HUMAN RIGHTS ON WOMEN MATTERS THROUGH CEDAW AND THE BANGLADESH CONSTITUTION

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I. Background

Any right of human being is centered on liberty. The modern concept of liberty had its origin, development and practice in Britain. This we can see to have resulted mainly from the Magna Carta 1215, Petition of Rights 1628, Bill of Rights 1688, Act of Settlement 1701, Habeas Corpus Act 1679 and 1816. In addition, the concept of liberty became enriched out of the American Declaration of Independence 1776 and American Bill of Rights 1791 and the French Declaration of Rights of Man 1789 in which liberty, equality and fraternity acquiesced later in human rights realm.[1]

II. The Universal Declaration of Human Rights, 1948 (UDHR)

While the San Francisco Conference did not undertake to define human rights and fundamental freedoms, respect for which was to be promoted by the Organization, it tacitly recognized that this must be one of the initial tasks of the United Nations. At its first session in San Francisco 1946, the Economic and Social Council established Commission on Human Rights, and decided that its work should be directed towards submitting proposals and reports regarding:

a) an international bill of rights;

b) international declarations or convention on civil liberties, the status of women, freedom of information, and similar matters;

c) the protection of minorities;

d) the prevention of discrimination on grounds of race, sex, language or religion.

The Commission held its first session in January and February, 1947. A difference of opinion soon developed as to the exact nature of the end product which should be prepared. The United States favored a declaration that would be set forth goals and aspiration rather than legally binding commitments. This position was in part due to reluctance to embark upon the treaty provision because of the requirement of Senate approval. The United Kingdom on the other hand, was skeptical of the value of a declaration of general goals and preferred a treaty which would contain detailed and precise provisions and would legally bind all states accepting it. It was finally decided that both approaches should be adopted, and that two major documents of general principles in the tradition of the French Declaration of the Rights of Man and the other a covenant of binding obligations in the tradition of the English Bill of Rights.

In spite of previous difficulties in the way of getting a general agreement on the definition of basic

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human rights and fundamental freedoms, the Commission was able within a comparatively short time to prepare a draft declaration of general principles. It had the benefit of various drafts prepared by Member States and the Secretariat and the Americanre Declaration of the Rights and Duties of Man adopted by the Bogota Conference of American States in May 1948. The American Declaration was based on an earlier draft prepared by the Inter-American Juridical Committee at the request of the Mexico City Conference of early 1945. This Declaration had constituted the first intern-governmental statement of human rights in history.[2]

The task of the Commission in the preparation of the draft declaration was facilitated not only by the texts which were at its disposal but also by the fact that the purpose of the document was to define goals to be achieved and not legal obligations to be respected. Representatives of states with different cultures, backgrounds, political and legal systems, and ideologies found it much easier to agree on general principles and goals which left considerable latitude of interpretation and application than upon binding commitments against which they must seriously and immediately measure their own national laws and practices. In fact, the Commission was able to finish its work by June 10, 1948. The draft was approved by the Economic and Social Council and adopted by the General Assembly without a negative vote on December 10, 1948. This is the International Bill of Human Rights concurrently known as the "Universal Declaration of Human Rights". The Declaration became operative upon approval by the General Assembly. Since it was not a treaty and was not intended to impose legal obligations, it was necessary to submit it to the Members with their various constitutional procedures.

The ongoing rights for human beings largely embodied for and popularly known to all are human rights. In 1976 three decades after the comprehensive undertaking was launched by the United Nations the "International Bill of Human Rights" became a reality with the entry into force of three significant instruments:

The International Covenant on Economic Social and Cultural Rights (ICESCR);

The International Covenant on Civil and Political Rights (ICCPR) and

The Optional Protocol to ICCPR.

The covenants require countries ratifying them to recognize or protect a wide range of human rights. And under the optional provisions, procedures are established allowing individuals as well as states to present complaints of rights violations.

The UDHR Consists of 30 articles. Article 1 specifics the basis of human rights.[3] Accordingly :

"All human beings are born free and equal in dignity and right. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Articles 2-21 deal with matters relating to civil and political rights whereas articles 22-28 to economic, social and cultural rights. Article 29 imposes on everyone duties towards community for promotion of human rights without abusing others' rights and Article 30 notes for any state, group or person whose rights and freedoms are infringed in implying provisions of this Declaration. It is notable that UDHR enriches its 30 Articles by implying terms like 'every one', 'no one'. or 'all' It signifies that the Declaration to all intents and purposes is applicable in a spirit of generic term in the sense that Human Rights Declaration is all inclusive in the realm of human rights matters.

III. Human Rights Norms in UN Charter

At the San Francisco Conference many delegations of participating states, as well as representatives of private organizations, agreed for the inclusion of more detailed provisions regarding human rights. As a result of these pressures a number of amendments to Dumberton Oaks proposals were adopted which had the common purpose of making more specific the responsibilities and powers of the organization with respect to human rights and fundamental freedoms, and providing the necessary machinery for discharging these responsibilities. When finally approved, the Charter of the United Nations, in sharp contrast to the covenant to the League of Nations, contained many specific provisions with respect to the obligations of Members, the responsibilities and powers of the organization, and the machinery and procedures which were to be used in promoting respect for human rights and fundamental freedoms.

In the preamble to the Charter there is a re-affirmation of faith " ... in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." Article 1 declares one of the purposes of the Organization to be the achievement of " ... international cooperation .... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 55 provides that " ... the United Nations shall promote... universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion," and by the terms of Article 56, " ... all Members pledge themselves to take joint and separate action in cooperation with the Organization..." for the achievement of this purpose along with provisions set forth in article 55.

By the terms of article 13, the General Assembly " ... shall initiate studies and make recommendations for the purpose of ... assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Article 62 authorizes the Economic and Social Council to " ... make recommendations for the purpose of promoting respect for and observance of, human rights and fundamental freedoms for all ..." and Article 68 directs the Council to establish a commission " ... for promotion of human rights. .." to assist it in the performance of its functions. Finally, Article 76, one of the basic objectives of the trusteeship system is " ... to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, and to encourage recognition of the independence of peoples of the world."

It is to be noted, however, that nowhere in the Charter is the phrase "human rights and fundamental freedoms" defined. Some delegations at San Francisco desired such a definition but recognized that time did not permit attempting it. Furthermore, it is to be noted that while there are repetitive enumeration of United Nations purposes and functions, the key words are "promoting", "encouraging", and "guaranteeing".

IV. Women's Rights related Instruments

Since UDHR several instruments of international concern on rights of women have come into being. Those instruments are such as :

1. **Convention on the Political Rights of Women, 1952**[4]

It embodies XI Articles. " ... Right to take part in the government of his country directly or through freely chosen representatives" in light of UDHR (Art 21) has been made the basis of this Convention. Women shall be entitled to vote in all elections in an equal footing with men. This is the first convention adopted by the United Nations specifically dealing with women.

2. **Convention on the Nationality of Married Women, 1957**[5]

It contains 12 Articles. On the aspect of the right to nationality of married women each contracting state in view of Article 15 of UDHR agree that neither the celebration nor the dissolution of marriage between one of its nationals and an alien shall automatically affect the nationality of the wife.

3. **Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962**[6]

It consists of 10 Articles. Taking Article 16(2) of UDHR it was enshrined in this convention that no marriage shall be legally entered into, without the full and free consent of both parties, such consent to be expressed by them in person after authority competent to solemnize the marriage and of witnesses as prescribed by law. State parties shall specify a minimum age for marriage. All marriages shall be registered.

4. **Declaration on the Elimination of Discrimination against Women, 1967**[7]

It contains 11 Articles. The Declaration represents a general pronouncement of the United Nations policy in regard to equality of rights of men and women and the elimination of discrimination based on sex.

5. **Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974**[8]

It consists of 6 clauses. Women and children in the circumstances of emergency and armed conflict shall not be deprived of shelter, food and medical aid or other traditional rights as per UDHR including ICCPR and ICESCR and Declaration of the Rights of Child or other instruments of international law

6. **Convention on the Elimination of All Forms of Discrimination against Women, 1979**[8]

It contains 30 Articles. Although it is not convention to deal with women's rights, it is the first universal instrument to address the issue of discrimination.

7. **Declaration on the Elimination of Violence Against Women, 1993**[9]

The Declaration includes a clear definition of violence as being physical, sexual and psychological violence occurring in the family or the community and perpetrated or condoned by the state.

V. Specifications from CEDAW

The Convention on the Elimination of All Forms of Discrimination Against Women with its 30 Articles is divided into a preamble and six parts. Part I (Article 1-6) contains a number of general provisions; Part II (Article 7-9) contains provisions relating to political rights; Part III (Article 10-14) embodies provisions relating to economic and social rights; Part IV (Article 15 -16) contains

provisions relating to civil and political rights; Part V (Article 17-22) contains provisions relating to implementation; and Part VI (Article 23-30) contains a number of final clauses.

In the preamble, the state parties to the Convention recall that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of the women, on an equal term with men in the political, social, economic and cultural life of their countries, hampering the growth of prosperity of social and the family life, and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity; and express their determination to implement the principles set forth in CEDAW. Article 1 defines discrimination against women as:

" ... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

Under the Convention the states undertake to adopt measures to promote the privileges of non-discrimination. Activities of this kind which are specifically mentioned include measures to suppress the exploitation of prostitution (Article 6); measures to eliminate sex discrimination in political and public life (Article 7), equal rights in relation to nationality (Article 9), education (Article 10), employment (Article 11), and health care (Article 12). The Convention also provides for equality of sexes with regard to marriage and family relations (Article 16), while recognizing the legitimacy of "special measures..... aimed at protection of maternity".

The Convention deals with an issue of human rights of fundamental importance, and the decision to supplement the very general provisions on discrimination to be found in such instruments as the covenant on civil and political rights is clearly a positive step.

The Committee on the Elimination of Discrimination Against Women, made up of 23 experts is the body established under the Convention. State Parties report periodically to the Committee on measures they have taken to give effect to the provisions of the Convention.

VI. Specification of Women's Rights under the Bangladesh Constitution

In the preamble of the Constitution of the Peoples' Republic of Bangladesh, it is stressed that the fundamental aim of the state to "realize through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental freedom, equality and justice, political, economic and social, will be secured for all citizens".

In the fundamental principles of state policy specifications have made about women's rights in articles 10, 15 and 18.[10] Participation of women in national life (Article 10), and availability of basic necessities for life, including food, clothing, shelter, education, medical care, guarantee for employment, reasonable rest and social security among others for widows (Article 15(d)) have been provided. The state shall adopt effective measures to prevent prostitution and gambling (Article 18(d)). These rights are considered as secured rights for women under fundamental principles of state policy.

Moreover, there are provisions under fundamental rights.[11] There shall be no discrimination on

grounds only of religion, race, caste, sex or place of birth and women shall have equal rights with men in all spheres of the state and of public life. The state cannot be prevented from making special provision in favour of women or children or for the advancement of any backward section of citizens (Article 28). The constitution has provided provisions for right to be exercised by all citizens and as such women have also rights at par with others. But the provisions as mentioned are considered to be exclusively applicable to women. To all intents and purposes, the Bangladesh constitution has embodied provisions in conformity with the Universal Declaration of Human Rights. And what to observe is the fact that its provisions seem also to be in conjunction with the Covenant on Economic, Social and Cultural Rights and Covenant on Civil and Political Rights.

Pursuant to the constitution several laws have been provided through acts and ordinances under which women can assert and enforce their rights. Moreover, certain laws have been promulgated exclusively with reference to the rights of women.

VII. Conclusion

It is to observe that equality criterion is maintained at international and national level. Women are entitled to safeguard their interests on the basis of equality criterion. But as a practical point of view, women are comparatively not at per with men.

International instruments such as the UN Charter, Universal Declaration of Human Rights and so on are also attentive to take into account vulnerable position of women and as such have embodied provisions exclusively effective to the interests of women. Stresses have also been given to pay heed to their vulnerable position by those instruments and along with that special provisions have also been provided for them in the instruments internationally and nationally concerned. It is seen that states enact provisions effective even exclusively to the rights of women. The purpose of so doing is to bring women at an equal plane with men. In order to do that efforts must be made at national and international context to make awareness among women about their rights by which they can secure their interests. In the fast changing world they must not consider themselves their interests to come to reality as a gift. Their rights will not be implemented unless they take all this seriously to achieve. If needed, they must be determined to establish their rights unitedly. There is a need for international forum to monitor the extent of implementation of womens' rights at national level. Each state should be liberal to promote to reduce gap between women and men to get rid of their vulnerable position. This will give rise to work conjointly for national prosperity and as time passes, will result in fruition internationally. Bangladesh constitution is liberal to the safeguard of womens' rights. There are a number of laws under which women can protect their rights as men can.[12] Several laws have been also provided exclusively for the rights of women.[13] But implementation of the laws depends on propensity of their actions. If they are not serious about security of their rights through the laws, those laws will then be existing in theory rather than in practice.

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CONSTITUTIONALISM AND GENDER JUSTICE IN BANGLADESH**

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Introduction

One of the most complex and misconstrued areas in the legal system of Bangladesh is that which deals with the family or personal sphere. This is the area which contains some of the most deep-rooted and pernicious legal anomalies. These anomalies are significant indicators of, among others, the persistent struggle between the forces of religious extremism and secular liberalism. Our legal system, through its processes and pronouncements, highlights how this struggle permeates every aspect of citizens' public and private space, and shows us how the legal mind evolves through and revolves around the social reality in which it functions. This state of affairs has as much to do with the historical and colonial legacy that we inherited, as it has to do with the patriarchal mindset through which we learn, philosophize and practice law. This is true for Bangladesh. It is true also for all of post-colonial South Asia. In this brief paper I will outline, in very broad strokes, some of the key areas of this struggle.

Gender Justice in a Post-Colonial Legal System - Too Little Too Late?

The complex interface of gender and colonial law (followed in Bangladesh, India and Pakistan, for example) shows us that it would be too simplistic to understand women's grievance by reducing the logic of colonial power to its binary (self/other or public/private dichotomy) logic. While this binary logic influenced actual legislation and its procedures, the endurance of the dichotomies in a postcolonial set up speak of a persistent paradigm of male privilege that quite well benefited and continues to benefit from the collapse and conflation of important concepts like personal and public space, the secular and the religious.

Whereas in post-independence Bangladesh, important economic and social events have increased women's mobility between the spheres, the overall notion of womanhood has not changed. Women are still seen in primarily moral and residual terms. Whether in legal pronouncements, economic

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propositions or literary performances, women are still caught up between the crossroads of religion, culture and politics. Even in many cases where women have shaped their own destinies, either individually or collectively, they have been forced to concede to a patriarchal bargain. As the women's movement grows stronger in Bangladesh, moving on from concentration only on personal law reform to issues of economic empowerment and women's public roles, the basic premise of debate remains unchanged. Women continue to fight the same exploitative structure of a patriarchal society where religious, social and legal systems collude with one another in subjugating women. Not much has changed in terms of qualitative legal advancement of women in Bangladesh, since the colonial encounter. For Bangladesh as well as the whole Subcontinent, the evolution of a post-colonial ethos of human rights and gender justice must be seen in the backdrop of not just a record of the colonial domination but also a track of the failures, silences, displacements and transformations produced by the functions of the colonized.

Let us, for example, take a look at part of a letter, which emerged out of the colonial space, which aptly illustrates the compromise between imperial and indigenous patriarchies. This letter, published in *The Times of London* in 1887, was written by a twenty-five year old Hindu woman, whose legal crusade for freedom from the conjugal claims of a husband she disliked sparked off a social and political debate about the position of women in society the like of which neither Victorian England nor colonial India had seen before. The woman in question, Rukhmabai, was married at the age of eleven, and her case became a *cause celebre* which questioned the authority--indeed the legality--of Indian marriage laws. Rukhmabai speaks:

> Is it not inhuman that our Hindoo men should have every liberty while women are tied on every hand for ever? If I were to write you all about this system of slavery, it would require months to complete it... Oh! but who has the power to venture and interfere in the customs and notions of such a vast multitude except the Government which rules over it? And as long as the government is indifferent to it I feel sure that India's daughters must not expect to be relieved from their present sufferings.

In his book, *Enslaved Daughters: Colonialism, Law and Women's Rights* Sudhir Chandra[1] examines Rukhmabai's case in detail, and the personalities involved, from micro to macro levels. He comments, "This was ... a war between the rulers and the ruled in which ... the two sought to distinguish their respective institutions, ideals and values with regard to women, marriage and family in order to claim superiority over the other."

Rukhmabai's lament remains unchanged today. Her lament is echoed in India and Bangladesh in the voices of Shah Bano and Shamsunnahar who fought and lost the battle on post-divorce maintenance for Muslim women; and in the voice of Mary Roy who challenged the constitutionality of the Travancore Christian Act (India) which allows daughters to inherit only one-fourth of the son. Rukhmabai's challenge to the status quo is clear in Pakistan, where Samia Sarwar's name is one of many who are victims of honour killings; where even recently, Zafran Bibi sat in a condemned cell, waiting to be stoned to death for adultery, although evidence showed she was raped by her brother in law. Rukhmabai's plea is probably most eloquent now in Bangladesh where there is an ongoing struggle on the question of *hilla* and *fatwa*, and who gets to delineate women's mobility between the public and the private spheres.

