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Lawless Laws: Land Rights, Poverty and Empowerment of Common People in Bangladesh

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IMPACT OF HUMAN RIGHTS ABUSES ON COMMUNITY SUSTAINABILITY IN THE VIEW POINT OF IMMIGRATION IN THE NORDIC COUNTRIES

Nafisa Yeasmin*

ABSTRACT *The Nordic countries are experiencing a shortfall in the labour market because of the decline in the local birth rate and increase of the number of elderly people. The region needs immigrants, both low-skilled and highly-skilled, from outside the EU to explore natural resources of the mentioned region and for future economic development of the Nordic community. However, some abuses of core components of human rights towards a particular group of immigrants are hindering the sustainable development of the community as a whole. This research explores the human rights approaches that could secure community viability of immigrants in the north part of the world which in turn would increase the understanding of the life of minorities and socio-cultural diversity.*

KEYWORDS: *Nordic, human rights, non-western immigrant, inequality, discrimination and sustainable community*

1. INTRODUCTION

Nordic region needs immigrants to fill a shortfall in the labor market, due to declining local birth rate and increasing proportion of the elderly people. The region needs 1.7 million new people to fill the gap in the labour market over the next 15 years in order to maintain the current type of well-being and sustainable development of the region (Vänskä 2015). The region is full of resources e.g. oil, gas, mine and tourism sectors. It is necessary to explore natural resources and make better use of them in the region. The number of immigrants has nearly doubled now since 2001 in the region (Yeasmin 2013). This number is increasing and diversity of the population of the whole region is growing indeed. There is a trend that both inhabitants and immigrants are moving towards southern part for getting better opportunities. Extreme cold weather and disparities in every sectors of integration, lack of certain opportunities also pushed immigrants to move to the southern part to some extent.

From the perspective of the development of the region, it is important to get information about what factors are important to attract immigrants to reside in the region. For example, the opportunity to practise their own culture and religion in

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region is important factor in order to live here. These are an integral part of human rights, but the mainstream positive laws and norms can make it difficult for immigrants, who are coming from another culture, to practice their own culture and religion. For example, animal protection laws are restricting the purchase of halal meat which is an essential part of Muslim culture and religious practices.

One of the main factors essential to foster labour market is the integration of the immigrants in the region so that they get access to regional working life frequently. Unemployment rate among the immigrants is 7.1% in Norway (Statistics Norway 2015). Unemployment rate ranged between 7 to 9.1 percent in Sweden (Fredlund 2014), 37% in Finnish Lapland (Suopajarvi 2015). In Denmark the unemployment rate among immigrants from non-Western countries is 4.8%, whereas the figure is less than 2% among immigrants from Western countries and persons of Danish origin (Nørskov 2010). This unemployment varies from city to city and among different immigrant groups from different nationalities. The highest inequalities between non-EU and EU immigrant women exist in these countries: this difference in Finland is 31%, Sweden 24% and Denmark 19 % (Eurostat 2015).

Finding a job is difficult for immigrants for several reasons. It is challenging for non-western Immigrants to integrate into the working life, unless their voice is to be heard positively. Statistics say that a negative attitude towards immigrants will increase in the future than now when they need to compete in the labour market with locals. A hardening opinions and racism is a threat that migrants are facing will be increased in the future accordingly. Nordic countries are well known for its equity in every sector which is changing now (Kvist 2012). The increase of migrants' social inequality and exclusion in Nordic countries may have adverse consequences in the near future, which will require adequate provision. It requires more knowledge-based education on social inclusion for sustainable community development and the development of cultural sensitivity. The Nordic population is now more multicultural and ethnically heterogeneous than in previous decades.

Particularly women and young immigrants need special attention in order to acculturation. They are now under the risk of marginalisation in the region (Eurostat 2015). Inequality and opportunities are indeed differing among immigrants depending on their nationality. Overall more than 20 per cent of immigrant young people are socially excluded in Finland. Between immigrant groups there are significant differences in how well they have adapted into Finnish society. For example, only 10.3 percent of native Persian speaking considered to be compared with the exclusion of Arabic-speaking (28.5%). The worst situation is Somali (41% excluded) and Kurdish (34%) adolescents. Marginalised youth with immigrant background are at the risk of poverty in Sweden (Kamali 2015), Denmark and Norway (Gudmundsson 2013).

