c„. 400|
57. *Avj-KziAvb*, m~iv-‡jvKgvb (31), AvqvZ- 19|
58. *RvwZmsN wkï AwaKvi mb`*, Aby‡”Q`- 27(1)|
59. mxivZ wek¦‡Kvl, *c~‡e©v³*, c„. 400|
60. ‡gvt BDbym wmK`vi, *Bmjv‡gi Av‡jv‡K cwievi cwiKíbv*, (XvKv: c¨v_ cvBÐvi B›Uvt), 1996, c„.23|
61. *Avj KziAvb*, m~iv-evKv¡ivn& (2), AvqvZ- 269|
62. *Z‡`e*, m~iv-RygyAv (62), AvqvZ- 2|
63. *RvwZmsN wkï AwaKvi mb`*, Aby‡”Q`- 28(1)|
64. *Avj-KziAvb*, m~iv-wbmv (4), AvqvZ- 9|

65. Avey hvKvwiqv BqvnBqv web kid Avb-bffx, *wiqv`ym& mv‡jnxb*, Ab~: gvIjvbv gynv¤§` Avey ˆZqe Avãyjøvcyix, (PÆMÖvg: in&gvwbqv Bmjvgx M‡elYv I cÖKvkbv †K›`ª), 2013, c„. 192|
66. *RvwZmsN wkï AwaKvi mb*`, Aby‡”Q`- 18(1)|
67. *Avj-KziAvb*, m~iv- wbmv (4), AvqvZ- 28|
68. ‡Z‡im eªu‡k, *c~‡e©v³*, c„. 56|
69. mxivZ wek¦‡Kvl, *c~‡e©v³*, c„. 403|
70. *Avj-KziAvb*, m~iv- wbmv (4), AvqvZ- 7|
71. *RvwZmsN wkï AwaKvi mb*`, Aby‡”Q`- 2(1)|
72. *MYcÖRvZš¿x evsjv‡`‡ki msweavb*, Aby‡”Q`- 27|
73. *Z‡`e*, Aby‡”Q`- 28(1)|
74. *Z‡`e*, Aby‡”Q`- 28(4)|
75. *RvwZmsN wkï AwaKvi mb*`, Aby‡”Q`- 24(1)|
76. *Z‡`e*, Aby‡”Q`- 31(1)|
77. MvRx kvgQzi ingvb I Ab¨vb¨ (m¤úvw`Z), *wewae× Bmjvgx AvBb*, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), 2001, c„.771|
78. MvRx kvgQzi ingvb, *c~‡e©v³*, c„. 284|
79. *Avj KziAvb*, m~iv-evKv¡ivn& (2), AvqvZ- 233|
80. *Z‡`e*, m~iv-RygyAv (62), AvqvZ- 10|
81. *RvwZmsN wkï AwaKvi mb*`, Aby‡”Q`- 12(1)|
82. *Z‡`e*, Aby‡”Q`- 13(1)|
83. *MYcÖRvZš¿x evsjv‡`‡ki msweavb*, Aby‡”Q`- 39(2)(K)|
84. *Avj-KziAvb*, m~iv- wbmv (4), AvqvZ-9|
85. Be‡b Rvixi Zvevix, *Zvdmx‡i Zvevix kixd*, 8g LÐ, Ab~: m¤úv`bv cwil`, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), 1994, c„.75|
86. Ameer Ali, *The Spirit of Islam*, (London: Methuen and Co Ltd.), 1967, pp. 258-269.
87. ‡gvt Avdhvjyi ingvb, *nhiZ gynv¤§` (mv.) Gi Rxebx wek¦‡Kvl*, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), 1989, c„. 61|
88. Bgvg eyLvix (ivt), *Avj& Av`veyj gydiv*`, wØZxq LÐ, Ab~: Ave`yjøvn web mvC` Rvjvjvev`x, (XvKv: BmjvwgK dvD‡Ðkb evsjv‡`k), 1994, nv`xm- 364|
89. wkïi Dc‡hvMx wek¦, *c~‡e©v³*, c„. 95|
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91. MvRx kvgQzi ingvb I Ab¨vb¨ (m¤úvw`Z), *c~‡e©v³*, c„.771|
92. gwnjv I wkï welqK gš¿Yvjq, *wkï AwaKvi mßvn*, (XvKv: BDwb‡md), 1997, c„. 6|
93. *RvwZmsN wkï AwaKvi mb*`, Aby‡”Q`- 23(1)|
94. *MYcÖRvZš¿x evsjv‡`‡ki msweavb*, Aby‡”Q`- 34(1)|

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- the name of the journal in italics;
- date of publication: month and year;
- page (s), or page range.
Shahdeen Malik, 'Law of Homicide in the Early Nineteenth Century Bengal: Changed Law and Unchanged Applications' *Bangladesh Journal of Law*, Vol. 2, No.1, (1998), pp. 85-102.

Article in Book
Dr. M. Shah Alam, 'Domestic Implementation of International Human Rights Law in Bangladesh', in: Dr. Mizanur Rahman (ed.), *Human Rights and Domestic Implementation Mechanism*, ELCOP, Dhaka (2006), pp. 13-30.

Newspaper and Magazine Articles
The author's name, title of article, Newspaper, date, page or section

Reference of Internet Sources
For journal articles, books, case law, newspaper articles, and other documents accessed via the Internet simply cite as normal adding the website address in angle brackets (omitting http://) and the date the material was accessed to the end of the citation. For example,

Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, ICJ, Advisory Opinion, paras. 61-63, www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm, last visited on 29 March, 2006.

Citation of Interview
If the author is also the interviewer, provide the name, position and institution (as relevant) of the interviewee, location of the interview and full date.
Conference paper report
Authorship/author, editor or organization, Year, *Full Title of Conference Report,* Location, Date. Place of publication: Publisher.

Newspaper articles
Author, First Names, Year, Title of Article or Column Header, *Full Title of Newspaper,*
Day and month before page number and column line.

Law reports
Name of the parties involved [Year of reporting] Volume Number, Abbreviation for the Law Reporting Series, part number/case number/page reference if available.
Abdur Razzaque v State [1996] 48 DLR 457.

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