Adjudicating Gender Justice in Bangladesh – Problematics of a Legal Worldview

The constitutions of each of the countries in the Subcontinent, contain the ethos of the Universal Declaration of Human Rights. Each of their Constitutions assimilates the normative language of human rights. All three countries have a remarkable track record of signing international human rights instruments, and playing important roles in human rights and women's rights Conventions. From the first Women's Rights Conference in Mexico in 1974 to the Beijing Plus Five in 2000, all have been active participants. Each country signed the historic Women's Convention, or CEDAW.[2] In fact, Bangladesh became the first country in South Asia to sign the Optional Protocol to CEDAW, a unique mechanism which allows individual women to bring complaints against their Governments. And yet, even a cursory look at the position of women vis-à-vis the private or personal sphere shows that not much has actually changed since Rukhmabai's time.

The legal worldview, created within colonial space, and duly retained by each country of the Subcontinent, is essentially binary: viewing the man as the Standard, or the primary bearer of rights and privileges, and the woman as the extension of the standard, the Other. This legal worldview allows the sustenance of fractured scales of justice, and does not make an apology for indifference to justice within the family. Sometimes it even reaches areas where the personal and public overlap, such as with citizenship and nationality laws. This is the continuation of a colonial worldview which ensures the personal sphere as the greatest site of exclusion for women; a site being resistant to notions of equity, equality, power sharing, decision making, access to property, and agency to move freely between the public and the private spheres.

Constitutionalism in Bangladesh recognizes the interrelationship between different rights. In this instance Bangladesh follows Indian precedence and maintains that the guaranteed rights are not mutually exclusive and must pass the test of procedural due process, fairness and reasonableness. Although this is generally the case and meticulously maintained for most of the rights guaranteed, when the issue involves questions of faith, morality, rights and mobility in relation to the personal sphere, the lines of determination become blurred.

One way of overcoming the blur is to see how our legal system is structured. Whereas the legal system in Bangladesh is for the most part uniformly structured, providing a consistent forum for civil, criminal, mercantile, evidentiary or contractual redress, the area of religious-personal laws reveal a whole range of anomalies, pointed out at the outset of this paper. The reality of the peculiarity of our Sub-continental legal dilemma has been aptly summarized by Tahir Mahmood in the following way:

> Our legal system is partly codified and partly uncodified, partly unified and partly diverse, partly civil and partly criminal. The whole gamut of our system, therefore, can be bifurcated into two simple compartments: laws made by the State and laws not made by the State but recognized by it en *par* with those made by it.[3]

The judiciary in post-independence Bangladesh has been grappling with this anomalous bifurcation and its consequences. Recent judicial attempts to reconcile traditional parameters of the personal realm and its attendant laws and customs, with equality principles and gender justice, gives rise to a very interesting and important trend in the contemporary legal milieu of Bangladesh. Not all of the

attempts have succeeded, nor have all of them been carried out with a secure appreciation of gender equity. But the debates evolving from these exercises are helping to take gender jurisprudence in the region a step further. They are also helping to define the nature of the State, extricating the secular from the theocratic.

The Bangladeshi Constitution came into existence twenty-one years after the Indian Constitution, and sixteen years after the Pakistani Constitution. It would have been natural to expect that the framers of the Bangladeshi Constitution would act upon the experiences observed during the implementation of both the Indian and Pakistani Constitutions. Instead, however, the existing system of legal pluralism as far as religious personal laws were concerned was allowed to continue. This ongoing pluralism meant that the Bangladeshi State was, on the one hand, obliged to reorganize the newly independent nation, while on the other hand, it "could not be expected to behave like the former English rulers and leave the personal laws virtually unmodified."[4] Having inherited the dogma, working principles, and social and political structure of its colonial predecessors, the war-ravaged newly independent Bangladesh did not at the time prioritize on the definition of the State's relationship vis-à-vis the personal sphere. Neither did it prescribe its role in regulating it. Thus, the Constitution has remained silent on this particular point, leaving the relationship undemarcated and unresolved. This dilemma continues in Bangladesh. It exposes the serious need for greater consolidation of personal laws and uniformity in their application, and for more responsive participation of the State in the regulation of the personal sphere.

Let us take the example of the Family Courts Ordinance, 1985, to highlight the blurring of lines. Not many realize that in Bangladesh this Ordinance is in fact one of the best current examples of a common system of personal law applicable to all citizens irrespective of religion or sex. Until 1997, the actual extent of the application of this Ordinance had been unresolved. For example, in 1994, in the case of Nirmal Kanti Das v. Sreemati Biva Rani,[5] the High Court Division held that the provisions of the Family Courts Ordinance apply not only to Muslim communities but to other communities as well. That very same year the High Court Division overruled itself in Krishna Pada Talukdar v. Geetasree Talukdar,[6] by holding that under Section 5 of the Ordinance only a Muslim litigant is entitled to bring a suit in the Family Court. In the latest judgment on this, in 1997, The High Court Division again overruled itself in Pachan Rissi Das v. Khuku Rani Dasi,[7] and held that the Family Courts Ordinance applies to all citizens of Bangladesh irrespective of religious faith. As of 1997, therefore, the Family Court serves as a common forum for members of all faiths in Bangladesh.[8] But an inherent flaw of this Ordinance persists, and is yet to be addressed either by the judiciary or the Law Commission and particularly by the Law Ministry. This is the fact that the tribal areas of Bangladesh in the Chittagong Hill Tracts have been kept out of the scope and application of this law.

Again, the Ordinance grants the Family Court jurisdiction to hear matters in only five areas: dissolution of marriage, restitution of conjugal rights, dower, maintenance, and guardianship and custody of children.[9] But personal laws include several other areas beyond these five, including inheritance, registration of marriage, adoption and prevention of dowry. This again surfaces the ongoing confusion of what actually constitutes religious-personal law, and to what extent that law is either religious or personal or both.

The ongoing socio-legal debate on *fatwa* and *hilla* and the litigation surrounding post-divorce maintenance (mata'a) for Muslim women, has given lawyers and judges the opportunity to look closely into the area of law, gender, development and economics. Lawyers who find themselves involved in such evolving issues, must take the opportunity to develop arguments setting clear links between gender justice and state interest. There must be an effort to adequately stress the social reality of Bangladesh, which could take us toward making a case for the correlation between gender inequality and poverty. Such opportunities must be taken to place the argument that it is in the interest of the State that gender parity between citizens' be achieved. It must be established that gender disparity whether in national policy, social dealings or the legal system, ultimately breeds various levels of disempowerment, stigmatization, poverty, insult and ostracization. Removing such unconstructiveness is ultimately in the interest of the State.

Through the practice of arbitrary divorces, illegal h*illa* and *fatwa*, every year thousands of women and their children are forced into poverty and life-threatening ostracisation. The cumulating effect of new destitution is bound to reflect in national resource allocation, and this is what our Courts must begin to take into account. It would be useful to have research undertaken to establish the very real link between deprivations in the personal realm (such as through desertion, non payment of post-divorce maintenance, *hilla* and *fatwa*) and the losses in national revenue, such as through wages of labour, social services, credit procurement, asset creation and other activities that are non-computed labour such as household maintenance.

I would argue that it is an issue of compelling State interest that citizens not be discriminated on the basis of their sex and religion. If it is not possible for the religious hierarchies to effectively guarantee sex equality of all members of their faiths, and if room for flexibility in religious practice cannot be assured, then the onus falls entirely upon the State to ensure parity among religious systems so that individuals do not lose out in basic matters because of their religious membership.[10]

The basis for achieving equality between sex and sex, and freedom from discrimination on the basis only of sex or religion are constitutionality mandated and protected by the clear pledges under the international human rights treaties signed by Bangladesh. None of these mandates are inconsistent with the central message of any recognized religion. The severe economic and political losses due to discrepancy between men and women, simply on the basis of religious and cultural bias, amply makes the case against imbalanced redress for one and the same grievance, simply on the distinction between public or private, secular or religious.

In simple terms, I would argue that the interest of the State that its citizens be treated equally, irrespective of their differences or qualifications only on the basis of their sex, religion or place of birth is informed by constitutional mandate. Constitutionalism in Bangladesh ensures that persons under like circumstances and conditions be treated alike both in the conferment of privileges and in the imposition of liabilities.[11] Citizens cannot be classified arbitrarily, simply because of their status as a religious minority, or as a 'backward class.' Nor can religious bodies classify their adherents arbitrarily, simply on the basis of their sex or marital status. The principle of equality applies to individuals as well as to a class or a group of persons, who cannot be denied the same protection of laws which is enjoyed by other persons within the same class, or persons of another class in like

circumstances. The equality provision of the Constitution of Bangladesh, in Article 27, intends not only that citizens are equal before the law, but that they are entitled to the equal protection of law.[12] If citizens are treated differently or disparately, either individually or as members of a group, then that difference or classification must pass the test of constitutionality.

The greatest obstacle until now in achieving a uniform personal system of justice for all citizens of Bangladesh, have been arguments of religious adherence and religious diversity. In order to overcome these obstacles, we must ask ourselves and respond to some crucial questions. How, for example, does the State address the problem of acts or omissions, carried out in the name of religious sanction, that adversely affect the fundamental rights of citizens in the personal sphere? What is the role of the Constitution and the State with regard to religion in eradicating such inequities? It is understood that the State does not have an unqualified authority to legislate religious correctness. But the State *can*, nevertheless, legislate in such a manner so as to conform to the Constitution and the universal norms of human rights, to which it is already pledge-bound. On the whole, religious correctness is to be decided by the particular religious sects or the individuals themselves. But when and if such decisions infringe upon the rights of an individual or a collective group, either within or outside that community, the State – in particular the judiciary, has a legal duty to intervene. We have important precedents which help us navigate this delicate demarcation. In the Durgah Committee Case,[13] for example, it was held that 'whether a particular religious practice is really an essential or integral part of a religion is to be decided by the Court, the opinion of the leaders of the religious denominations is not final."

Article 41(1) of the Constitution is often relied upon by the defenders of the *status quo* of the religious personal law system. I would submit that such defenders rely on a selective reading, which either fails to appreciate or purposively ignores the qualified nature of this religious freedom. Freedom of religion and its practice is recognized as a right *subject to* the public order, health and morality. This does not mean by extension that the order and health of the personal sphere is to be excluded. That public order is directly linked to a nation's personal or social order is a foregone argument. The State, therefore, has express authority to regulate the practice or expression of religion in Bangladesh, in so far as it affects the rights of others, either within or outside the same religious group, detrimentally.

In the case of Bangladesh, the location of personal laws in the scheme of Article 41(1) must ultimately be determined by how "practice of religion" is interpreted. The search for the location in Bangladesh is, I would argue, somewhat less complex than that from India, which, on this level of debate on the position of personal laws *vis-à-vis* the Constitutional framework, has the additional burden of distinguishing personal law not only from religion, but also from culture. Article 29 of the Indian Constitution guarantees all sections of the citizens the fundamental right to conserve their distinct culture. But given the arguably comparatively uniform, homogenous linguistic and cultural configuration of Bangladesh, the most pointed dimension of the personal-constitutional debate is minimized. This fact lends crucial weight to the feasibility of having a homogenous set of laws for the country for uniform application.

For Bangladesh, the issues of religion, gender justice and human rights are intricately linked. This is true for most of South Asia. Thus, an arbitrary utilitarian delinking of the issues, would only derail the piecemeal results achieved over the past three decades through gradual synergising of the

individual claim in relation to the State. I feel that the most sustainable approach for South Asia and certainly for Bangladesh is to, in the words of An-Na'im, "enhance the synergy and interdependence of human rights, religion and secularism ... enhance the need for positive engagement of the universality of human rights as the most appropriate means for securing individual freedom ..."[14]

In the final analysis of constructive legal reform, the determination does rest in the placing of the personal sphere in a proper perspective in relation to other social factors, including religion, law, culture and economic development. This cannot be achieved through a purely utilitarian lens. Even the West is beginning to question the efficiency orientedness of utilitarianism, on which several of the decolonized Asian legal systems are based. In the case of Bangladesh, the judiciary has until now mainly applied a strict efficiency model of justice, given its constitutional and foundational principles. It has only recently begun to shift towards an appreciation for the inter-connectedness between culture, religion and the personal.[15] This is a welcome change.

The judiciary in Bangladesh is beginning to assimilate the foundational philosophical principles of the Constitution, and the day to day context in which it is made to operate. But this is a slow process, as it is not always possible to distinguish between entrenched traditions, philosophies and legal arguments from others not so entrenched. Nevertheless there is an emerging trend in which questions of freedom of religion, and individual justice are more and more being argued in terms of the foundational principles of the Constitution. We are moving certainly towards the understanding that all fundamental principles of human rights, including gender rights, can be accommodated under religious laws. I am sanguine that the true voice of religion cannot condone discrimination; and neither can the State.

Conclusion

The whole rights-based system within which we seek to ensure individual and gender justice, itself is beholden to the colonial encounter. The resistance to gender justice is not limited to any one pocket of the world, it is universal. Hence the reactions of indigenous patriarchy to colonialism has followed a more or less consistent pattern throughout history. As yet there is hardly a documented legal system which is wholly free from patriarchal or paternalist bias. In fact, the current international human rights structure itself and the substance of many norms of human rights law reflect and ensure a male perspective. In the UN structure itself the absence of women is striking. It has been estimated that at the current rate of appointments and change, it will take until the year 2021 for women to hold half of the UN professional jobs. Amartya Sen unveils the many faces of gender inequality and its very clear links to national development. In Sen's estimate, of the one hundred million women missing in the world today, due to poverty, illiteracy, high death rates, malnutrition and discrimination, our Subcontinent alone accounts for 45.6 million.[16]

Since it is clear that issues of gender inequity are not country specific, the debates surrounding them therefore cannot but be propelled from within a universal frame of reference. The legal framework for redressing inequities within the family must be rooted in terms of an emerging global culture of human rights. Each country of the Subcontinent is plagued with endemic patriarchy, and use religion to justify imbalance in the personal sphere of their citizenry. In each country the differentials of gender

justice in the public verus private spheres are stark. While each country in the region must take care of the unique dimension of its adherence to justice in the family through internal developments, the whole region must move together to find a balance between a pretentious and unrealistic universalism and a paralyzing cultural relativism.[17]

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GLOBAL ENVIRONMENTAL GOVERNANCE : A REALITY CHECK OF SOME CARDINAL PRINCIPLES

Dr. Mizanur Rahman Khan*

Since the first global conference on Environment in 1972, many environmental regimes have come into existence. Each regime reflects the structure of the problem being addressed. Therefore, different regimes use different tools, draw on different constituencies and have different institutional arrangements. Still most regimes have come to respect some fundamental principles and articulate them through their institutions. Two of those appear cardinal to the emerging legal regime of environmental governance: one is the burden-based principle of common but differentiated responsibility and the other is the market-based polluter-pays principle. With the World Summit on Sustainable Development (WSSD) is over, it is worth looking through the prism of these two principles how far the global community is committed to achieving sustainable development at global, national and local levels.

Principle of common but differentiated responsibility (CBDR)

As a nascent principle of environmental law, "common but differentiated responsibility" (CBDR) evolved from the notion of "common heritage of mankind." This concept gained stature in the UN Convention on the Law of the Sea as well as in the international designation of certain areas, resources and problems as "common concern" of mankind. Who is responsible for degrading the global commons, such as Atmosphere or Oceans? The answer is a function of each country's historical responsibility for such problems, its level of development, and capacity to act. This was recognized by Principle 23 of the Stockholm Declaration: "the extent of the applicability of standards which are valid for the most advanced countries, but which may be inappropriate and of unwarranted social cost for developing countries." Rio Principle 7, the principle of CBDR, reads,"[S]tates shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities." Thus, while all countries are responsible for the degradation, some are more responsible than others.

The first b*asic* principle of the Climate Convention, Article 3(1) states: "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof." Accordingly, the Kyoto Protocol assigns responsibility of reduction of greenhouse gas (GHG) emissions to industrial countries. Developing countries are exempted from such commitments. Many other multilateral environmental agreements (MEAs)

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affirm this principle. Thus, CBDR has moved from being a `soft' international principle (as in Rio Declaration) to a nascent but increasingly robust component of international law, as manifest by its codification in the UNFCCC and the Kyoto Protocol. These agreements stipulate the transfer of technology and additional finance to developing countries for environmental protection.

The developing South has to grow and develop, but in a more environment-friendly way. If there is any rationale in the argument that until recent times, the North was unaware of the consequences of their fossil fuel-based development, there is the more convincing rationale that the South deserves equal environmental space in the global commons for their industrialization. If early ignorance of the effects of development is justifiable, this warrants that the North should assist the South all the more in avoiding the earlier polluting paths of industrialization.

The fact is that climate change is not caused by emissions taking place today. Experts have calculated that nearly two-thirds of the GHGs added to the atmosphere over the past century as a result of human activity originated in the industrialized countries, of which nearly a third by the US alone. Hence it is these countries that have the primary responsibility for action and they have the resources to do it. The US argues that if not current, but future emissions from the South will soon exceed those of the North; so at least the key developing countries have to be parties to reduction programs. However, this argument will have validity once the industrial countries manifest their seriousness about reduction of GHGs.

Thus, based on the principle of equity and fairness, it is rational to adopt the principle of "equal entitlements" fixing the amount of emissions that each individual in the world is entitled to. The concept had been endorsed by the member nations at the last Non-Aligned Movement (NAM) Summit in South Africa. No one can argue that the Northern countries have a divine right to emit more per capita than the Southern countries. Equally, no one can argue that the South has a right to freely expand their populations and thereby diminish the share, which is available to everyone else. Thus, it seems that while rights to emission must be divided between nations on a per capita basis, the time at which the number of heads should be counted also needs to be agreed. However, once the principle of per capita entitlements is agreed upon, finding a base year should not be that difficult.