Human rights, interconnected with human and community development, are all about securing basic freedoms of migrants, which is the subject of a recent study of Euro-Artic countries. Community viability of this region mainly depends on the full realisation of equal treatment and non-discrimination. Nordic countries are well known as countries that strictly follow the international principles of law which they have adopted (Kvist 2012: 1-320). However, immigrants from this perspective are

required to study the effects of the laws in practice. An immigrant to the community must be provided with adequate social, societal and legal possibilities for the religious and social activities, as well as political participation to promote the conditions of education, health and work life in the north. Immigrant inclusion, an integral part of Nordic society, must be translated into a resource, because we need more people to safeguard the economic outlook for the region. Nordic society needs comprehensive support for integration and the psychological encouragement to motivate immigrants to take responsibility for the future direction (Rubio-Martin 2014). They need collective participation, alongside other organisations to make room for a humane sustainable economy and conditions for a good life. The development of the region and the realisation of equality required a flexible attitude and a network of cooperation, which requires voices to be heard from different population groups including majorities and minorities. This paper examines how to develop the situation accordingly by reducing existing prejudices and by strengthening good ethnic relations between native population and immigrants.

Immigrant minorities of the region suffer from a kind of identity crisis, as their rights and responsibilities are not coherent in the state law. The argument against immigration continues and it is centered on cultural otherness of immigrants (Eriksen 2013). The debate on minority rights are not in the agenda of discussion in the mainstream Nordic society, they are raising the debate on negative perspectives e.g., economic crisis of Nordic welfare countries. A racial attack in a school in Sweden 2015 is also an example that why immigrants have been suffering from identity crisis in that society (Nordberg 2015).

This paper contributes in broadening knowledge about the realisation of human rights of migrants, such as equality, non-discrimination, multiculturalism and acceptance of diversity among locals and human development of a democratic and inclusive management. Migrants are a heterogeneous group, and it is difficult for them to get their voices heard in the Nordic mainstream society. Migrants are outside of the discussion and the debate on immigration issues in the Arctic region. For this reason, many immigrants are not aware of the importance of their social role in the region. Immigrants' views are conspicuous from their absence from the general human rights and development discourses. In the light of the recent policies of immigrants, mainly placed in a position in which case they are presented as recipients and needed on which social support. This research explores the human rights approaches that could secure community viability of immigrants in the north part of Finland, which in turn would increase the understanding of the life of minorities and socio-cultural diversity.

2. LITERATURE REVIEW

In the review of literature, the researcher synthesised the results of previous studies on two different aspects, e.g., 1) the context of inequality and discrimination, and 2) the impact of the violation of these two core components of human rights – how it causes uncertainty on the identities of immigrants and inverse impact on community sustainability in the north. The concept immigrants indicate is that refugees and immigrants from non-western countries residing in region are in disadvantaged position in the region. Nordic countries are new in immigrant receiving, as Finland started receiving immigrants in 1990.

2.1 The Context of Inequality and Discrimination

Race, colour or class is still a cause of discrimination and inequality, because the structure of society in some ways value some lives more than others, and some groups have more opportunities and resources than others (Andersen and Hill 2015). For example, there are significant differences between immigrants from outside and inside the EU countries (Ambrosini and Barone 2007). There are different policies for immigrants from the EU and immigrants from outside the EU (Kumra and Manfredi 2012). Some immigrants are well integrated and some are still in a disadvantaged position because of their race, colour and religious affiliation (Kumra and Manfredi 2012). Immigrant workers are also discriminated in the host labour market in the north, indeed in Arctic (Yeasmin 2012; Kumra and Manfredi 2012). Despite having some integration policies for immigrants outside the EU, they experience discrimination at the workplace in the host countries (Krings et al. 2014). EU immigrants are entitled to be treated as nationals in the case of work permit or to set up a business. They have access to education likewise nationals. On the contrary, non-western immigrants need a work permit to take a job and have to go through bureaucratic procedure to set up a business in the host countries and their certificate needs to be acknowledged by the particular ministry and so on, which hinder integration of non-western immigrants in the north. There are lack of other fundamental opportunities for upward occupational mobility and work related health and safety issues (Vandenbrande et al. 2006; Ambrosini and Barone 2007; Yeasmin 2012; Kumra and Manfredi 2012). Those discriminations are supported by the policy of the governments of the countries to some extent. Although interpretation of governmental policies seems to promote equality among all immigrant groups which is inverse in practice. According to the Universal Declaration of Human Rights, all human beings are born free and equal in dignity and rights. Two different policies of the government towards the EU and non-EU immigrants reflect the media discourses which create inverse hierarchical impact among society and employers. Governmental intuitions and policies influence each other in negative ways (Beutin et al. 2006). It creates "us" and "them" policies (Bridget 2011), where all the EU immigrants belong to "US" group and other immigrants belong to "THEM" group. Local media coverage on asylum, refugees and non-western immigrants and their diverse culture play a key role in the construction of public beliefs. If governmental attitude is variable for immigrants from different countries, then public attitudes also reflect the governmental perceptions. The result is exclusion, marginalisation and favouritism leading to humiliation (Heaven 2009, 1-2; Williams 2014). For example, for the EU immigrants, it is not necessary to approve their educational certificates by the host governmental authority, thus employers also trust and rely on their certificates as it is secured by the governmental policy. On the other hand, employers have less trust on the certificates of non-western immigrants, because of not having any political and institutional trust (Röder and Muhlau 2010) towards non-western immigrants. It is a different treatment towards diversities.