The Reality

GHG emissions are increasing in countries like the US and Japan. Since the 1990s, US emission of CO_2 increased by almost 20%. By some estimates, Bush' energy plan will increase US emissions by as much as 35% by the first commitment period (2008-2012) under the Protocol. Japanese emissions rose around 7% from the 1990 level. But emissions in the EU are decreasing. Despite all the sweeping concessions made off the Kyoto Protocol to satisfy the Annex-1 countries, its coming into force before end of 2002 is uncertain yet. As the leading emitter of GHGs both in aggregate and per capita terms, the US under President Bush have abdicated responsibility for action and opted out of the Protocol. It may be recalled that former President Clinton in a speech on 22 October 1997 clearly acknowledged the special US responsibility for global warming. Now US insistence on developing country participation in binding commitments under the Protocol is unfair and contrary to the accepted principle of CBDR.

Delegates at the WSSD agreed on a text identifying the UNFCCC as the "key" instrument for addressing climate change; reaffirming the UNFCCC's ultimate objective of stabilizing GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system; and recalling the Millennium Declaration. It also contains the following reference to Kyoto ratification: "States that have ratified the Kyoto Protocol strongly urge States that have not already done so to ratify the Kyoto Protocol in a timely manner."

Funding for Sustainable Development

The Report of the UN Secretary General on "Implementing Agenda 21" argues that "there is undoubtedly a gap in implementation" in four areas and one of them is that "the financial resources required for implementing Agenda 21 have not been forthcoming and mechanisms for the transfer of technology have not improved." Although the Agenda 21 reaffirmed the UN target of ODA as 0.7% of the donor countries' GDP, the Report says the average ODA flow from DAC members fell from 0.35% of GDP in 1992 to 0.22% in 2000. Even this level is declining as of today. Only five countries meet the UN and Millennium Summit target so far: Denmark, Luxembourg, Norway, the Netherlands and Sweden. US come as the last with its contribution of about 0.10% of its GNI as ODA. US have indicated it would not contribute to the 3 new funds established for the developing countries to meet the challenge of climate change. We may recall that the Malmo Ministerial Declaration adopted in May 2000 noted with deep concern an 'alarming discrepancy between commitments and action.' Since the mid-1990s, the Global Environmental Facility (GEF) is yet to mobilize even $10 billion, whereas the UNCED suggested for an amount of $125 billion. There is apprehension in the developing world that even this declining ODA might be redirected towards meeting the environmental priorities of the industrial North.

The focus of the WSSD was the WEHAB themes - water and sanitation, energy, health, agriculture and biodiversity. However, the Summit acknowledged that poverty eradication is the greatest global challenge, and accepted targets and timetables for the purpose: halving the population living below poverty level by 2015. The major decisions included: establishment of a World Solidarity Fund for Poverty Eradication, improved access to indigenous people and their communities to economic activities, a target for improved sanitation and improved access to energy services. Overall, the Plan of Implementation contains over 30 targets, including many stemming from the Millennium Development Goals.

In terms of financial commitments, the US has announced US$970 million in investments on water and sanitation projects; the EU announced its "Water for Life" initiative, and the UN has received an additional 21 water-and-sanitation-related initiatives worth about $20 million. Similarly, the Plan of Implementation commitment on energy access will be accompanied by financial commitments from the EU ($700 million), the US ($43 million), and 32 separate partnership initiatives worth up to $26 million. The point is that all these contributions are on voluntary basis, whereas acceptance of the principle of CBDR warrants that financing for achieving sustainable development be based on binding contributions by the industrial world. But the US with Australia and Japan argued that the CBDR principle is irrelevant in the Section on Finance in the Implementation Plan.

Polluter Pays Principle (PPP)

In the 1980s, regulations were deemed more desirable and efficient in environmental protection (WCED, pp. 198-200 & 319). Now a change has taken place. This is reflected in Agenda 21. The new call is for international cooperation in the use of economic instruments (Agenda 21, pp. 252-254). The current focus is on prevention as more cost-effective, rather than cure, through incentives/ disincentives to change individual behavior.

It may be recalled that in response to Stockholm, the PPP was first adopted by OECD under the 1972 and 1974 Recommendations (1) (2). It meant that the polluter should bear the "costs of pollution prevention and control measures," the latter being "measures decided by public authorities to ensure that the environment is in an acceptable state." It has since evolved into a broader principle of cost internalization - polluters should pay the full cost of environmental damage that their activities cause.

Through several Recommendations adopted in the last two decades, PPP was extended in OECD making the polluters liable for a) the costs of administrative measures to be taken by the authorities as a result of pollutant emission, b) the cost of a regional system for monitoring air pollution, and c) accidental pollution. Now a movement is under way to extend progressively the PPP to the cost of damage caused by pollution in the form of compensation to the victims.

Thus, with its beginning as an economic principle, PPP has been considered since the 1990s as "a general principle of international environmental law." This worldwide recognition heightened with its embodiment in the Single European Act of 1987 and the Treaty of Maastricht of 1992. It is likely that it will be referred to in many conventions and regional or global declarations. Current work on third party liability under the Convention on Transboundary Movement of Hazardous Waste could strengthen the PPP. This trend reflects growing world support for the principle on which the market economy rests, and its application to environmental matters.

Based on such legislations, PPP has been applied in several countries, but their application has been confined mostly to single developed countries. Market creation involving the assignment of tradable pollution rights in sulfur emissions was introduced in the US through the Clean Air Act of 1990. It is estimated to have saved $5 to $12 bn in achieving the desired level of pollution reduction.

PPP at the International Level

Environment knows no border. So the feasibility of applying economic instruments like the PPP at the international level is now being explored. So far its international application has been limited within the EU. Whereas PPP within a country can reduce pollution at least cost, application at the international level can achieve pollution abatement at global least cost. Introduction of 4 flexible mechanisms under the Kyoto Protocol was based on this rationale. Application of PPP limited to the industrial countries alone has disadvantages of inefficiency and higher costs. Developing countries also lose because most of the polluters are in the industrial world, whereas cost-effective opportunities exist in both areas. In a system that allocates rights to pollute in a fair manner or provides compensation to non-polluters, resource transfer would occur from developed to developing countries. Thus, from the global as well as developing country perspective, application of PPP to global environmental problems is desirable.

We may recall Principle 21 of the Stockholm Declaration of 1972, which says, in part: "States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction." In like manner, UNCLOS III distinguishes between `pollution' and `damage.' Article 194(2) requires states not to cause damage by pollution, being directed to:

"Take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with the Convention."

The above stipulations stop short of pointing out the liability for extra-territorial damages constantly being caused by powerful polluting agents worldwide. PPP should internalize not only the externalities within the national border, but beyond including the compensations involved. Otherwise, how can it be called market-based and efficient? Again the rea*lity* is different. The strong objections of some countries to international application of PPP, is evident from the compromise language of the Rio Declaration (Principle 16):

"National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear costs of pollution, with due regard to the public interests and without distorting international trade and investment."

This text, which falls short of more specific language of EC and OECD instruments, includes words, which limit obligations to states. Some powerful countries argue that PPP is applicable only at the national level, and does not govern relations or responsibilities between states. This is untenable, a simple shirking of responsibility under a principle the industrial countries are great advocates of. Even if the PPP were applied fully within each of industrial countries, current state of the global environment would have been lot better. We could have witnessed adoption of numerical commitments to supplementarity by industrial countries under the Protocol. Instead, they will pick up the `low hanging fruits' of developing countries through the CDM for present and future use. There is pressure for harmonization of national policies with universal environmental standards. So new barriers in the form of environmental protectionism is already evident in the North against exports from the South.

Thus, PPP needs to be codified in earnest for international application. Its content has changed and will continue to do so. That can be accommodated with occasional review and amendments. It is to be noted that unlike the CBDR, PPP is not a principle of equity. It is designed to send market-based appropriate signals to agents of pollution. The aim is to avoid wasting environmental resources and to put an end to the cost-free use of the global environment as a receptacle for ever increasing pollution.

With its lackluster socio-economic parameters and extremely limited environmental and financial resources, Bangladesh is in real need of using economic instruments like the PPP to get the most off the least in environmental management. At the coming WSSD, together with like-minded states, Bangladesh can assume a lead role in negotiating the codification of the PPP for its global application. That would be a worthwhile contribution to global environmental governance.

THE MAGURCHARA BLOWOUT AND THE ENVIRONMENTAL AND HUMAN RIGHTS ISSUES : AN OVERVIEW

Salim Mahmud*

1. Introduction

Bangladesh has been endowed with large potential reserves of natural gas that made it important to world energy markets.[1] Bangladesh has already been identified to be the hub of energy in the South Asian region.[2] Although there had been much prospectivity in Bangladesh for gas resources since 1960s, due to lack of markets the International Oil Companies (IOCs) were not interested for exploration works there till the late 1980s.[3] World Bank in an assessment report in 1987 within the framework of the Petroleum Exploration Promotion Programme, mentioned that Bangladesh is a prospective country for gas resources.[4] Hydrocarbon Habitat Study (HHS) was conducted since 1984-1986 under the WB funded Petroleum Exploration Promotion Project in Bangladesh. The HHS signified that there are prospects of oil and gas in Bangladesh which warrant further investigation and which could draw attention of the IOCs.[5] At the end of 1980s when International Oil Companies (IOCs) realised that Bangladesh has remarkable prospectivity for gas resources and natural gas is emerging as a fuel of choice, they became interested for oil and gas exploration in Bangladesh.[6] Bangladesh adopted a number of policies since the beginning of 1990s to facilitate the expansion of the private sector and increase the inflow of foreign investments in the energy sector. As part of those policies, the government of Bangladesh (GOB) adopted its Petroleum Policy in 1993. Due to the growing interests of the Multinational Corporations (MNCs) in the energy sector of Bangladesh there had been "tremendous optimism over Bangladesh's economic future."[7] Bangladesh looked set to "emerge as South Asia's next success story."[8] Bangladesh is divided into 23 blocks for oil and exploration. GOB announced the First Round Bidding for eight oil and gas blocks in 1993[9] under which three important blocks[10] (block no.12, 13 and 14) were awarded to US oil company Occidental on January 11, 1995 under the Production Sharing Contract (PSC) with Bangladesh Oil, Gas and Mineral Corporation (Petrobangla[11]). When Occidental started drilling its first well at Magurchara under Moulavibazar District, a massive blowout took place on June 15, 1997 that tainted the history of the oil and gas exploration in Bangladesh. The blowout caused severe damage to the environment, economy and social life of Bangladesh. The disaster gave rise to human rights degradations in Magurchara. It is determined by the high powered Investigation Committee constituted by GOB that negligence on the part of Occidental was responsible for the disaster[12]. Government of Bangladesh claims that it could not yet get compensation for the loss it incurred due to the blowout from the contractor for its alleged negligence in the course of drilling well at Magurchara. The Maguchara disaster raised a number of legal, environmental and human rights issues that need to be addressed. The prima facie question that arises from the Magurchara blowout is whether Bangladesh is entitled

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to claim adequate damages from the contractor for severely damaging the environment, the economy and the social life of Bangladesh and also for the degradation of human rights of the indigenous community of Magurchara. This question is important because the claim of compensation for damage to the environment will have a far-reaching impact on the environmental jurisprudence of Bangladesh which is now passing through its infancy. This study is also important as in the recent times much attention has been focused on the environmental and human rights impacts of natural resources development, and the upstream sectors of these industries throughout the world have produced some of the notorious cases of environmental and human rights abuses. This study is relevant as it would go for examining how far the petroleum environmental regulations in Bangladesh can efficiently address the emerging environmental issues in the petroleum sector with reference to the human rights and sustainable development issues that are also involved in this case.

This paper seeks to examine as to how far Bangladesh's claim for compensation from the contractor (originally Occidental was the contractor which is replaced by Unocal) for the blowout accident in Magurchara is justified. It will commence with the ensuing section looking at the background of the case. An examination of the effectiveness of the petroleum environmental regulations is contained in section three. Section four will give an analysis of the case focusing the environmental, human rights and sustainable development issues. Section five will analyse whether "Polluter Pays Principle" is applicabe to the Magurchara disaster. The national issues such as the enforcement inadequacy, the role of the government and NGOs are contained in section six. Section 7 of the study reviews the corporate social responsibilities of the Multinational Corporations (MNCs). Section 8 of the study examines whether the local communities of Magurchara or pressure groups in Bangladesh can sue Occidental/Unocal in their home state for the environmental compensation, assuming that the existing environmental laws in Bangladesh due to their enforcement constraints can not give them any remedy. And the paper will conclude with a number of recommendations pertaining to legal, environmental and human rights issues of the Magurchara disaster including the justification of Bangladesh's claim for adequate compensation from Unocal for the disaster.

2. Background

Occidental entered into PSC with Petrobangla, the national oil company of Bangladesh, on January 11, 1995 for the purpose of exploration and production (E & P) of oil and gas in the blocks 12, [13] and 1413 which were awarded[14] to it under the First Round Block Bidding announced in September 1993. Occidental started drilling its first well at Magurchara at the beginning of June, 1997. Magurchara is located in block no.14 of Surma basin, which is presumed to be very rich in natural gas reserves.[15] On June 15, 1997 after only twelve days of drilling, the gas well at Magurchara experienced a major blow-out.[16] "The explosion of gas turned into an inferno, towering over 300 feet (91 meters) and spreading to the surrounding rainforest, corpland and villeges".[17] The blow-out caused multifarious damage to the environment, economy and social life of Bangladesh. The gas explosion caused Bangladesh the entire gas reserve of Magurchara gas field of approximately 245 billion cubic feet, the current price of which is about $685 million or Tk 3900 crore[18]. The environmentalists opined that it would require 50-60 years to recover the environment from the effects of the disaster.[19] The disaster was controlled by a relief well after six months from the date of explosion. After the disaster GOB formed an expert

committee to investigate the incident and directed to submit a report. The report[20] of the investigation committee held Occidental responsible for negligence while drilling well at Magurchara.[21] The committee observed that the contractor did not take precautionary measures when it started drilling a huge and costly gas well.

But Occidental denied the allegation of negligence on their part and termed the disaster "a human error" or " simply an accident"[22]. It was also established that Occidental did not fulfill one of the important legal requirements under the environmental regulations of Bangladesh before starting exploration works. Bangladesh claimed compensation from Occidental after being satisfied that the blowout was the result of Occidental's negligence and absence of due diligence and care. At the outset Occidental agreed to compensate for the loss of gas from the gas field due to the blowout, if Occidental discovers sufficient gas reserves in other fields, but denied to compensate for the environmental damage, which was estimated to be 609 crore taka by the Ministry of Environment and Forest, GOB[23]. Occidental signed a Supplementary Agreement with Petrobangla in 1998[24]. Leaving the issue pending Occidental entered into an agreement[25] with Unocal Corporation, another US company, in May 1999, under which Occidental transferred its properties in Bangladesh to Unocal and Occidental acquired Unocal's holdings in Yemen. Under this agreement Occidental transferred its rights under the PSCs in all their oil and gas blocks in Bangladesh to Unocal and thereby Unocal became the successor of rights and liabilities of Occidental in Bangladesh. After a long delay, Petrobangla on July 2, 2002 sent the compensation claim of $ 685 million for burning 245 Bcf gas of Magurchara in the blowout. In response, Unocal on July 4, 2002 refused to pay the compensation claiming that the Supplementary Agreement signed in 1998 providing Petrobangla additional five percent shares for block 14 forfeited its claim for further compensation[26]. The GOB has a claim of Tk 609[27]crore as compensation for the environmental damage which is yet unsettled.

3. Petroleum Environmental Regulations and Policies in Question

Statutory and Policy Approach

Although there have been about 185 laws in Bangladesh which have a bearing on environment, directly, indirectly or casually, until 1995 the country did not have any major legislation which dealt with environmental issues as a whole. In response to the global call for the protection and conservation of environment and ecology, the Department of Environment (DOE) emerged to address the growing environmental issues under the umbrella of the Ministry of Environment and Forest in 1989. As part of its commitments towards the UN Conference on Human Environment at Stockholm, Bangladesh adopted the National Conservation Strategy (NCS), adopted the National Environment Policy in 1992 and revised the old environment pollution control law by framing the Bangladesh Environment Conservation Act in 1995. GOB also prepared a National Environment Management Action Plan and framed the Environment Conservation Rules in 1997 as mandated by the Environment Conservation Act of 1995. Since the inception of the legal regime of the petroleum sector of the independent Bangladesh in 1974, the petroleum laws paid attention to the environmental issues.

3.1. The Petroleum Act, 1974

The legal regime of the petroleum sector of Bangladesh started its journey in 1974 with the enactment of the Petroleum Act[28]. The Petroleum sector in Bangladesh is regulated mainly by the Petroleum Act of 1974. This law has empowered GOB and Petrobangla[29] to enter into petroleum agreements with any person for the purpose of any petroleum operation.[30] All petroleum agreements with IOCs have to be entered into subject to the provisions of this Act. As per the provisions of the Petroleum Act, Petrobangla (the national oil company) is authorized to enter into any petroleum agreement with the International Oil Companies and under this authority Petrobangla enters into all Production Sharing Contracts with the IOCs. Except making reference to environmental protection, most mining and petroleum codes of the developing countries are silent on this issue. Although the Petroleum Act of 1974 didn't incorporate detail provisions relating to the protection of the environment, in the context of early 1970s the environmental protection clause as enshrined in the Act was timely and significant. The endeavour of the framers of that law is commendable. The Act[31] provides that it shall be the duty of any person engaged in any petroleum operation to consider factors connected with the ecology and the environment. Since the government is legally entitled to frame rules under the Act for the effective enforcement of the Act, this provision is no doubt a guideline as well as a direction for the government to make rules in future in connection with the environmental protection in petroleum operations.

3.2 The Environment Conservation Act, 1995

The Environmental Conservation Act as adopted in 1995 is a comprehensive law for the cause of environmental protection in Bangladesh. The four important strategies of the Environment Conservation Act, 1997 are: (a) declaration of ecologically critical areas, (b) environmental clearance, (c) regulations of the industries and other development activities discharge permit, and (d) formulation and declaration of environmental guidelines. Environment Conservation Act 1995 is the apex law on the protection of environment in Bangladesh that requires all projects including the oil and gas projects to conform to environmental standards.

3.3 The National Energy Policy, 1996

The National Energy Policy (NEP) was approved by GOB in September 1995, but officially promulgated in January 1996. One of the objectives of the National Energy Policies is to "ensure environmentally sound sustainable energy development programmes causing minimum damage to environment."[32] The NEP[33] provides that environmental issues will be considered for all types of fuels and in each and every step of fuel cycle; namely exploration, appraisal, extraction, conversion, transportation and consumption. The "Environment Policy"[34] as embodied in the NEP signifies that environment impact assessment shall be made mandatory and should constitute an integral part of any new energy development project, and use of economically viable and environment friendly technology are to be promoted.

3.4 The Environment Conservation Rules, 1997

The Environment Conservation Act, 1995 has delegated authority to GOB to make rules under the

Occidental who was the operator of the project. Another local petroleum geologist commented that in order to prevent the upward flow of gas in blowout, normally heavy mud or chemical substances are used, but Occidental did not do it properly.[48] An official of Occidental told that they (Occidental) could not prevent the accident because of Petrobangla's restriction on the use of "top drive" on "drilling machine". But the Chairman of Petrobangla told that "top drive" is not an instrument to prevent the accident, its function is to increase the speed of drilling.[49] It is established by the probe body of the Ministry of Energy, GOB that the disaster is the outcome of Occidental's negligence.[50]

Occidental was under a legally binding obligation to get Environmental Clearance under the Environment Conservation Act[51] and Rules before starting exploration work at Magurchara. Earlier Occidental had applied for environmental clearance to the DOE and had submitted EIA report to the DOE. Officials of the DOE had given comments on it and they asked for the fulfillment of certain conditions. Occidental didn't reply nor collected an environmental clearance certificate that was mandatory. But before getting Environmental clearance (EC) from DOE, Occidental started exploration[52] in violation of the environmental regulations of the host state. After the accident Occidental insisted that it had been "ignorant of the law"[53] which is not an excuse under the existing laws.

According to Petrobangla, it definitely has a claim on the gas lost due to the blowout, because the responsibility for the accident lies with Occidental; and Unocal is the successor of the assets and liabilities of Occidental in Bangladesh[54]. Immediately after Petrobangla claimed compensation of $ 685 million to Unocal for loss of gas due to the blowout, Unocal refused to pay the compensation claiming that the Supplementary Agreement signed in 1998 providing Petrobangla additional five percent share of profits for block 14 forfeited its claim for further compensation[55]. But Petrobangla said the agreement signed with Occidental in 1998 has no link to the compensation for the Magurchara blowout; no article of the agreement added any clause which could anyway mention that five percent additional share of profits was given as compensation of the loss of gas due to the blowout.[56] Petrobangla officials said that they made the recompense claim totally on the basis of report of the enquiry committee that probed the Magurchara blowout.[57] The GOB has a claim of Tk 609[58]crore as compensation for the environmental damage which is yet unsettled.

Although Unocal claims that the compensation issue was settled by the Supplementary Agreement (SA) signed in 1998, Mr Nuruddin Mahmud Kamal (former Chairman, PDB) and Mr SKM Abdullah (former Chairman, Petrobangla) opined that "the reason for signing the SA has been clearly undernoted for an extension of PSC because, the contractor was unable to fulfill its obligations within the initial exploration period of three years from the date of signing of the PSC. The parties wished to amend certain provisions of the PSC to enable the contractor to undertake and fulfill its obligations."[59] The two local experts said "from article 1.1(b) (c) [of the SA] it appears that the contractor cleverly made provisions for MB 1 blowout costs and Third Party claims with a view to making insurance claims but nowhere in the agreement it was even intended that the recipient of the claims for damages and losses relating to MB 1 will be Petrobangla. In fact, reportedly, Petrobangla has neither been involved on the insurance claim issue nor was the recipient of such claims. If this contention is true, Occidental/Unocal has bypassed Petrobangla/Government on this count, which

deserves to be explained."[60] What the two experts want to mean is that Petrobangla was not made the beneficiary of the insurance clause of the Supplementary Agreement.

4.1. Damage to Environment

The blowout caused severe damage to the environment for which the contractor is liable under the provisions of the PSC signed between Petrobangla and the Contractor in January 1995. Under article 10.6 of the PSC with Occidental, a legally binding contract, the contractor is under an obligation to "take necessary measures for conservation, protection of property, crops, fishing and fisheries, navigation and the environment, prevention of pollution and safety of life and health of personnel"[61] while conducting petroleum operations. Under the same PSC the Occidental was made responsible for "complying with all environmental, health and safety laws of the Peoples Republic of Bangladesh, applicable to the petroleum industry in the peoples Republic of Bangladesh."[62]

The blow out had a disastrous effect on the ecosystems of the surrounding region by destroying the dense natural forests.[63] It also destroyed Dhaka-Sylhet highway. The soil of the region had been seriously affected by the explosion. "The soil has not only lost its fertility, but also become inappropriate for construction of any heavy structure. The gas fire denuded the surrounding 700-acre reserved forest, rich in flora and fauna. The land will be no good for trees, tea, crops and vegetable for 50 years, according to soil scientists. Environmentalists said that the region would be facing a very serious loss of green cover and extinction of wildlife species. The damage to the environment was multiplied due to the prolonged period for which the fire continued: for 17 days, according to official reports, and for 21-60 days over a range of 2-3 km according to the local people, journalists and NGO activists."[64] WFD (Well Flow Dynamics) whose personnel were mobilized and integrated in the relief well drilling team[65] to analyse the down hole flow situation in the blowing well and also to contribute in the planning and supervision of the final kill operation, in their report said that the blowout caused "damage to a tea plantation, the forest, road and the main rail road track in the Northeast corner of Bangladesh."[66] According to the report of WFD the final 'kill operation' completed in early 1998.[67] The environmentalists opined that it would require 50-60 years to recover the environment from the effects of the disaster.[68] The environmental damage was estimated to be Tk 609 crore by the Ministry of Environment and Forest, GOB. But Unocal president said that the amount of the claim is unsubstantiated for which Unocal had suggested the Ministry to use an internationally recognized expert third party[69] to assess the cost of resetting the environment in the affected area.[70] Occidental also incurred huge damage due to the blowout. There are instances where oil companies were held liable for negligent drilling that caused blowout. A US court refused to dismiss claims against a foreign company whose negligent drilling caused the blowout of a well in Mexican offshore waters that caused pollution of US beaches and waters.[71]

4.2 Human Rights Issues

The development of international environmental law has since the outset been heavily influenced by the consideration of protection of the basic rights of human beings. This is evidenced by Principle 1 of both the Stockholm and Rio Declaration, which state that human beings have the fundamental right to life in an environment of quality, and are entitled to a healthy and productive life in harmony with nature.[72] In the recent past, international environmental law has become increasingly concerned with

Act.[35] The Environment Conservation Rules, 1997 are the first set of rules, promulgated under the Environment Act, 1995. Among other things, these rules set:

(a) Requirement for and procedure to obtain environment clearance from the Department of Environment (DOE).

(b) Requirement for EIA according to categories of industrial and other development inventories.

The DOE may take upto sixty days to issue the site clearance (from the date of receiving the application), sixty days to approve the EIA and thirty days more to issue the Environment Clearance.[36]

3.4.1. Environment Impact Assessment

Environment Impact Assessment has been accepted as the most efficient approach to environmental management and protection. In the oil and gas projects EIA is now widely required.[37] In developing and implementing oil and gas projects, as is normally the case in conventional infrastructure projects, environmental screening, environmental impact assessment and the specification of environmental performance norms assume special importance. Incorporating environmental assessment into the relevant phases of the project satisfies three objectives:

(a) Identification of environmental risks from the inception of the project.

(b) Definition of an acceptable environmental impact.

(c) Establishment of environmental norms and standard to which the contractor is expected to conform while implementing the project.

During the project identification, the host government or agency responsible for developing the project should incorporate the results of an environmental screening into the specification. The screening should verify the likely impact of the project on all environmental media (air, water, soil) and also on concerned parties such as communities and impacted or displaced population.

When developing the project to the stage of an invitation to bid, the host government or agency usually undertakes a cost benefit analysis of the project. Along with the cost benefit analysis, an environmental impact assessment (EIA) should be undertaken. The EIA should specify and evaluate the likely environmental impacts of the option and project specification finally chosen. It should establish that all alternatives have been examined and that the project has maximized benefits in relation to social and environmental costs. The EIA and prevailing environmental legislation should allow establishing a set of environmental performance norms, which should then be specified in the invitation to bid. This would enable the bidder to incorporate the desired norms into the project design and the technology proposed. It would also enable the bidder to identify strategic choices that would mitigate the project's foreseen environmental impact, i.e., to use environment friendly technologies rather than end-of-pipe treatment. For projects that can have a substantial impact on the environment, the project agreement and the supplementary agreements should specify the obligations of the contracting parties to evaluate, treat and/or remedy unforeseen environmental impacts. Petroleum operation should require at a minimum the submission of an EIA before license is granted and operations can proceed.[38] In view of the fact that petroleum exploration is a high-risk venture and investment may be deterred by stringent requirements, it is more feasible for regulatory agencies to require a staged EIA, or a

preliminary EIA followed by a full EIA if necessary.[39] The World Bank prepared guidelines for EIA for the petroleum industry in 1991 known as Guidelines for Environmental Assessment of Energy and Industry Projects[40] which serves as really a guideline for the developing countries.

The Environment Conservation Rules, 1997 provided that EIA is mandatory for all development projects and thereby it laid down the legal basis for EIA in Bangladesh.

3.4.2 Clearance Certificate from DOE

Environment clearance before implementing any industrial project has been made mandatory in Bangladesh under the Environment Conservation Rules, 1997 as well as Environment Conservation Act, 1995[41] that spelt out that without prior clearance from the Director General of the DOE no industrial enterprise or development of any industrial project should be approved.

Contractual Approach

3.5 The Model PSC of 1997

The contractual approach involves the inclusion of provisions in the resource agreements/licenses meant to protect environment and human rights. This is the oldest method, and it is still widely used machinery for the management of these problems, at least, in the developing countries. The reason being that Environmental awareness and management have generally been slow to develop in the developing countries as a result of which there had not been sufficient legislations on environmental protection in those countries. But there are rare occasions where the contractual provisions deal with human rights issues specifically.

Under the Petroleum Act, 1974 GOB/Petrobangla has the discretion to enter into any kind of agreement with the International Oil Companies for the purpose of petroleum operations. In 1974 GOB adopted a model PSC under the Act in the light of Indonesian model PSC. Since then Bangladesh preferred to enter into all agreements with IOCs for E&P of oil and gas on the basis of PSC.[42] The existing Model PSC was adopted by GOB in 1997 on the basis of which all PSCs are signed with IOCs. Under article 10.6 and 10.6(f) of the 1997 Model PSC, the contractor is under a legal obligation to conduct petroleum operations "taking necessary measures for conservation, safety of life, property, crops, fisheries, navigation, protection of environment, prevention of pollution and safety and health of personnel."[43] The contractor is also under a legal obligation for "taking all necessary precautions to prevent pollution of or damage to the environment."[44] All PSCs that were signed basing on this Model PSC contain the same provision regarding the protection of environment.

4. Analysis of the case

Blowout is defined as the "uncontrolled flow of gas, oil or other well fluids into the atmosphere which occurs when formation pressure exceeds the pressure applied to it by the column of drilling fluid. Shallow gas blowout relates to uncontrolled flow of gas from gas pockets located above the intended reservoir prior to the installation of a blowout preventer".[45] It is alleged that the Magurchara blowout was caused "by lack of proper management skills of Occidental while embedding mechanical installation at a depth of 950 metres."[46] Professor Badrul Imam,[47] a geologist and Professor, Geology Department of Dhaka University opined that the blowout was a gross negligence on the part of

impact on and protection of indigenous people. In the Texaco case, part of the damage claims against the company is to compensate the indigenous people living in the polluted areas.

It is a fact that resources development and environmental problems have been inseparable, but "the association of MNCs with human rights violations is recent phenomenon that have challenged traditional notion of human rights."[73] Environmental problems are associated with resources development in both developed and developing countries, but human rights issues have arisen in such cases mostly in developing countries.[74] Most of the environmental and human rights issues are involved in the activities of the multinational corporations (MNCs) engaged in the development of petroleum and mineral resources on the one hand, and the role of the host governments within whose territories the MNCs operate, on the other. The development of natural resources gives rise to both positive and negative impacts. The most negative impacts are the environmental and human rights degradations. The process of exploration, development, extraction, transportation and consumption of minerals and petroleum recourses are noted to involve significant adverse environmental and human impacts, the nature of which varies with the character and scope of the particular activities or operations in question. Petroleum and mineral development is potentially a devastating process for the environment, starting with exploration and ending in extraction. Apart from this, the increasing association of MNCs with human rights violations has added to the negative impacts of resources development. Environmental and human rights problems have become, in modern times, the new generation of risks to the resources sector. The recent Ogoni[75] disaster in Nigeria raised specific environmental and human rights questions touching on the operations of a MNC in Nigeria. The government's handling of the issue drew worldwide condemnation and specific sanctions by the international community. In Papua New Guinea[76], Broken Hill Proprietary Company, an Australian mining company operating in that country was accused of environmental degradation of the OK Tedi lands and rivers. This subsequently snowballed into legal actions in Papua New Guinea and Australia against the company by the members of the affected community. In Ecuador,[77] an American company Texaco was seriously criticised for the abuse of the environment and human rights of the indigenous people of the Oriente, and this led to spates of legal actions in the home country of the company. Charges of environmental and human rights violations have been leveled on British Petroleum (BP), a renowned IOC and the Colombian government with respect to resources development in that country. Unocal is sued in the United States for indulging human rights violations[78] in Myanmar in the course of exploration of hydrocarbon in that country. These are some instances of the new spate of environmental and human rights issues that are confronting the resources sector today in the developing countries.

The Magurchara disaster in Bangladesh caused human rights degradations in the affected area. It caused severe damage to the tribal habitat.[79] A tribal group "khasi Punji" became the worst victim of the disaster. Houses including all the belongings of a number of families of this community were burnt to ashes with gas fire. The explosion damaged their cultivable land with crops, i.e., Khasi pan jhums on 50 acres of land were damaged.[80] After the incident the total area was evacuated, but no effective initiative was taken to rehabilitate the affected and displaced indigenous people. Their sufferings knew no bounds. The handling of the disaster by the concerned authority drew nation wide

condemnation.

4.3 The Issue of Sustainable Development

The most accepted definition of sustainable development was given in the Bruntland Report of the World Commission on Environment and Development (WCED) that defined it as: "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[81] Sustainable development is also defined as "development which ensures that the utilization of resources and the environment today does not damage prospects for their use by future generations".[82] It has been contended that sustainable development rests on clear principles viz. environment, futurity, equity and participation.[83] The principle of "environment" states that true environmental costs of any human activity must be taken fully into account. The "futurity" principle posits that, in any human activity, the effects of that activity on the future generations must be considered, recognizing that future generations have an equal right to the natural resources.[84] The principle of "equity" requires access to and control over resources to be much more evenly distributed within and amongst countries. The principle of participation signifies that development requires people sharing in decision-making with regards to goals and means of development, and such participants should take an active role in pursuing such goals.[85] The concept of sustainable development was introduced in 1980 in the World Conservation Strategy (1980). Although the concept emerged in the context of conservation of natural resources, it contained within it wider implications, extending from human rights and governance issues to those involving the functioning of the international economy and national development strategies.[86] In determining the implications of sustainable development on petroleum resources, there is the need to do so in the light of the principles of sustainable development. Some of these principles include:[87]

(a) the principle of intergenerational equity;

(b) the principle of sustainable use;

(c) the principle of equitable use;

(d) the precautionary principle.