It creates a major source of inequality in social classes (Wrench 2008). For instance, in Sweden refugees are resettled in a geographically isolated area, where they do not have any opportunities to interact with locals, since integration is a two-way process

which presumably is not working in Sweden. This sort of segregation between immigrants and natives is not unique in Sweden (Fredlund- Bloms 2014). Since the USA, Canada, the UK – they may have this model to some extent. However, my argument in this regard is that Euro Arctic countries are sparsely populated area and future economic development of this region partially depends on immigrant population and their integration in the host society. Segregated immigrant communities and neighborhoods may increase the risk of marginalisation in the broader society (Fredlund- Bloms 2014), which has a negative impact on communal development in the north. This attitude also forced Swedes to think that refugees are a different group of people and it also creates anti-immigrant discourses. Media conversations and political parties brand it a debatable issue among native voters. As a result, non-western immigrants encounter multiple forms of disadvantages than western immigrants (Yeasmin 2012; Painter et al. 2015). In the region, members of the non-western immigrants are more likely to be victimised of injustice at the workplace, and racism and xenophobia in the society, which include workplace abuse (Kringset al. 2014), harassment and bullying (Cassandra et al. 2014) by the locals and western immigrants as well. Immigrants, who are from different culture than the natives, are under nearly eight times higher risk of bullying at the workplace (Bergbom et al. 2015). Dissimilarities from the majority of non-western immigrant cause this risk at workplaces. Immigrants from non western countries are experienced to do low paying jobs in the region (Yeasmin 2012; Kumra and Manfredi 2012; Kvam 2015). Different wage rates for different groups of immigrant workers and discrimination against immigrant workers seem to exist in the European labour market and Nordic labour market is not an exception (Müller 2003; Kumra and Manfredi 2012; Bratsberg et al. 2014, Pettersen and Østby 2014). To some extent, the wage negotiation is very much depending on employers in the region which is patterned by preference-based discrimination. Although, there are salary scales, employers prefer to negotiate the minimum scale for immigrants. There are disparities in the labour certification process as well (Rissing and Castilla 2014). Highly educated immigrants also experienced low wage position in the region than locals at entry (Kerr and Kerr 2011). An immigrant is working like a poor. Regional labour market lacks observation of differential social groups fare by the relevant authority and lack of impact assessment of policies and legislations concerning disparities between different communities in the regional society (Kumra and Manfredi 2012). There are prejudices in recruitment systems. Employers are more liberal when it comes to recruiting European and American immigrants than non-western immigrants from Third World countries (Yeasmin 2012). The reason for this may be that the culture of Europeans and Americans is in many ways similar to Nordic culture. Local employers have much more trust in immigrants from nearby countries or from Europe or America (Jaakkola 2009). Regional attitude towards immigrants from Anglo-Saxon countries and within the EU are more favourable than towards immigrants who are culturally different or who come from countries that have a low standard of living or are far away (Jaakkola 2009). Predicting attitudes towards immigrants is discussed in previous studies (Hainmuller and Hiscox 2010; Beattie and Johnson 2012; Rooth 2010), which suggest that natives oppose immigrants with similar skill levels but favour immigrants with different skill levels. Getting a better

job is depending on favouritism in the region which is an illegal practice. The transnational jurisdiction of the EU lacks full accountability, thus nepotism and some other general corruption documented abundantly (Støvring 2014: 340).