It means developing petroleum in a manner that minimizes the depletion rate of reserves and maximizes the life of petroleum resources, without harming the environment, both for the interest of present and future generations.[88] This implication necessarily requires some positive actions. Firstly, there is the need to use petroleum resources in such a manner so as to benefit the present and future generations. Secondly, the economic benefits of exploiting petroleum resources "should not be wasted nor enjoyed only by the generation which witnesses the exploitation."[89] In striving towards sustainable development, the initiative of governments is central in leading to its actualization. They need to show a strong political resolve in this direction and promote programmes that ensure its feasibility.[90]

The way the government of Bangladesh has engaged MNCs in the oil and gas exploration and extraction activities in most of the hydrocarbon blocks concurrently and the way MNCs are involved in the petroleum operations there, raised the sustainable development issues which need to be addressed. There are few cases where the Supreme Court of Bangladesh dealt with conservation and

equitable utilization of natural resources. In Bangladesh Environmental Lawyers Association (BELA) v. Ministry of Energy and Mineral Resources,[91] the government decision to lease out the 15 oil and gas blocks out of 23 to international oil companies was challenged in the High Court Division of the Supreme Court. It emphasized the need for a co-coordinated policy guidelines and planning for maximum sustainable utilization of the natural resources. The principle of sustainable development presupposes that development by the present generation should not be at the expense of the future generations. Article 4 of the Rio Declaration says that environmental protection must be an integrated part of the development process and can't be considered in isolation from it. The issue of sustainable development is pertinent in this case for two reasons, firstly, the blowout caused severe damage to the environment of the region in such a manner that it would carry the negative impact of the disaster for next 50-60 years according to the environmentalists, and secondly, the gas explosion burnt the entire gas reserve of Magurchara gas field of approximately 245 Bcf (the current price of which is about $ 685 million [92]) as a consequence of which the present and the future generations of Bangladesh would be deprived of their valuable natural resources of which they are the owner under the constitution of Bangladesh.[93] The environmental impact of the Magurchara, as already mentioned in the preceding part of the study, will be borne by the future generation of that region and the generations to come in Bangladesh will be deprived of their rights. These realities obviously have negative implication on sustainable development.

4.4. Polluter Pays Principle and Magurchara Blowout

It has become the pertinent question whether "Polluter Pays" principle can be applied to the Magurchara blowout case. Article 16 of the Rio Declaration lays down that national authorities should promote the internalization of environmental costs and the use of economic instruments, reflecting the principle that the polluter should bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment. The Polluter Pays Principle intends to compel the oil and gas (O&G) industry to integrate the full environmental and social costs of their activities into their production costs. The incorporation of Polluter Pays Principle into international law has implications for the development under national law of civil liability rules for environmental damage.[94] "The O&G industry is clearly a major stakeholder in the process of the development of law which relates to liability for environmental damage."[95] Although this principle has not yet been enacted in Bangladesh by any legislation, Unocal can't outweigh the enforcement of 'polluter pays' principle in the Magurchara case because the contractor is under a legally binding obligation under the PSC not to harm the environment for which it will incur a civil liability for damages under the law of torts. In most developing countries environmental regulatory and compliance provisions are incorporated into the partnership agreement. In this way, if the foreign companies violate the regulations, the developing country has a contract remedy that it can pursue through the local courts, the international justice system or arbitration.[96] Environmental fines and liability including administrative and criminal penalty are steadily on the rising trend in many countries.[97] The petroleum environmental regulation in Bangladesh should contain provision for both civil and criminal liability for environmental pollution.

5. National Issues

5.1 Enforcement Inadequacy

Most of the developing countries don't have the enforcement capability to ensure adequate protection of their environment.[98] There are acute problems as well relating to the enforcement of human rights. Basing transnational corporate responsibilities on international human rights standards is no doubt the most effective way of ensuring comparable standards across national jurisdictions. The implementation of international human rights law depends on national governments through their supervisory roles under human rights treaties[99]. The enforcement machineries in developing countries both in environmental and human rights arena are very weak. They also lack in trained personnel to carry out effective supervision and enforcement. Bangladesh is not an exception to this reality. Although Bangladesh has framed a considerable level of environmental regulations, they are hardly enforced. The enforcement inadequacy on the part of the government has been grossly manifested in the Magurchara case. GOB could not enforce the binding principle of law concerning the "environmental clearance" before starting the project. Secondly, the official of Petrobangla who was engaged in joint monitoring under the PSC didn't perform his duty efficiently.[100] Thirdly, Petrobangla's Environment and Safety Division[101] could not compel the contractor to abide by the safety and environmental regulations.

5.2 Role of the Government

It is undoubtedly the host government that has the major role to play in the management of environmental and human rights problems arising from the resources development. The role of the Energy Ministry, GOB in handling the issue is criticized by the different quarters. Regarding the role of the Energy Ministry in post-blowout situation some local experts put four pertinent and legitimate questions: (1) why was Occidental given an extension of the terminated PSC without resolving the compensation issue? (2) Why did Petrobangla sign the Supplementary Agreement with Occidental in 1998? (3) Why didn't Petrobangla formally raise the compensation issue for a long time? (4) Why was Occidental allowed to sell off its rights in all its hydrocarbon blocks in Bangladesh to Unocal? There are no straight-cut answers to all these questions, but the following issues need to be addressed in exploring the answers:

Firstly, it was reported (News Letter of Project Underground, Volume 5, Number 9, May 31, 2000) that there had been tremendous diplomatic pressure from the then US administration on Bangladesh government to grant an extension of terminated PSC to Occidental (Oxy). On January 10, 1998 the original contract with Occidental for E&P expired. With the disaster in mind, GOB seemed "unsympathetic" to a request for an extension of the contract. It is claimed in a report that the US administration then intervened.[102] "US ambassador to the UN, Bill Richardson accepted an invitation from Occidental lobbyist Robert McGee to meet the Bangladeshi Commerce Minister... A confidential memo from Richardson to GOB said, 'I am troubled by reports that the future of the joint venture between Occidental Petroleum and Unocal is in jeopardy'. He told the government to 'move swiftly to grant the extension so they can get on with their important work. Nothing would please me more than to inform President Clinton that the US companies were awarded the blocks they are seeking'"[103]

After that, PSC with Oxy was extended, but Oxy in 1999 after transferring its shares to Unocal left Bangladesh when there was a strong public opinion in Bangladesh to collect compensation from Oxy. In response to a question from the author US energy lawyer Professor Owen L. Anderson, Eugene Kuntz Professor in Oil, Gas and Natural Resources, told that United States is "famous" for creating diplomatic pressure for protecting the interests of US companies operating outside.[104]

Secondly, it is strongly claimed that the Supplementary Agreement signed with Occidental in 1998 has no link to the compensation for the Magurchara blowout; no article of the agreement added any clause which could anyway mention that five percent additional share of profits was given as compensation of the loss of gas due to the blowout and some local experts opined that the reason for signing the SA has been an extension of PSC because, the contractor was unable to fulfill its obligations within the initial exploration period of three years from the date of signing of the PSC and thereby the parties wished to amend certain provisions of the PSC to enable the contractor to undertake and fulfill its obligations.[105] These are very reasonable arguments; but the question remains why the contractor Occidental agreed in 1998 to give five percent additional share of profits to Petrobangla. Unocal claims it to be the existence of compensation for the gas burnt in the blowout. In the given situation, it requires a thorough examination of the confronting positions to get the real answer as to why the SA was signed.

Thirdly, some local experts claim that the issue of compensation could have been raised long before had the then Energy Secretary, GOB didn't deliberately decline to open the Probe Committee Report before the Parliamentary Standing Committee.[106] In late 2000, the Parliamentary Standing Committee on Energy Ministry became involved in a tug-of- war with the then Energy Secretary when he refused to submit the "classified report" before the Committee. Finally in 2001, with the then Prime Minister Sheikh Hasina's intervention, the report was made available to the Committee and Petrobangla.[107] In an interview with the press, the then Energy Secretary told that a number of conditions had been imposed on the contractor (Occidental) while signing the Supplementary Agreement that allowed an extension of the PSC for two years. The important conditions, inter alia, were: (a) the contractor would not be allowed to claim cost recovery from the Magurchara well and (b) if there were any discovery of hydrocarbon in the same block, the contractor would give an additional share of profits to Petrobangla to make up the loss of gas burnt in the blowout. He also told that these measures were taken at the recommendations of the Enquiry Committee. He commented that it was not binding on their part to publish the report of the probe committee.[108]

Fourthly, the question why Occidental was allowed to leave Bangladesh by transferring its rights in all their blocks in Bangladesh to Unocal seems to be apparently pertinent. But, had Occidental not been allowed to do so, it would not make any difference so far as legal and economic implications are concerned, as Unocal "stepped into the shoes" of Occidental when they entered into an agreement under which Occidental transferred its properties in Bangladesh to Unocal and Occidental would acquire Unocal's holdings in Yemen.[109] As a presumption of law Unocal shoulders all the liabilities of Occidental under the PSCs they had entered to in Bangladesh, which Unocal itself doesn't deny. The author thinks that for the convenience of both Occidental and Petrobangla/GOB Occidental opted for leaving Bangladesh and GOB allowed it accordingly. That is to say, in order to avoid any

embarrassing situation GOB preferred the replacement of Occidental by another US oil company in Bangladesh without changing the legal and economic positions of the contactor and the host government, as there had been strong public opinion against Occidental in Bangladesh after the Magurchara disaster.

5.3. Role of the NGOs/Pressure Groups

The NGOs and pressure groups in Bangladesh could not play any significant role in the Magurchara issue. Brent Spar's case shows the power of public opinion activated by Greenpeace in a sensitive area like the protection of the environment. A MNC had to bow to the pressure of public opinion although they had a legal permission from the UK government to dump the Brent Spar at the sea. Any corresponding role of Rainforest Action Network (RAN) and Oxfam America[110] against Texaco for its activities in Ecuador, Body Shop[111] in Ogoni issue in Nigeria, and EarthRight International (ERI) against Unocal in Myanmar, was not seen in Bangladesh in the Magurchara issue. Magurchara blowout caused a huge damage to the environment which the NGOs and pressure groups in Bangladesh failed to highlight nationally and internationally. They didn't take any effective initiative for creating public opinion to pressurize the government with a view to realizing the compensation money from Occidental/Unocal for the environmental damage.

6. The Responsibility of Multinational Corporations

Occidental's disregard of the mandatory provision for EIA clearance from the DOE and its negligence during the petroleum operation in Magurchara give rise to remind the MNCs mainly working in the developing countries as to what are their responsibilities in the states where they operate. There is no doubt that multinational corporations are widely accepted as an integral part of the international economy and the agent for beneficial flows of capital and diffusion of technology,[112] although the MNCs particularly the "majors", i.e., the Seven Sisters, were accused of "exploitation" of petroleum resources of the developing countries till late 1960s. The responsibility of corporations today is defined by norms of global environmental sustainability, accountability and transparency of corporate entities, the respect for human rights, free trade and the inseparability of corporate global undertakings.[113] All the corporate responsibilities are not grounded in law. Some of them are matters of moral rather than legal obligations, but they should not be undermined as today's social or moral concerns are likely to be tomorrow's legal obligations. The development of legal obligations relating to environmental matters and corporate criminal responsibility are good examples of this progressive development of social concern into legal obligations. Most of the multinational corporations' home states' organization OECD in 1976 declared Guidelines for Multinationals as part of its Declaration on International Investment And Multinational Enterprises. The aim of the OECD Guidelines is to ensure that MNEs operate in harmony with the policies of the countries where they operate. Although these 'Guidelines' are not meant for the developing countries, they have a moral influence on the operations of the multinational corporations in the developing countries. In order to promote environmental protection, the Guidelines state that the enterprises should take due account of the need to protect the environment and to avoid environmentally related health problems.[114] There are now established normative standards in the human rights field which are sufficiently global and multidisciplinary to provide a legal basis for directing corporate behaviour in their social or political and indeed economic persona.

As human rights law is built on broad notions of fairness and justice- guaranteeing its benefits to everyone, balancing all competing claims etc.- it can prove immensely beneficial in the otherwise partisan discourse on corporate social responsibility.[115] Some transnational corporations such as Shell and the Body Shop have expressly endorsed the value of human rights standards in the definition of good practice within their organizations. Oxfam believes that even if there is no clear legal obligation, TNCs do have an ethical and moral duty to respect the fundamental human rights in the countries in which they operate.[116]

The author is yet to be convinced that, if forced to choose between human rights and profits, TNCs would choose the former. There is some evidence that TNCs simply do not adopt proactive social policies without some form of pressure. That pressure is internal as well as external. Internally it arises from specific situations in which companies find themselves. Shell in Nigeria is a good example in this respect. Externally it arises from pressures that require and encourage TNCs not only to respect human rights, but to protect them actively, by developing and implementing effective social responsibility policies and procedures based on the principle that a company has responsibility for its impact on lives and environments in the countries where it operates.

7. Extraterritorial Application of US Environmental Law: An Option?

In the light of the Magurchara disaster a legal as well as academic question arises whether the local communities who are victims of the disaster can file a suit in the United States, the home state of both Unocal and Occidental, for compensation of environmental damage, assuming that the existing environmental laws in Bangladesh due to their enforcement constraints can not give them any remedy. Obviously, the parties to the contract (PSC), i.e., GOB/Petrobangla and Unocal, have to settle disputes[117] (if any) either amicably or through expert determination or arbitration; they can't go to any forum except these forums. But the local communities of Magurchara who are affected by the blowout are not a party to the PSC; therefore they are not bound by the dispute settlement clause of the PSC. The question of filing suits on the part of the local community or pressure groups in the courts of US for compensation of Magurchara disaster arises for two reasons: (1) Although the concept of Public Interest Litigation (PIL) has emerged in the South Asian countries including Bangladesh under which courts, disregarding the traditional concept of locus standi, entertain a new genus of litigation[118] for protecting the fundamental rights of the people and the courts verdicted that a clean and wholesome environment is a prerequisite to enjoy the " right to life" enshrined in the constitution as a fundamental right[119], but in Bangladesh PIL is still not effective enough to redress the petitioners with compensation for environmental damage. (2) There is an emerging trend that the local communities and pressure groups are willing to abandon their local courts[120] and pursue their claims in the home states of the MNCs and the cases reveal willingness on the part of some courts of the home states of MNCs to entertain such cases.[121]

US anti-bribery law the Foreign Corrupt Practices Act of 1977 which was enacted after several highly publicized incidents involving bribery of foreign officials in the airplane manufacturing industry, imposes criminal and civil penalties on US corporate officers and employees working and traveling abroad if they make payments or offer anything of value to a foreign official in an attempt to influence

the official to act, decide or use his influence with his government in a way that helps the US company to obtain or retain business in the foreign country. US anti-trust law has also extra-territorial jurisdiction.

The justification for these extraterritorial extensions of US law is predicated on the proposition that Congress can prescribe standards of conduct for American citizens and American corporations, regardless of locale.[122] In view of this discussion a logical question arises whether the local community of Magurchara can sue Occidental/Unocal in the US for compensation of the environmental damage caused by Occidental. In determining whether a US law applies extraterritorially, an American court must address at least three issues:[123]

(a) It must decide whether Congress intended the statute to apply to conduct outside the territorial jurisdiction of the United States.[124]

(b) The court must also determine whether the conduct abroad had actual or intended effects within the United States.

(c) A third consideration is the extent to which the US statute is in conflict with the domestic law or policies of a foreign state.[125] A court might well conclude that there is no Congressional intent to give a statute extraterritorial scope because such an application would conflict with another country's own policies.[126]

Courts do not, of course, necessarily raise all of these issues in every case or in the order indicated. For filing any damage suit on the part of local communities in a US court for the Magurchara disaster the first consideration is that the law under which the suit would be instituted has to be intended effective extraterritorially. There are several major environmental statutes in the United States that have relevance to the conduct of petroleum operations.[127] It needs to be examined as to which statue may apply to a suit filed by Bangladeshi nationals for environmental damage caused in Bangladesh depending upon the language and purpose of the specific statute. The Magurchara issue satisfies the second consideration of a US court that the conduct abroad must have effects within the US. Obviously Occidental's negligence in drilling the Magurchara well caused the environmental disaster that would hamper the image of the US companies operating abroad and ultimately it would create a negative impact on the US economy. A prospective case before a US court against Occidental/ Unocal for Magurchara disaster also satisfies the third condition as recognized by the US courts that there must not be a conflict between US environmental laws and those of a foreign state. As noted earlier, laws, policies and model production sharing contract of Bangladesh acknowledge the general principles of environmental protection, and they are not inconsistent with the US environmental laws. In view of the Texaco Case[128] (Ecuador) where the New York court entertained a suit filed by the local people of Ecuador and Peru affected by the operations of Texaco in Peru, it needs to be examined whether a similar damage suit can be filed before a US court if Unocal denies to pay adequate compensation for the environmental damage caused by the Magurchara disaster.

8. Concluding Observations

From the analysis in the preceding parts of the study on the legal, environmental and human rights issues of the Magurchara disaster the following observations can be made:

1. Petrobangla definitely has a justified claim on the gas lost due to the blowout, because negligence on the part of Occidental was proved to be the cause of the disaster.[129] Unocal "stepped into the shoes" of Occidental when they entered into an agreement under which Occidental transferred its rights in the PSCs in Bangladesh to Unocal and Occidental acquired Unocal's holdings in Yemen.[130] As a presumption of law Unocal shoulders all the liabilities of Occidental under the PSCs they had entered to in Bangladesh.

2. Although it is strongly claimed from GOB side that the Supplementary Agreement signed with Occidental in 1998 has no link to the compensation for the Magurchara blowout, the question remains why the contractor Occidental agreed in 1998 to give five percent additional share of profits to Petrobangla.Unocal claims it to be the existence of compensation for the gas burnt in the blowout. In the given situation, it requires a thorough examination of the confronting positions to get the real answer as to why the SA was signed. Even if it is proved that 5% additional share offered to Petrobangla was meant for compensation for the gas lost during blowout, still it needs to be examined whether that is an adequate compensation.

3. Occidental was absolutely liable for the environmental damage caused due to the blowout as under the PSC with Occidental, a legally binding contract, the contractor was under an obligation to take necessary measures for conservation and protection of the environment[131] and the negligence of Occidental was proved to be the cause of the blowout.[132] There are instances[133] in the US where oil companies were held liable for negligent drilling that caused blowout. It is unfortunate that an IOC like Occidental didn't feel it necessary to comply with an important legal requirement to get Environmental Clearance from DOE before starting exploration work, and it insisted that it had been "ignorant of the law"[134] which is not an excuse under the existing laws. Bangladesh is entitled to the cost of resetting the environment in the affected area.

4. GOB should resolve the compensation issue amicably; it should handle the issue in a way it doesn't create any negative impact on the investment in Bangladesh. If the parties fail to resolve the issue amicably, GOB should then proceed to resolve the issue by way of expert determination or arbitration as per the PSC. In view of the Texaco Case (Ecuador) and Unocal Case (Myanmar) it can be examined whether the aggrieved local communities/pressure groups can sue Occidental/ Unocal in their home state for the environmental compensation, assuming that the existing environmental laws in Bangladesh due to their enforcement constraints can not give them any remedy. In Bangladesh PIL is still not effective enough to redress the petitioners with compensation for environmental damage.

5. Petroleum investment decisions in Bangladesh obviously have to take into consideration of the principle of sustainable development, which prescribes for developing petroleum in a manner

that minimizes the depletion rate of reserves and maximizes the life of petroleum resources, without harming the environment, both for the interest of present and future generations. In this connection, GOB can consider to establish a "Resources for the Future Fund"[135] (RFF) in the framework of national energy policy and model contract which would set apart a specific percentage of energy revenue for sustainable development, such as for research and development of renewable energy[136], or investment and saving for future use.

6. The Multinational Corporations (MNCs) should not deviate from their corporate social responsibilities. They should adopt uniform standards, not double standards, for their operations in the developed and developing countries. The home countries of MNCs should introduce legislations imposing a code of conduct for their companies operating abroad. In Bangladesh, the government and other agencies need to supervise how far the operations of the MNCs therein are environment friendly and human rights protective. Establishing the National Human Rights Commission can be a good endeavour in this connection. NGOs/pressure groups in Bangladesh should be reactive as well as proactive in environmental and human rights issues.

7. In view of the Magurchara issue it is obvious that there has to be transparency in the petroleum sector of Bangladesh. Firstly, hydrocarbon blocks should be allocated by competitive bidding, not by discretionary authority.[137] Secondly, the activities of the Energy Ministry and Petrobangla should be periodically disclosed before the concerned Parliamentary Standing Committee for review. Thirdly, every IOC who is a participant in the bidding process will make a declaration that it doesn't have any local agent.[138] Fourthly, the creation of the office of Ombudsman is an imperative for ensuring transparency of the public sector.

8. GOB should think to bring about legal and regulatory reforms in the petroleum and energy sector in conformity with its commitment to the Washington Consensus. Petroleum environmental regulations in Bangladesh should be reformed in a manner it can address the emerging issues of the sector.

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INDIGENOUS PEOPLES, DEVELOPMENT AND ENVIRONMENT: THE NEW APPROACH IN INTERNATIONAL HUMAN RIGHTS LAW

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I. INTRODUCTION

Indigenous Peoples are generally considered those who inhabited a country or a geographic region at the time when people of different cultures, or ethnic origins arrived, the new arrivals after becoming dominant through the conquest, occupation, settlement or other means.[1] Although the Union Government of India found itself unable to define who are the Indigenous Peoples in India, the World Bank on its own classified in 1991 the Scheduled Tribes as Indigenous Peoples in India for various development programmes.[2] At the present time there can be few modem problems which are so elusive of effective regulation and which so challenge the efficiency of both the international and domestic systems as that of the development and environment question. In the contemporary era, indigenous movement the world over has presented various legal as well as sociological issues, the development and environment issue is one of these issues. The present paper will examine the impact of development on indigenous peoples, their environment and the recent trend in International human rights law.

II. ADVERSE IMPACT OF DEVELOPMENT ON INDIGENOUS PEOPLES AND THEIR ENVIRONMENT

Development means growth, it is a process of change from a less desirable to a more desirable state of affairs. Economists identify it with economic productivity through industrialization or otherwise, sociologists with social change or social differentiation, political scientists with democratization or expanded government[3]. However, we are here concerned with economic development based on industrialization and its adverse impact over indigenous peoples and their environment.

Most of the indigenous peoples live in the word's most vulnerable ecosystems: the Arctic and Tundra, the tropical rainforests, the boreal forests, reverine and coastal zones, mountains and semi-arid rangelands. In spite of their vulnerable ecosystems, the territories used and occupied by indigenous peoples are often seen as important repositories of unexplored natural resources. Paradoxically, presence of these resources had turned out to be harmful to the indigenous peoples.[4] Once largely inaccessible, these regions and their mineral deposits, hydroelectric potential, hardwoods, oil and new farm and pasture lands have been put within man's reach by modern technology. As a result in the last 40 years or so, these lands have come under unprecedented pressure by governments, development banks, transnational corporations and entrepreneurs for searching resources to supply the growing demand of industrialization. The development schemes devised for the purpose of national development

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often seriously affect indigenous peoples' environment and their traditional livelihood leading to impoverishment of these communities. Because this development model puts heavy emphasis on the indiscriminate exploitation of natural resources in order to render them productive and to solve the urgent economic needs of the nation states caused much damage to the indigenous peoples especially to their lands, their natural resources, their ecosystem in forest, their way of life, their beliefs and cultures.[5] The state planners and policy makers, while launching centrally promoted development programmes, do not take into account either the interest or claims of the indigenous populations and hardly respect their economic and cultural rights. The result of these programmes very often initiated in the name of national development has led to the displacement of millions of indigenous peoples all over the world.[6] Thus this ill-conceived development policies are responsible for the ecological degradation, which greatly effects the human rights of indigenous peoples, particularly, environment. As indigenous peoples have a close link between their way of life and the land and nature, the adverse impact of development falls on the habitat of these peoples in violation of their human rights including environment. In this connection the preliminary report on human rights and the environment prepared for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities states:

"The prevailing development process ... is not only damaging to the environment but may also be harming the way of life of many people, and especially indigenous peoples. Indeed, it can be said that all environmental degradation has a direct impact on the human rights of the indigenous peoples dependent on that environment. For example, where there is unrestrained deforestation, forest-dwelling indigenous peoples may be forced from their traditional homelands, may thereby be denied a means of livelihood, may be driven to take refuge among strangers and, in the most extreme cases, may fall victim to diseases against which they have no immunity. Similarly desertification, a phenomenon which is as much man-made as it is an act of nature, has led many self-sufficient pastoralists to an impoverished existence in refugee camps. Even smaller-scale environmental sacrifices - the inundation caused by dam-building, mining, prospecting and so on - have affected indigenous peoples all over the world, causing them to leave lands they have occupied for generations, often without their willing consent or any compensation. Indigenous peoples may, thus, be victims of inappropriate development and environmental degradation. As such their fundamental freedoms and human rights are affected".[7]

Thus without being consulted or participating in discussions or decision-making, the indigenous populations are direct victims of the development model which threaten our environment.

III. SUSTAINABLE DEVELOPMENT AND INDIGENOUS PEOPLES

For the above mentioned reasons the industrial development model which was previously considered as the promoter of progress for mankind is now being questioned by the environmentalists, planners and experts. Since 1980s a new awareness has developed about the limits of this development model due to industrialization and over exploitation of natural resources which cause major environmental threats to our planet resulting from acid rain, depletion of the ozone layer, the greenhouse effect and depletion of tropical forests. The World opinion realizes that the modern development based on high technology, industrialization and the irrational use of natural resources is destructive to the mankind

because the existing development model does not respect men. The people also began to realize that development demands an approach of humanity and respect, of cooperation and the sacrifice of cherished vested interest, and it depends upon participation and wisdom. It is necessary to accept the fact that the fundamental precondition for development is the relationship between countries and between communities and individual within countries.[8]

At the beginning of the 1990s people began to talk about *human development.* A start was made on measuring progress by introducing the "Human Development Index" (HDI) in place of "Gross National Product" (GNP) as the instrument of measurement. The HDI consists of three indicators for measuring development:

(1) Life expectancy (which implies health and living conditions),

(2) Literacy (which implies education, the ability to hold down a job and appreciable one's surroundings and culture), and

(3) Purchasing power (which implies the ability to buy products and to satisfy basic needs).[9]

As a result the world opinion increasingly recognizes that the protection and preservation of the environment of biosphere is *sine qua non* for the achievement of *human development.*[10] If a harmonious balance is not established between the challenges of development and the imperatives of environment, the very survival of the mankind will be endangered. Accordingly, the emphasis is now on the achievement of *Sustainable Development.*[11] This concept developed in response to the adverse impact of prevailing development model which has caused "cries of a alarm" in the contemporary international society. The expression *Sustainable Development* implies a growth of awareness and a search for the balanced development policy and the impact of human activity on the environment. It also implies an attempt to take account of the relationship between the economy and the biosphere. It reflects a new approach to development i.e. a development which is at once supportable, but viable and durable. Thus *Sustainable Development* means a development which satisfy the needs of the present without diminishing the capacity of future generations to meet their own needs. The essence of this new approach is the concept of *intergenerational equity.* According to Sylvie Fauchex and Jean Francois the concept of *intergenerational equity* comprises three basic principles:

(i) Each generation must conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict future generations options. Each generation is entitled to diversity comparable to past generations;

(ii) Each generation must maintain the equality of the planet so that it is passed on in no worse condition than it was received. Each is entitled to inherit an Earth comparable to the Earth which sustained its forebears;

(iii) Each generation should provide its members with equal rights of access to the legacy from past generations.[12]

It is most relevant to mention the fact that the notion of sustainability is the essence of both indigenous economies and their cultures. They have a special relationship with land and the environment in which they live. In nearly all indigenous cultures, the land is revered as *Mother Earth,* and it is the core of

their culture. Furthermore, indigenous people have, over a long period of time, developed successful systems of land use and resource management. These systems including nomadic pastoralism, shifting cultivation, various forms of agro-forestry, terrace agriculture, hunting, herding and fishing, were for a long time considered inefficient, unproductive and primitive. However, as World opinion grows more conscious of the environment and particularly of the damage being done to fragile habitats, there has been a corresponding interest in indigenous land-use practices.[13]

Obviously much attention is now being taken in adopting the techniques and methods utilized by the indigenous peoples for conservation of natural resources. It is now increasingly being felt that we can learn much, how to ensure sustain natural resources and its management, from native indigenous peoples. The Rio Declaration on Environment and Development held in Rio de Janeiro, Brazil in 1992, emphasized the "vital" importance of indigenous peoples' traditional knowledge of the ecosystems in which they live. The Principle 22 of the declaration affirmed that:

Indigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and practice. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. [14]

Against this background we now propose to discuss the relevant provisions of the UN Charter and other international instruments pertaining to right to development of indigenous peoples and protection of their environment under international human rights law.

IV. INDIGENOUS PEOPLES' RIGHT TO DEVELOPMENT AND PROTECTION OF THEIR ENVIRONMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW

A. GENERAL PROVISIONS

An objective reading of the UN Charter, the Universal Declaration of Human Rights, the two Human Rights Covenants and the other human rights instruments including the declarations by various UN organs and specialized agencies indicates that efforts are being made to seek greater happiness for the human species. The idea of development is based on the conviction that there exist a close link between economic, social and cultural development and the realization of human rights.[15] The UN General Assembly, in its resolution 1161(xii) of 26 November 1957, stated that "a balance and integrated economic and social development would contribute towards the promotion and maintenance of peace and security, social progress and better standards of living, and the observance of, and respect for, human rights and fundamental freedom for all". Similarly, the third preambular paragraph of the International Covenant on Economic, Social and Cultural Rights, 1966, states that "in accordance with the Universal Declaration of Human Rights, the idea of free human being enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights".

Besides the above mentioned goals of development, the interconnection between the realization of human rights and economic development is recognized in the International Conference on Human Rights held in Teheran, Iran, in 1968. The Conference expressed its conviction that "the enjoyment of economic and social rights is inherently linked with any meaningful enjoyment of civil and political

rights and that there is a profound interconnection between the realization of human rights and economic development". The commission on Human Rights, on 13 March 1969, affirmed in its resolution 15(xxv): "That the ultimate objective of any effort to promote economic development should be social development of peoples, the welfare of every human being and the full development of his personality". The Declaration on Social Progress and Development adopted by the General Assembly on 11 December 1969 stated in its eighth preambular paragraph: "Emphasizing the interdependence of economic and social development in the wider process of growth and change, as well as the importance of a strategy of integrated development which takes full account in all stages of its social aspects".

The close link between economic, social and cultural development and realization of human rights is affirmed in the Declaration on the Right to Development adopted by the General Assembly on 4th December 1986. The declaration stated in its second preambular paragraph that "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom".

The Declaration on the Right to Development adopted by the General Assembly on 4 December 1986 defined what the UN understands by development. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[16] The declaration further emphasized that the human right to development implies the subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources. The human person is the central subject of development and should be the active participant and beneficiary of the right to development. All human beings have a responsibility for development, individually and collectively. [17]

The above mentioned general provisions relating to development under International Human Rights Law directly related to the situation of indigenous peoples. The challenge of development made it necessary to consider the civil, political, economic, social and cultural rights set forth in international instruments but never implemented.

B. SPECIFIC PROVISIONS

Besides the general provisions, indigenous peoples' rights relating to development have been specifically recognized in UNESCO Declaration on Ethno-development, ILO Convention No. 169 and the Draft Declaration on Indigenous Rights Prepared by the UN Working Group which is now under consideration by the UN Human Rights Commission.

(i) UNESCO Declaration on Ethno-development[18]

The declaration recognizes that "ethno-development is an inalienable right of Indian groups".[19] According to the declaration ethno-development is "the extension and consolidation of the elements of its own culture, through strengthening the independent decision making capacity of a culturally distinct society to direct its own development and exercise self-determination, at whatever level,

which implies an equitable and independent share of power".[20] The declaration also expresses its conviction that ethnic group is "a political and administrative unit, with authority over its own territory and decision making powers within the confines of its development project, in a process of increasing autonomy and self-management".[21]

(ii) ILO Convention No. 169[22]

In its fifth preambular paragraph, the International Labour Organization (ILO) Convention No. 169 of 1989 recognizes the indigenous peoples' right relating to development and states: "Recognizing the aspirations of these peoples to exercise control over their own institutions, ways of life and economic developments and to maintain and develop their identities, languages and religions, within the framework of the States in which they live." Article 2 of the Convention spells out the responsibility of Governments for developing coordinated and systematic action to protect individual and specific rights and to guarantee respect for the peoples concerned. Paragraph 2(b) of the Article calls upon Governments to include measures for "promoting the full realization of the social, economic and cultural rights of these people with respect for their social and cultural identity, their customs and traditions and their institutions". Article 7 is much more specific. Paragraph 1 of the Article 7 reads: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible,over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plants and programmes for national and regional development which may affect them directly". Besides the above, paragraph 2 of the Article 7 recognizes indigenous peoples' right to participation in economic development when it states: "The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and cooperation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement." Furthermore, paragraph 3 of the same article 7 lays down the responsibility of Government to carry out studies "in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities".

(iii) UN Draft Declaration on Indigenous Rights[23]

The draft Declaration on indigenous peoples prepared by the UN Working Group expressed its conviction in the fifth preambular paragraph: "Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia,* in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests." The eighth preambular paragraph of the draft also states that : "Control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and need". Besides these promises the, ninth preambular paragraph of the draft recognizes

that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment".

Since indigenous peoples have suffered environmental damage due to over consumption of natural resources and other activities on their lands in the name of development, draft Article 28 will be of the special importance to the indigenous peoples. The Article recognizes the right of indigenous peoples "to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from states and through international cooperation."

V. CONCLUSION

In conclusion it can be said that the existing development model is the cause and environmental problem is the effect. The cause should be removed to escape from the environmental problem. Therefore, the1980s were considered within the UN system as lost years of development.[24] The UNESCO Declaration on Ethno-development, the ILO Convention No. 169, and the UN Draft Declaration prepared by the Working Group are attempts to put an end to the outrages that indigenous peoples have suffered in the name of development. As has been shown repeatedly, the liberal, transnational, or state bureaucratic model of development is deadly to indigenous peoples therefore, if indigenous peoples are not only to survive but also to be able to improve their standards of living on their own term and increase their status relative to the rest of society, then development must take the form of indigenous *ethno-development.* To this end it is necessary that indigenous peoples should have the right to decide about their own affairs, to participate in the decision making bodies and process, to respect their traditions and cultures, to protect land, development projects, from hydroelectric dams to the introduction of plantation crops. It is also essential that development projects, programmes and policies should be devised and formulated keeping in mind the needs, desires, cultural specificities and in consultation with the indigenous groups.

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2 Indigenous peoples inhabit large areas of the earth's surface. Nearly 300 million indigenous people belonging to 5,000 or so groups are scattered in more than 70 countries. More than half of the indigenous population live in China and India, some 10 million in Myanmar and 30 million in South America. Among many indigenous peoples are the tribals *(Adivasis)* in India and Bangladesh, Aboriginals and Torres in Australia, Indian of Americas, the Maori of New Zealand, Yanomami of Brazil, and the Saami, Innit, Pygmy and Tiruray of the Norway, Denmark. Cameroon and Philippines respectively.

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17 Ibid. Articles 1.2 & 2.

18 The document known as Declaration of San Jose on Ethnocide and Ethno-development, 1981.

19 *Ibid.* Article 2.