The Non-discrimination Act (1325/2014) prohibits discrimination on the basis of age, ethnic or national origin, nationality, language, religion, belief and so on in Finland (Koivunen et al. 2015). However, discrimination is mostly a hidden informal practice of inequality in recruitment which is difficult to prove as stated (Koivunen 2015): 'In addition, recruiters' and job seekers' subjective experiences and interpretations of the selection process and the possible occurrence of discrimination usually differ from each other. Discrimination in the selection policy and processes can be subtle or covert.'

Both unconscious (Beattie and Johnson 2012; Rooth 2010) and malicious practices of discrimination by the employers are difficult to recognise, because in recruitment process those can occur through ambiguous selection criteria (Husu 2002: 48-52). The opportunity of being invited to a job interview is lower for applicants with non-western names than applicants with the EU identity (Larja et al. 2012: 162-5; Koivunen 2015; Khosravi 2012: 65-80). Selection process is an example of practices, which contribute to the production of inequality regimes (Acker 2009: 208-209; Acker 2011: 72).

2.2 Impact of Human Rights abuses on Community Sustainability in the North

Non-western Immigrants are out of social inclusion and labour market integration, which causes uncertainty on their identities (Dugarova 2015). This confusing situation makes constraints in acculturation in the north. They feel excluded culturally, socially and economically as a minority in the host society. The northern community as a whole is smaller than that of the southern, geographically isolated in global terms, where a small non-western community find themselves in disadvantageous position because of social exclusion. Proper realisations of human rights abuse among locals could be a facet for safeguarding the economy and communities in the north. The region lacks the dialogue of human rights of immigrants.

Inequality and discrimination causes symptoms of depression or psychological health issues among the immigrants (Yang et al. 2013). Especially immigrant women and youths are in danger in the north society. They experience physical and mental (Szmukler and Bach 2015, 18) chronic pain which come through inequality and discrimination at working life. This situation limits individual and community sustainability, which has a negative effect on future economic development of the region (Pastor and Morello-Frosch 2014, 1890- 1896), as it is a sparsely populated area, which needs immigrant communities from outside the region. Economic activities in the region encompass diverse sectors, since regional development depends on Arctic fishing, underground technology, oil and gas extraction, mining, forestry, reindeer husbandry and tourism industry (Röver 2014). The exploitation of oil, gas, underground technology and mining demand manpower for which the region needs immigrants from outside the region from 2019 onwards. Tourism industry is partially depending on manpower outside the region as well. As a result the North is a

developing region that needs extra human capital for the exploration and exploitation of gas and energy, as it is known that no less than 80 percent of the world's technology for underground mining is expected to be explored from the European, Norwegian and Russian North (Carl 2011). An influx of people means rising demand, innovations and diverse new ideas. Social networks and group thinking develop common values and comprehensive visions (Geis and Kutzmark 2006). In case of achieving sustainable development, the region needs to attract minorities who will stay in the region and contribute in regional development. So immigration is seen as a way of achieving long term growth of the northern society. 'Sustainable development' focuses on three major pillars: boosting the economy, protecting the environment and promoting social equality. Human rights of immigrants 'is a field that needs yet collective commitments of Nordic countries to community development. Potential projects against violations of human, labour and environmental rights provide wide coverage and screens (Barder et al. 2013: 832-853). Balancing the promotion of these three pillars is necessary for sustainable development in the region. Critics argue that Arctic policies are often at best developed for the people of the North (Röver and Ridder-Strolis 2014).

Human rights abuses do not encourage non-western immigrants highly to be integrated in the region and committed themselves to their host societies (Smith 2014, 1224-1246). If northern societies accept immigrants and multiculturalism, they should no longer ignore their rights; every community needs survival, social protection and equal opportunities like those of the majority. They need collective engagement with other communities to create the conditions for a sustainable economy (Yeasmin 2014). Mechanism of the protections of human rights is an important means to foster social inclusion.

Usually the immigrants try to find a better option and a bigger peer community from the southern part and try to move to the south. They prefer to work on their own network and practise their own culture that help them to feel happy and provide mental satisfactions (planned behavior theory), which is not a solution for community development of the region.

3. METHODS AND DATA COLLECTION

The researcher conducted literature review of previous research in the context of inequality and discrimination. She studied two different perspectives of the abuses of this components of human rights: 1) How non-western immigrant are discriminated in the integration process than European and how this differential national policies of member states had an effect on local discourses; and 2) how refugees and non-western immigrants are segregated in the labour market, and the impact of unequal treatment of wages among immigrants, and dissimilar attitudes of employers are preparing the immigrants socially excluded group in the dominant society. The researcher also studied the impact of social exclusion on community development in the host countries. The basic concept of justice in a democratic society includes an equal application of fundamental rights (e.g., economic, political and legal rights) among all members of the country (Álvarez et al. 2012).