20 *Ibid.* Article 3.

21 *Ibid.*

22 ILO Convention No. 169 in 1989 is a revised convention of the convention No. 107 in 1957 relation to protection and integration of indigenous and tribal populations.

23 The Working Group on Indigenous Populations created by the UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities has prepared a Draft Declaration on the Rights of Indigenous Peoples. The draft is now under the consideration by the UN Commission on Human Rights, which is expected to be adopted by the General Assembly latest by the *2004.* For the text of the draft, See, UN Working Group's report. UN Doc. E/CN. 4/Sub.2/1993/29.

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AMBIGUITIES AND CONFUSIONS IN MIGRATION-TRAFFICKING NEXUS : A CHALLENGE FOR DEVELOPMENT PRACTITIONERS

Md. Shahidul Haque*

"The problem of Trafficking and the web of human right violations it embraces present some of the most difficult and pressing issues on the international human rights agenda. Complexities include different political contexts and geographical dimensions of the problem; ideological and conceptual differences of approach ... link between trafficking and migration presents another complexity presenting both political and substantive obstacles to resolutions of the trafficking problem."

UN Secretary General's Report on 'Trafficking in Women and Girls' presented at the 58th Commission on Human Rights (2002), Geneva.

Introduction

Migration dynamics have undergone fundamental transformations in the 21st century adding new multi-faceted dimensions, complexities and challenges. Migration no longer only means "shifting of population" from one place to another across political or geographical frontiers. The age-old migratory nature of human beings which helped conquering the planet has substantially been reshaped by formation of nation-states, extreme poverty, economic imbalances, environmental degradation and security challenges. Today migration is not determined by simple human nature or desire, rather it is an outcome of a set of inter-related historical, geographical, economic, sociological and political factors. These factors, forces and processes create a complex migration picture (shown in Annexure I). Noticeably, the migration picture developed in mid-90s did not contain trafficking in persons as a part of migration phenomenon. It does not mean that trafficking did not exist then. It was perhaps, because of lack of understanding and knowledge of intricacies of trafficking and migration that led to the absence of recognition of trafficking as a migration "gone wrong" event. The gaps or limitations in understanding pose a critical challenge for states and international communities to address trafficking in persons effectively.

Trafficking in persons is the "dark side" of migration, which places people in a "harm" situation. It is a form of modern day slavery. It is a coercive and violent form of movement which must be prevented[1] contrary to safe migration which should be promoted as a right and which could be beneficial for all. The trafficking process thrives on individual's vulnerability and it has three core elements, namely movement, deception or coercion and "harm" situation of exploitation or slavery like practice[2]. The tensions between the economically rationalized integrative forces which encourage migration and the restrictive immigration policies which discourages such movement have also been redefining the development discourse.

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This paper intends to examine the intricate link between migration and trafficking within the complex continuum of "population movement". It also attempts to establish the relations between "smuggling in migrants" and "trafficking in persons" to bring in further conceptual clarity. It tries to argue that clear cut differentiation between migration, smuggling, trafficking is extremely difficult and attempts to separate them for development of interventions may be counter-productive at the end. The paper concludes that the best possible option is to take comprehensive and integrated interventions for management of migration and trafficking.

Conceptual Ambiguities, Limitations and Confusions about Population Movement

Involuntary and Voluntary Migration: There are primarily two generic types of population movements. First, "involuntary" or "forced" migration in which people are compelled to move out of their home in large numbers in situations of conflict. People flee or are obliged to leave their home or places of habitual residence out of fear of persecution or events threatening to their lives or safety.[3] There are numerous reasons behind forced migration such as persecution, human rights violations, repression, conflict, military aggression, natural and man-made disasters. Sometimes people also leave their home on their own initiative to escape from these life-threatening situations. But a large number also are forced out of their home by "groups", often armed, to fulfil some objectives such as "depopulating" an area or "ethnic cleansing". Those forced to leave their home are either cross international borders in search of refuge or move to another place within the state- borders. The first group is known as "refugee", whereas the second group of people is termed as "internally displaced people" (IDPs). Refugees move under compulsion, not by choice or for better livelihood. Refugees have a special status in international law under the (UN Convention and Protocol Relating to the Status of Refugees administrated by UNHCR. By definition, a refugee is a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable to or owing to such fear, is unwilling to avail himself/herself of the protection of that country or return there for fear of persecution.[4]

Second, "voluntary" migration in which people move out in search of better livelihood. The voluntary migration is a part of people's strategies to enhance and/or diversify the livelihood. The decision to migrate is often guided by the wider and& brighter opportunities abroad. People who migrate are known as "migrants", "labor migrants" or "economic migrants". The migrants are rational economic agents who are able to judge opportunities abroad. The term "migrant" covers all cases where the decision to migrate is taken freely by the individual concern, for reasons of "personal convenience" and without intervention of an external compelling factor.[5] But people also migrate because of poverty, lack of employment opportunity, and disaster. The forces of globalization, widening and deepening of trade liberalization, economic disparities at home combined with ageing and declining of population abroad influence both internal and international migration. Migration has been an enduring component of human civilization. It has contributed to enriching societies and benefiting economics of both origin and destination countries.

It is estimated that there are about 185 million people living outside their country of birth, amounting to about 2.5% of global population.[6] Out of which 15 million are refugees and 22+ million are IDPs.[7]

Refugees and IDPs constitute a small part of the global migratory population. The lines between migrant and asylum seekers are getting confused as well as the distinction between migration control and the refugee protection is becoming blurred.[8] But, a clear-cut differentiation between forced and voluntary migrants in the globalized world is a challenge as asylum seekers and refugees often use the same channel of migration as that of documented or undocumented migrants. The refugees and IDPs often, join a larger stream of migrants posing challenges to the refugee regime. The development challenge is further compounded by the absence of an international regime for managing broader population mobility.

Trafficking in persons and Migrants: Migration and trafficking are two distinct but inter-related phenomena. Migration is a broad general concept and trafficking is only a sub-set or category of the broader concept. Migration is the movement of people from one place to another (in case of international migration one country to another) in order to take up an employment or establish residence, or to seek refuge from persecution.[9] It applies to various types of movements guided by diverse causes. International migration (i.e. migration across borders) in particular is a complex and multidimensional phenomenon. The dynamics of international migration is often explained or measured in relations to (either alone or in combination) citizenship, residence, time or duration of stay, purpose of stay or place of birth etc. Trafficking in persons is a subset of migration. It is the movement (either internally or internationally) of a person under a situation of deceit, force, threat, debt bondage etc. involving exploitation and violation of human rights of the person. Trafficking in persons generically includes smuggling[10] plus abusive exploitation and human rights violations. Studies suggest that a person by placing himself/herself in the hands of traffickers loses control of his/her fate and freedom[11] and ends up in a "harm"[12] situation.

On the other hand, the termurn migrant could be understood as covering all cases where the decision to migrate is taken freely by the individual concerned, for reasons of "personal convenience" and without intervention of an extent external compelling factor. It is clear from the definition that migrant does not refer to refugees, exiles, or other forced or persons forced or compelled to leave their home. According to the International Convention on the Protection of the Rights of All Migrant Wworkers and Members of Their Families, a "Migrant worker" is a person who is to be engaged, is engaged or has been engaged, in a remunerated activity, in a State of which, he or she is not a national.[13] The definition includes undocumented workers who would also, under this Convention, be entitled to certain rights.[14]

It is difficult to differentiate between migration and trafficking, as the demarcation between the two phenomena is often apparent and a question of perception. An attempt to draw a clear line between the two concepts is described as working in a "terminological minefield".[15] Sometimes attempts, though wrongly, are made to distinguish migration as a labor issue and trafficking as a human rights issue.[16] Again, any generalization in identifying the difference between the two concepts can be misleading because both the concepts are overlapping, contextual and time bound. In simple terms, the difference could be as follows:

- Trafficked person is deceived or forced (actual or threat) to move. Whereas, migrant (even domestic worker) is not usually deceived or forced to leave his/her place of residence. But,

sometimes it could be difficult to draw a line between the two concepts, as there are gray areas in between blurring the clear distinction.

- Trafficking is a development-retarding phenomenon, whereas Migration is an integral component of economic development.
- Trafficking is viewed as an anti-social and morally degrading heinous event. But, migration is widely considered as a process that enhances social progress in both the origin and destination countries and it could be an empowering process. Exploitation, profit and illegality are all central to the idea of trafficking in persons.[17] That is certainly not the case in the migration process.

Trafficking in persons and smuggling in Migrants: In order to better understand migration-trafficking nexus, we need to address linkages between the concepts of trafficking and smuggling.[18] The Palermo Protocol clearly draws a distinction between trafficking and smuggling. According to the Protocol on Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (popularly known as Palermo protocol), "trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, either by the threat or use of abduction, force, fraud, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, with the aim of submitting them to any form of exploitation [...]". On the other hand, according to the Protocol against the Smuggling of Migrants by Land, Air and Sea (other part of Palermo protocol) "Smuggling of migrants shall mean the procurement of the illegal entry into or illegal residence of a person in (a) (any) State Party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit".

IOM definitions are close to the above mentioned UN Protocols. According to IOM, trafficking occurs when a migrant is illicitly engaged (recruited, kidnapped, sold, etc.) and/or moved, either within national or across international borders. The intermediaries (traffickers) during any part of this process obtain economic or other profit by means of deception, coercion and/or other forms of exploitation, under conditions that violate the fundamental human rights of migrants.[19] On the other hand, smuggling occurs when there is only facilitation of illegal border crossing.[20]

The primary difference between trafficking and smuggling appears to be in relation to coercion, exploitation and violation of human rights. Smuggling is clearly the manner in which a person enters a country, and with the involvement of third parties that assist him/her to achieve entry. Therefore, a potential migrant requests and pays a third party for assistance to cross into another State where, she/he has no right of residence and the third party (smugglers) involvement goes no further than the facilitation of the illegal border crossing. Whereas, trafficking is a more complex concept, in that it requires consideration not only of the manner in which a migrant enters a country but also his/her working conditions (outcome). Trafficking involves coercion and exploitation and the main purpose of trafficking is to place persons in a "harm" situation where their labor can be exploited under conditions that involve human rights abuses. Trafficking has a bigger impact, particularly on women and children and entails trafficking for commercial sex purposes. Also for work in sweatshops, forced

labor, begging, domestic or agricultural labor and forced or fictitious marriages. Trafficking is not a single event but a process starting from the recruitment of victims, continuing on with the travel, and ending with the exploitation of the person (outcome). The differences between smuggling and trafficking could be as follows:

- Normally, smuggled migrants are aware of the conditions of the travel and voluntarily engage themselves in the process of illegal migration. Victims of trafficking are seldom aware of the entire process. Even if they submit themselves freely to the trafficker, they can not consent to the human rights violations they will be subjected to.
- While smuggling of persons indisputably involves international cross-border movements, trafficking could also occur within national borders, although the vast majority happens across international borders.

Experts opined that, clear distinction between smuggling and trafficking could be difficult to establish particularly in analyzing causes, process and outcomes. Smuggling may contain elements of deception and/or coercion as well. Both smuggled and trafficked persons (and even migrants) incur into debts with the intermediaries, and the abuse of human rights may occur during the time of smuggling operations also. Although the main purpose of migrant smuggling might be to facilitate the illegal entry of the migrant into another country, there are many cases in which smuggled migrants are exposed to violation and exploitation either during transportation to the destination country or on arrival.[21] There is often a gray area in between the two processes. It is not realistic to discuss smuggling without trafficking.[22]

There is, however, a similarity as both trafficking and smuggling threaten State Security[23] because of the presence of organized crime, irregular migration and violation of national legislation in both the processes. But, threat from trafficking in persons on State security is much higher as it concerns human security and basic human rights of the citizens. States need to provide protection to both the victims of smuggling and trafficking in persons in terms of return and reintegration, and medical, psychological, counseling and legal support.

Distinction between Trafficking, Smuggling and Migration: It is obvious that ascertaining a clear distinction between migration, smuggling and trafficking is extremely complex. They are inter-twined and an integral component of the population movement process—both conceptually and operationally. It could be rather realistic to conceive all the three concepts as part of a dynamic "population movement scenario". People on the move could be placed in the boxes (Annexure-II) depending on their legal and human rights status. Movements back and forth along the two processes could also be possible. Often that is the case. Migrants in an orderly and humane situation could be placed as a part of the left process and trafficked/smuggled persons on the right process of the diagram shown in the Annexure-II.

Theoretical Framework for Analysing Migration and Trafficking

There are several theories to explain reasons for cross-border migration. The migration theories, over the years, have moved from macro-level structural explanations (e.g. spatial differences in the characteristics of capital and labour market) to individual level behavioural explanations (e.g. beliefs,

norms and expectations about consequences of migration behaviour)[24]. Recent, theories are looking at migration integrating structural behavioural explanations. The process of migration could be analysed through macro theory (Push-Push factor), or mMicro theory, or new economics of migration, or dual labour market theory, or world system theory, or network theory, or institutional theory or migration system theory.[25]

On the other hand, there is not much theoretical work done on trafficking phenomena. There is no strong theoretical construction, which could deal trafficking within the broader migration dynamics taking into accounts the process and outcome of trafficking. There are two overlapping approaches to analyse trafficking.[26] First, economic perspective that considers trafficking as an economic activity. Itapproach places trafficking in a broader concept of migration as a business in which agents/ institutions seek to make profit.[27] Some analysts have suggested that trafficking should be viewed as a consequence of the "commodification" of migration process that generates profit out of peoples' mobility. Second, legal perspective that considers trafficking as a criminal activity. It considers trafficking as a violation of legal provisions of State and violation of human rights. Criminal networks have emerged involving trafficking in persons, which provide labour to the "hidden economy" illegally. The main weakness of the two perspectives is neither of the two focuses on the outcome of trafficking e.g. human rights violations of victims. Therefore, there are discussions on construction of "humanitarian perspectives" to analyse trafficking.

Placing trafficking only in economic and/or legal bounds makes it difficult to identify elements of movements (migration) that are associated with quasi-legal or quasi-economic issues. The ambiguities in theoretical understanding of the migration-trafficking nexus often lead to unavailability of adequate and& reliable statistical data. The researchers face difficulties in choosing appropriate method of data collection and analysis. The inadequate data in turn imposes two types of "limitations" on the researches, first, over dependence on subjective interpretation which could be biased and marred by individuals' perceptions. And, second, adoption of "ad hoc methods" which sometimes could lead to distorted analysis and outcomes. Since trafficking and irregular migration take place within broader socio-economic space, there is a need to be careful in choosing right terminology in describing the processes. The elements of "population movement" can be described or conceived in terms of some generic terms such as internal, international, regular, irregular, voluntary and forced.

Implications of Migration-Trafficking Ambiguities on Policy-Programs to Address Trafficking in Persons

Over-emphasizing trafficking in persons within the general debate on a migratory process and "mixing" it with legal migration could be counter productive in addressing trafficking. It may also make safe migration difficult especially for the people of developing countries. Some of the destination countries sometimes use trafficking and smuggling as excuses to develop more restrictive approaches towards migration. They argue that "trafficking in migrants" is a criminal act and needs strict crime prevention strategies to tackle it. The issue of migrants human rights with that of human rights of trafficked or smuggled persons are often "mixed" up creating difficulties for management of migration.

Efforts to limit trafficking should not limit freedom of movement of people. Migration must remain a basic option as a source of livelihood for many families and communities. It also provides opportunities for developing countries to enhance socio-economic development, among other, through receiving remittances and skill transfers. The UN High Commissioner for Human Rights has recommended[28] that anti-trafficking measures should not adversely affect the common right and dignity of persons, in particular the rights of migrants, internally displaced persons, refugees and asylum-seekers. It further recommended protection of the rights of all persons to move freely and ensure that anti-trafficking measures do not infringe upon that right.[29]

IOM's Counter Trafficking Approaches

Established in 1951, the International Organization for Migration (IOM) is an intergovernmental body working with Governments and migrants worldwide to provide comprehensive responses to migration challenges including trafficking in persons. IOM is committed to the principle that humane and orderly migration benefits all migrants and both origin and destination countries. IOM's prime objectives in facilitating the management of all forms of migration, including labor migration, are:

- to promote humane and orderly migration and combat irregular migration, including smuggling and trafficking
- to foster economic and social development of countries of origin, transit and destination and
- to better link diasporas with the socio-economic development of origin country, and
- to uphold the human dignity and well-being of migrants.

IOM approaches trafficking problems from a broader framework of migration. It takes a comprehensive and integrated strategy in addressing trafficking problem. It's counter-trafficking interventions take both the "movement" and the "outcome" of trafficking episode as integral component process. IOM's strategy to counter people trafficking covers activities aiming at combating and ultimately preventing such criminal activities, on the one hand, and the protection of and assistance to the victims, on the other. The different components of the strategy include:

- mass information campaigns;
- capacity building/technical cooperation (especially anti-trafficking legislation and training of government officials);
- assistance, protection and voluntary return and reintegration of victims;
- prevention of and assistance regarding sexually transmitted infections and reproductive health;
- development of transnational cooperation network among authorities, NGOs and intergovernmental organizations;
- research and forum activities.