The researcher interviewed immigrants, e.g., entrepreneurs, jobseekers and some workers from non-western countries who were residing in Norway,¹ Denmark,² Sweden³ and Finland⁴. She took in-depth interviews and asked questions about e.g. 1) the impact of social exclusion in host country, 2) the contribution of immigrant communities in the growth of host economy and community development or sustainability, 3) their opinion about human rights or fundamental rights which are often closely linked to discriminatory laws and practice, and attitudes of prejudice and xenophobia against immigrants (Crépeau 2015). Her informants in Denmark were from different countries, e.g. Turkey, Iraq, Japan, Pakistan and Bangladesh. Her informants in Norway are from Columbia and Bangladesh. Respondents in Sweden are from Bangladesh, Sudan and Iraq. In Finland, her interviewees are from Bangladesh, Pakistan, Somalia and Algeria. The researcher made face-to-face interviews and her research was based on written notes of interviews. The method applied in the data analysis phase was content analysis, which involves re-reading the interview transcripts to identify themes emerging from the informants' answers. She proceeded to index and code relevant words, opinions and sentences, dividing these into three different categories: 1) seeking information, 2) challenges and 3) suggestions.

There were limitations conducting the interviews in Norway, Sweden and Denmark. I did not have time enough to inform my interviewees beforehand, since I visited there for short period and settled interviews on the spot and instantly. Although my questions were ready beforehand, however my interviewees were not prepared in advance, thus they did not have enough time to anticipate the issues and could be that all messages were not providing by the informants and something they forgot to mention.

4. ANALYSES

Human rights abuses has an unsatisfactory impact on community development, since the issues also came up in my interview. According to my interviewees in Aarhus and Rovaniemi, Human rights abuses increase criminal offences among immigrants and natives, likewise riots, angeriness, bullying and harassment which is a barrier of economic and social development of future generation of the arctic countries. This sort of abuses are causing social distress, fear, hate and desire for retribution among children in the school to adult. The respondents from Lulea noticed that non-western immigrants are facing trouble of successful integration. Because integration is a two-way process, but in practice it is noticed by the respondents that there are low

¹ Visited Oslo in 2015 which was funded by Oslo Architecture Triennial, and visited Tromsø in 2011 which was self-funded.

² Visited Copenhagen and Aarhus which was funded by North to North mobility program in 2015.

³ Visited Luleå, Sweden in 2014 which was self-funded.

⁴ The researcher-author lives in Rovaniemi. In 2015, she took interviews of the immigrants residing here which was also self-funded.

interaction between non-western immigrants and locals. Integration services offer varieties of events, information, and create opportunities for immigrants and locals to speed integration process up. However, according to the respondents unfortunately the participation of locals and non-western immigrants in those happenings remain flopped. Muslims immigrants are a stigmatised group. For not having proper information and knowledge about their culture and religion, locals are scared of refugees who are mostly Muslim minorities. Some of the interviewees believe that lack of information creates fear and hate to each other which may be the main cause of more terrorist and terrorism attack e.g., Norway shock by Breivik in 2011 and Swedish riots 2015. Youth immigrants in the northern region are experiencing depressive and anxiety symptoms for being marginalised in the society. It is also harmful for societal development.

According to the respondents, some particular religious minorities have experienced often prejudice and social exclusion, which led minorities to think about their identities, and it turns to radicalism to some extent. The discrimination towards some groups of immigrants is expressed deeper than other immigrant groups. According to the book "Racist Violence in Finland",⁵ racist crimes reported by police were 669 in 2005, 558 in 2004 and 522 in 2003. According to another report, racist crimes have increased in 2007 and 2008. As per the Finnish National Police College, 800-900 reports of offences suspected to be hate-crimes (Gilligan 2015: 171-8) are recorded every year. There are also hidden crimes which are not reported. Especially religious crimes are among them.

Typical racist crimes were assault, dishonour, insult, slander, discrimination, threat, intentional damage and the destruction of domestic premises. It is apparently a violation of the Human Rights Act. According to official statistics, the most likely victims of racist violence were 15-24 year old boys/men. Over last five years, the hate crimes against some particular group of non-western immigrant climbed up by 24 percent in Sweden and about 74% were motivated by racism or xenophobia (Fredlund 2014).

According to the interviewees, there are two social classes, existed based on race and color in the region: in one side there are refugees and other non-western immigrants who have come as students, jobseekers etc, and on the other side, there are natives and European immigrants. It is creating conflict between 1) immigrants and immigrants, and 2) immigrants and natives. This legitimate disparity against refugees and non-western group, weakened their intentions to act for social and community development. Low wage trends also make income gap, inefficiency and harmful effects and hindering the collective and political capacity of societies and community health. As according to the respondents, low income is common among socially

⁵ Haaparaava, Edita and Annastiina Mäkilä. 2011. *Racist Violence in Finland*. Brussels: European Network against Racism (ENAR) in. Also published online by Open Society Foundations at <http://cms.horus.be/files/99935/MediaArchive/Racist%20Violence%20Report%20Finland%20-%20online.pdf>, accessed 10 July 2015.

excluded groups and with this limited resources it is difficult to have full participation in community life. Some immigrants try to change their social status by establishing business. However, some factors, e.g., political economic factors, language, very little knowledge about local business society and so-called bureaucracy make the entrepreneurship harder in the northern countries. According to the interviewees, 'immigrant entrepreneurs are establishing business to change their fate and societal class. On the other hand, some are closing their business and moving to the southern part of the northern countries for better opportunities or for better business climate which is not a good solution, since northern parts are losing manpower for future development.' This chain-snowball process is familiar among non-western immigrants and equally visible in the region. Starting business is a little test of fortune of immigrants to get themselves to be employed. Isolation from the wider community keeps immigrant women and youths out from the mainstream community development. The immigrants first try to cope with mainstream community. However, social exclusion makes them think about their own ethnic, cultural and religious background. Immigrant women are sometimes obligated by the present situation to stay at home for raising their children. Inequality and discrimination forms different ethnic enclaves. Ethnic enclave causes negative effect on the host society and creates ethnically distinct neighborhoods which obstruct assimilation. The members of ethnic enclave always support co-ethnics and it increases negative out-group attitudes. It is not a threat to the host society, but it hinders community sustainability.

It also came up in the interview that without any network or prior-relations with the employer, it is hard to get job for immigrants. It is a question of trust and employers have trust on western immigrants more than non-western group. Moreover, very few who are working in a same office with locals experience communication difficulties, differences in working style and lack of awareness of majority's culture. Maintaining good relations with the western immigrants is easy for locals. Since their working style is as same as Nordic working model, culture, life style, race and colour. This similarity builds quick trust and faith in relationship between the western and Nordic people. Solidarity between ethnic enclaves could promote strong favoritism at workplaces. It correspondingly comes in the discussion that good working attitudes of employers towards workers also depend on good relationship between host country and immigrant country of origin at state level. Employees who are not treated well and not trusted respond in a negative way, they demonstrate their unwillingness to use their knowledge and ingenuity in a collective manner which is not adequate for reaching official goals.

For Muslims immigrants it is hard to get access in the labour market on the basis of their educational background (Bloom 2014: 860; Campbell 2012). Recently, Muslims are in disadvantage position because of their names and veils too. It came up in the interview that these countries are democratic countries and according to their fundamental rights, all people have rights to practice their respective religion, but in practice that is not applicable. Even ritual slaughtering is banned by the Danish government. According to the Animal Protection Act, prior stunning is needed before slaughtering. It is also a controversial issue about human rights abuses among Muslim

immigrants in the region, which was raised in the interview. It is a conflict between the Human Rights Act and the Animal Protection Act. It has an everyday effect on getting halal meats for Muslim immigrants. It is a question about Muslim cultural sustainability and identity.

5. CONCLUSIONS

Social inclusion of non-western immigrants and refugees is a potential need in the region for community development and sustainability, since this region is geographically isolated and sparsely populated, and the increase of its population aging and low birthrate made community sustainability of immigrants residing in the region inevitable. It influences basic concepts of belongings, acceptance and recognition of refugees and non-western immigrants. For non-western immigrants and refugees, social inclusion would be manifested by the realisation of full and equal participation in the socio-economic, cultural and political dimensions of their life in the new country of destiny.