Currently, IOM is implementing counter-trafficking projects in 60 countries including Bangladesh. In Bangladesh, it is implementing projects with the Government to enhance capacity of law enforcement agencies to prevent trafficking in women and children and build capacity of local level

elected representatives for combating trafficking. IOM is also coordinating a thematic exercise to bring conceptual clarity in understanding trafficking paradigm.[30]

Conclusions

The existing migration policy in some origin countries based on bans/restrictions on migration of women abroad for employment purposes (which is otherwise discriminatory and regressive in nature) and the restrictive migration policies for some countries in some destination countries cannot effectively manage global population mobility particularly trafficking in persons. Rather, it pushes the flow underground making innocent people easy victims of criminal gangs.

The traditional theoretical understanding can no longer comprehend the complexities of trafficking in persons. It can not analyze and resolve the ambiguities and uncertainties concerning migration and trafficking. It warrants new theoretical framework for providing a clear picture and analytical understanding on the issue. There is a general consensus that trafficking should be analyzed in its totality ("process" as well as "outcome") and that pPolicyies addressing trafficking should have provisions for safe migration as well.

It is also recognized that counter-trafficking interventions are not always gender responsive. Moreover, they often lack a rights-based sustainable development orientation. This hampers efficacy of the interventions and disempowers the survivors. The core of a meaningful counter-trafficking strategy should be based on the principle that women's rights are human rights. The counter-trafficking interventions should be gender sensitive and rights based. It should also address the different and specific needs of women and children survivors. It should ensure their fundamental human entitlements in order to expand their choices, promote their well-being and empower them in an equitable and sustainable manner.

There is a need for an integrated and multi-sectoral program to address trafficking in persons as an integral component of development. The irregular migration including trafficking could perhaps be curbed by progressively "regulating" the flow of migrants. The process will require not only adoption of a migration policy, but also a reorientation of basic strategies and rationale for migration management. The new migration-trafficking regime should be consistent with global development trends and priorities. The international development partners should similarly "rethink" the significance of migration on the socio-economic development process both in origin and destination countries especially its potential role in addressing global inequalities. Increasingly, migration is conceived as a "developmental force" as well as an "equalizing force" which could soften the impact of adverse consequences of globalization process on the developing countries. The development partners should look beyond traditional boundaries of "security", "criminality", "sovereignty" or "immigration" in formulating a creative counter trafficking policy and strategy.

A comprehensive, flexible and balanced mechanism to regulate migration including irregular flows can reduce "tension" between Sstates on one hand and between employers and migrant workers on the other. It can also enhance the image of the country and society. The UN Principles and Guidelines on Human Rights and Human Trafficking[31] haves recommended that Sstates should adopt labor migration agreements which may include provisions for minimum work standards, model contracts,

modes of repatriation. It further suggested that Sstates should effectively enforce agreements to help eliminate trafficking and related exploitations.

The collaborative endeavors among the sStates should work towards a comprehensive, widely negotiated and mutually agreed arrangement in the form of a "Framework for Cooperation" to manage migration and trafficking. The Framework should reflect concerns and interests of all States and parties and should contain principles to guide individual sStates to formulate and implement their individual migration and counter trafficking policy. The Framework must have a mechanism to reconcile contradictory priorities and interests of countries. The success of the "Cooperation Framework" to address trafficking in persons will largely depend on balancing the concerns, priorities and development interests of the trafficked survivors and migrants as well as the origin, transit and the destination countries.

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9. IOM, Overview of International Migration, Migration Management Training Program, April '97, Geneva.
10. Smuggling is a situation when a person places himself/herself to facilitate his/her border crossing in a irregular manner is exchange of financial or other material benefits.
11. IOM, Migrant Trafficking and Human Smuggling in Europe: A review of the evidence with case studies from Hungary, Poland and Ukraine, Geneva, 2000.
12. "Harm" is the undesirable outcome that places a person in a situation whereby, the person finds him/herself in an exploitative and dehumanizing condition. Often beaten up, sexually and psychologically abused, made to work long hours without any remuneration. Freedom of mobility and choice are non-existent. The "harm" results from a situation of forced labor, servitude and slavery-like practices in which a person is trapped/held in place through force, manipulation or coercion for a given period of time.

13. Article 2 (3a) of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
14. For details see Ahmed, Syed Refaat Ahmed, Forlorn Migrants: An International Legal Regime for undocumented Migrant Workers, 1999, UPL Dhaka.
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23. Security has been used in its broadest possible term including both military and non-military dimensions.
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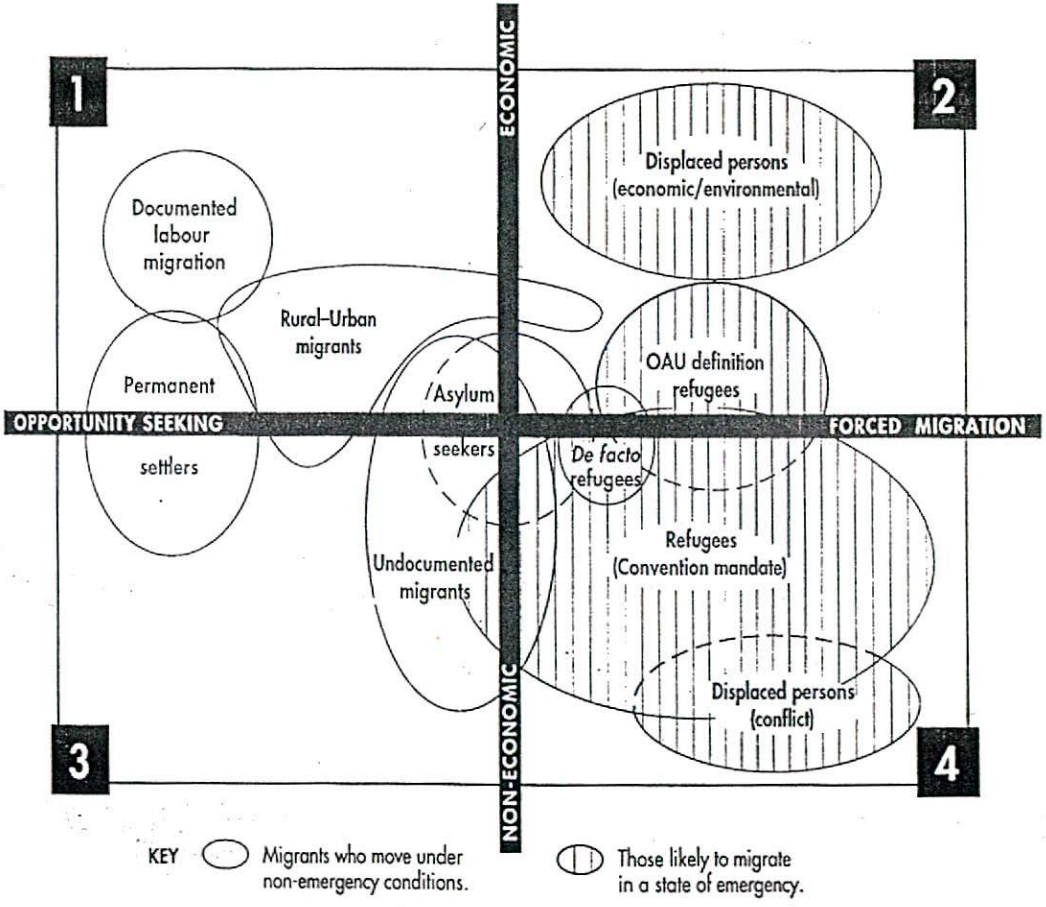
31. UN, op.cit.,

Annexure-I

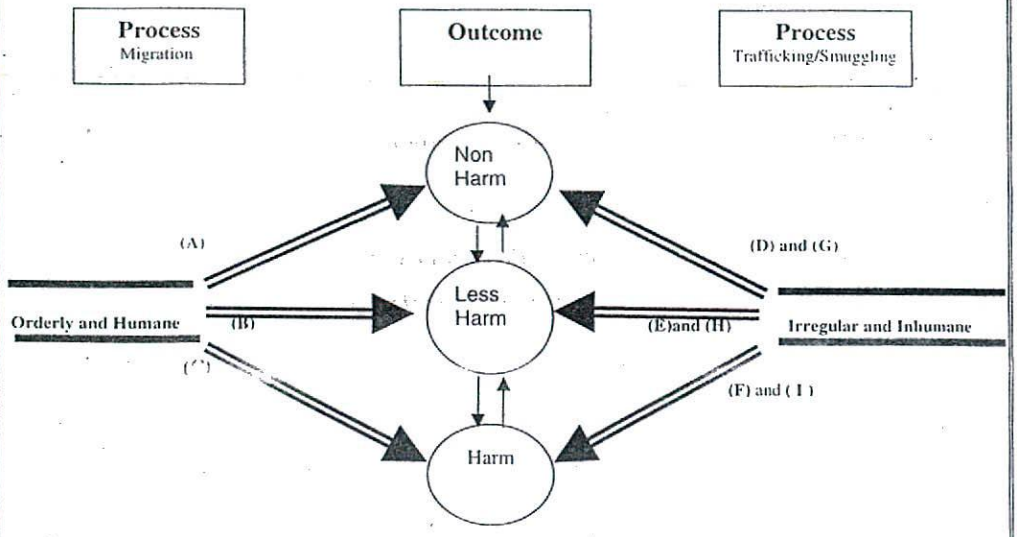
Typologies and interrelated causes of migration



Source: IOM, "Overview of International Migration", Migration Management Training Program, April 1997, Geneva.

Annexure-II

Dynamics of Population Movement in a Process - Outcome Scenario



(A) A person who has been migrated to another country with legal documents (orderly process) and is in a "non-harm" working situation (humane outcome).

(B) A person who has been migrated to another country with legal documents (orderly process), but is in a "less-harm" situation (exploitative outcome).

(C) A person who has been migrated to another country with legal documents (orderly process), but is in a "harm" situation (inhumane outcome).

(D) A person who has been smuggled into another country (irregular/in orderly process) but is in a "non-harm" working situation (humane outcome).

(E) A person who has been smuggled into another country (irregular process), and is in a "less-harm" situation ((exploitative outcome).

(F) A person who has been smuggled into another country (irregular process), and is in a "harm " situation (inhumane outcome).

(G) A person who has been trafficked either within his or her own country or another country through a forced, deceptive and abusive process (irregular process) but is in a "non-harm" situation (humane outcome).

(H) A person who has been trafficked either within his or her own country or another country through a forced, deceptive and abusive process (irregular process) and is in a "less-harm" situation (exploitative outcome).

(I) A person who has been trafficked through a forced, deceptive and abusive process (irregular process) and is in a "harm" situation (inhumane outcome).

THE LAWYER' S ROLE IN PROTECTING HUMAN RIGHTS AND SUPPORTING DEVELOPMENT

R. David Harden*

This article advances the concept that lawyers from developing nations can foster economic, political and social development in their country by advocating for the protection of human rights.

I. Definition

For the purposes of this paper, "human rights" is defined as the individual right to life, liberty and property. Human rights violations are a manifestation of an abuse of state power whereby a state, either by commission or omission, fails to protect an individual's right to life, liberty and property.

II. The Relationship Between Development and Human Rights

Respect for human rights is fundamental to a free and democratic society — a simple statement, really. But establishing a government that protects the human rights of its people continues to confound many nations around the world. The protection of human rights, however, is more than the sum of those who are not subject to unjustified government abuse. A respect for human rights is an essential element for economic, political and social development.

Conversely, governments that fail to protect human rights often stagnate both economically, politically and socially. Such governments do not develop viable, independent democratic institutions; elites tend to suppress minority views; the market place of ideas atrophies; power concentrates and freedoms recede. Governments that violate human rights are also often slow to generate wealth and alleviate poverty. Further, these types of dysfunctional countries, often doomed for collapse, have common characteristics. They lack freedom, democracy, rule of law and political accountability. In these nations, the governing class is usually grossly corrupt. Social indicators often point to low levels of literacy, tribal or ethnic tension, and wide gender discrimination. Further, serious foreign assistance and economic investment in these states will likely yield poor development results. This outcome is not unexpected. A social system based on the capricious decisions of the powerful, without regard to the rule of law, fosters unpredictability and instability in its social systems and ultimately fails to attract the essential financial, technological and social investments necessary to create political and economic viability. Clearly, the inverse is also true. Sustained and broad-based development requires a respect for the rule of law, stability and predictability in its social systems. Nations that abide by human rights norms exhibit these characteristics necessary for development.

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III. The Role of the Lawyer in Protecting Human Rights and Supporting Development

Lawyers have a professional obligation to foster the rule of law in their country. One clear manifestation of this duty is to protect and respect human rights. Outlined below are just a few of the specific ways in which today's lawyer could encourage the protection of human rights, respect for the rule of law, and a pathway to development.

A. Seek Champions in the Criminal Justice System

In many developing countries, the criminal justice system is marked by endemic corruption. Police, prosecutors and judges dispense or withhold justice for a fee. Yet, in even the most corrupt of systems there are champions of the rule of law — individuals who believe in fair play and true justice. Lawyers working through the criminal justice system need to identify these champions in order to bring justice to the victims of abuse. For instance, in some South Asian countries there are certain anti-trafficking groups that have identified police and judges who will not be bribed. In those instances, human rights lawyers have worked through these champions to bring the traffickers to justice while protecting the dignity of the victims.

There is need for caution, however. Some lawyers who seek justice for their clients work within the system of corruption by bribing police, judges or juries. The problem here, of course, is that corruption breeds increased disregard for the rule of law. Ultimately, lawyers can better serve their clients and country by supporting a fair criminal justice system that works within the bounds of established law rather than contributing to an existing corrupt framework.

B. Engage the Civil Justice System

In many developing countries, the civil justice system is often overlooked as a means for fostering human rights. Yet, the civil system, by its very nature, can be a powerful tool in bringing justice to both victim and abuser in an alternative manner that may be more effective than the criminal justice system. There are key differences between the criminal and civil justice systems that impact upon those seeking justice.

First, in criminal matters the state prosecutes a defendant as a matter of government action. Under tort law in the civil system, however, a plaintiff typically seeks financial compensation from the defendant for physical and mental injuries as a result of the defendant's negligence or willful misconduct. Further, while the criminal justice system requires intervention by police and prosecutors, the civil system often does not require police action and bypasses government prosecutors altogether. As a result, there are less possible points for corruption. Third, the standard of evidence is often lower in civil actions (a preponderance of evidence regarding the defendant's liability) than in criminal cases (defendant's guilt beyond a reasonable doubt) thus bringing defendant more easily to justice. The end result: the civil defendant liable under tort law is required to pay compensation to the plaintiff. The defendant is not jailed but merely out-of-pocket of an amount equal to the damages suffered by the

plaintiff. For the victim, this redress may be more meaningful than having the defendant jailed under criminal law — since the plaintiff will be made as a whole as possible through financial reparations. Finally, lawyers seeking to bring human rights abusers to justice should consider filing cases in both the criminal and the civil systems — with the hope that either one or both of the systems will produce favorable results for their clients.

C. Protect Freedom of the Press and the Right of Free Speech

Lawyers can check abusive state power by supporting and protecting freedom of speech and the press. The lawyer's role in protecting freedom of speech and press is to zealously defend those who expose government, and those who espouse contrary views. No doubt, journalists with free reign have significant positive impact on the development of a country. A free press can serve as a powerful check against human rights abuses, corruption and government incompetence. And, an informed population can compel accountability of its leaders. A developing state, at almost no cost, can expand social predictability and stability — merely by unshackling the press.

D. Protect Freedom of Religion and Assembly, Assert the Right to Petition the Government for a Redress of Grievances

Freedom of religion and assembly as well as the right to petition the government for redress fundamentally shifts state power from political leaders to the citizens. The lawyer's duty is to vigorously defend these rights upon unreasonable encroachment. A state that can dictate or restrict religious practices ultimately limits free speech and fosters distrust. Additionally, a citizen's right to assemble often means the right to demonstrate against government, to give a voice to all citizens, regardless of rank and privilege. Finally, and perhaps most interesting, the right to petition holds government accountable. This right embodies the notion that the king — or, in these days, the government is not above the law and must be held responsible for its actions. Today's lawyer must hold the government responsible, accountable and liable for its abuses — the failure to do so is a dereliction of duty.

E. Promote Ethics in Government

As stated, protecting human rights requires strict limitation on state power. As a related matter, an enforceable ethics framework in government curbs the private power of public elite. In short, those who serve the public interest should not privately gain. Consequently, lawyers can be at the forefront in advancing ethics in government by serving as independent ethics officials who demand government transparency and accountability in its business dealings. For instance, many countries require their political leaders to disclose personal financial interests publicly, under the penalty of perjury. Such financial disclosures impede corruption by allowing a nation's citizens to know its leaders and their financial relationships. Moreover, this type of financial disclosure can foster business confidence in developing countries by demonstrating that the political elite are bound by the rule of law.

F. Provide Pro Bono Legal Services to the Under-Served

Typically, lawyers are among the wealthiest, most influential segments of a society, and therefore have an obligation to provide pro bono legal services to the under-served for the benefit of the public. New lawyers can sharpen their professional skills by helping the under-served, experienced lawyers can change the course of a client's life merely by donating a few hours of service. Imagine the positive impact on a nation if that countries bar association made a commitment on behalf of its members to fundamentally protect the interest of the poor, under-served and underdeveloped members of society.

IV. Conclusion

The primary responsibility for a nation's development must come from within a country — from the hearts and minds of its citizens. Unless there is a commitment by those leading citizens with the skills and knowledge to foster real and positive change, a state's investment in economic, political and social economic development will yield little result. An underlying, broad-based respect for human rights clearly demonstrates a nation's commitment to improve the welfare of its people. Lawyers have the privilege and the obligation to lead this charge.