Successful social inclusion of immigrants ensures their human rights in the host country. Social inclusion has a positive impact on immigrants that possess the proper combination of attributes which facilitate them to be full members of the host communities where they settle in. Community development program for immigrant women with mainstream society influences them to be integrated in the host countries. Ensuring participations of all groups of people is a part of social inclusion. Low levels of participation in community activities among immigrant women and locals are noticeable, which usually happens because of their different culture and looks. Thus it is important to increase awareness for participating in community activities. Mainstream society should respect diverse culture, since it is their rights to practise their culture too. Accordingly, respecting their rights should encourage immigrants as a means of engaging themselves in the host communities and inspired them to build a social networks and capital.

Human rights mechanisms, such as the Special Rapporteur on the Human Rights of Migrants, human rights codes, employment legislation, criminal code and the Committee on Migrant Workers, do exist for immigrants to seek redress for inequality and discrimination. Their rights are guaranteed by the European Convention on Human Rights and other international human rights instruments that Nordic countries have pledged to observe.

Although, it is difficult to prove discrimination on the grounds of colour, nationality or language, it is good to have a regular monitoring group. The monitoring group should be formed by engaging different groups of people from different background. The monitoring group can take anti-racist and pro-inclusion initiatives starting from workplaces to every social sectors that promote the social and cultural inclusion of minority communities. The monitoring group can seek normative justification from employers for being racist towards the immigrants and such justification needs to be rationalised among the citizens of a political community.

Establishing civic rights of the immigrants and eliminating discrimination is an essential factor for community development and its sustainability. North has considerable value for accommodating new minorities, which can contribute to the

increase in population needed to boost the region's economy and to solve demographic challenges (Yeasmin 2014).

Local communities need the knowledge and information about what can be done at the local and regional levels to preserve and protect the environment, nature and human capital in the Arctic region (Rasmussen and Olsen 2014).

5.1 Limitations and Suggestions for Future Research

Some limitations have been considered when interpreting the findings. Firstly, the sample was selected from immigrants from very few non-western countries, there are a lot of non-western citizens who are living in the Nordic and their voice is not being heard during the interviews; therefore, further clarification is required before the results of this study can be generalised as a non-western group. The original nationalities of the majority of immigrants were from Bangladesh, Iraq, Algeria, Japan and Turkey, it is unrevealed whether the results would differ for immigrants from other non-western countries. Secondly, due to limited sample size, since sample are collected from only four cities of this four Nordic countries where as there are other bigger cities are not considered in my sample collections which may pose problems related with model specification. Despite of its limitation, the paper successfully presents an explorative research results on the impact assessment of human rights abuses and the result is supported by the previous studies in satisfactory manner.

Next suggested research indicates how the politics of human rights affect minority rights of Muslim immigrants in the Arctic. The research could be a comparative law study from other sparsely populated area with extreme Arctic weather.

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THE IMPACT OF *ORDRE PUBLIC* ON PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION: NATIONAL AND INTERNATIONAL PERSPECTIVES

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ABSTRACT *The parties of an international sale contract have the absolute autonomy to choose the operating laws for the transaction. They have the right to choose the law of arbitration and arbitrators in case of international commercial disputes. The states generally comply with arbitral award but the state can ignore it on the excuse of public policy. This article analyses the concept of party autonomy and ordre public (public policy) and tries to find out the superiority between the two with the help of statutory provisions and judicial decisions of different countries including Bangladesh. It is found that though the concept of ordre public jurisprudentially varies from country to country nonetheless the party autonomy must not supersede it.*

KEYWORDS: *International commercial arbitration, ordre public, party autonomy, UNCITRAL model law.*

1. INTRODUCTION

The study area of this article relates to party autonomy in international commercial arbitration, *ordre public* or public policy and the relationship between them. Party autonomy is a core and backbone of arbitration. In structuring the arbitration, the parties agree on an institutional arbitration or ad hoc arbitration, appointment of arbitrator, the arbitration rules of an arbitration institution or the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL) Arbitration Rules, for example, arbitration procedure, place of arbitration, governing law, etc. Thus, the parties may form and structure the arbitration as agreed upon by them (Kazutake 2005: 23). However, the issue is what are the limits to party autonomy, if any? Can the parties agree on any matters they please, or are there restrictions? In international commercial arbitration parties by virtue of their party autonomy control the whole arbitration process. But violation of *ordre public* by the enforcing state has long been a ground for refusing recognition/enforcement of

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foreign judgments and awards. The public policy exception to enforcement is an acknowledgement of the right of the state and its courts to exercise ultimate control over the arbitral process. Party autonomy does not get preference when the issue of *ordre public* arises. However, the concept of *ordre public* varies from country to country. Is it justifiable to refuse the enforcement of the arbitral award on the basis of such a variable concept which has no predictability?

This article is an initiative to find out the answers of those issues. To do this, the article proceeds chronologically. In first part, it defines some of the commercial terms like commercial disputes, international arbitration and so on in order to make the whole concept clear. Then it mentions in brief international conventions and treaties on commercial arbitration. It also focuses on arbitration laws of Bangladesh.

The core part of this study discusses party autonomy, public policy, the judicial application of the public policy and the relationship between them. It is revealed that the judiciary of most of the countries consider the concept of *ordre public* narrowly and weigh this according to national perspective. Nonetheless, this article explores the supremacy of *ordre public* over the party autonomy.

2. MEANING OF 'COMMERCIAL DISPUTE'

Generally, the dispute where an amount of money, goods or services is claimed by one party and denied by the other under an agreement can be considered as a commercial dispute. The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature whether contractual or not. As per article 1 of the UNCITRAL Model Law 1985:

Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

This would exclude political, territorial or diplomatic disputes between sovereign nations, or between nations and individuals (Mo 2003: 693).

2.1 Meaning of 'International'

The term 'international' is used in the Article to mark the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries and so are international (Redfern et al. 2004: 12). 'International' means that the relevant arbitration involves a foreign element. A foreign element is material or significant if it can result in the parties' submission to the courts of another country, or the application of the laws of another country.

UNCITRAL Model Law 1985 clarifies the term international arbitration stating that:

Art. 1(3): An arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different states; or

- (b) one of the following places is situated outside the state in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where the substantial part of obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

So international arbitration means

[E]specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators in accordance with procedures, structures and substantive legal or non-legal standards chosen directly by the parties (Lew et al. 2003: 1).

3. INTERNATIONAL CONVENTIONS AND TREATIES OF INTERNATIONAL COMMERCIAL ARBITRATION

Major trading nations have entered into international treaties and conventions designed to facilitate the international enforcement of arbitration awards and agreements. The first such arrangement in the contemporary era was the Montevideo Convention signed in 1889 by various Latin American states (Born 2001: 19). Later on many international conventions have been adopted to speed up international commercial arbitration, such as:

- i. The Geneva Protocol on Arbitration Clause of 1923,
- ii. The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927,
- iii. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention),
- iv. Washington Convention or the ICSID Convention 1966,
- v. Inter-American Convention on International Commercial Arbitration, 1975 (The Panama Convention),
- vi. The European Convention on International Commercial Arbitration 1961,
- vii. The Model Law adopted by the UNCITRAL on 21 June 1985.

3.1 International Commercial Arbitration under the Law of Bangladesh

The primary source of Bangladeshi arbitration law is now the Shalish Ain 2001. The new legislation on arbitration has been enacted for the purpose of international commercial arbitration, recognition and enforcement of the award of foreign arbitration and enactment of other arbitration related rules. The general principles on which this legislation is based are (i) to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense, (ii) to impart freedom to the parties to agree on how their disputes are resolved, and (iii) to restrict the extent of intervention by courts:

The existence of a '*seat*', the place where the arbitration has its juridical base, not necessarily the place where it is geographically based, is vital to arbitration. The Arbitration Act 1996 is triggered when the seat of the arbitration is in Bangladesh (Shalish Ain 2001 s 3(1)).

As per section 9(2) of the Shalish Ain 2001 this Act only applies to written arbitration agreement but there is no need for the agreement to be signed by the parties. In case of international commercial arbitration, parties have the autonomy, subject to the provision of this Act, to appoint arbitrator (Shalish Ain 2001 s 12(1)). This Act authorises the arbitrator to determine questions relating to the initial validity of the main contract. An arbitrator is therefore not deprived of jurisdiction under an arbitration clause simply because it is alleged that the contract in which the clause appears was void, voidable, illegal or did not come into existence (Shalish Ain 2001 s 17). The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties or if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal (Shalish Ain 2001 ss 25, 30). The tribunal is obligated to act fairly and impartially giving each party reasonable opportunity to present their case (Shalish Ain 2001, 23). Arbitrators can be removed from their office because of their partiality and non-qualification (Shalish Ain 2001 ss 13, 15)).

4. PARTY AUTONOMY

First of all it is necessary to know the meaning of autonomy. Literally, autonomy means 'total independence of parties in organising but not conducting an arbitration' (Chatterjee 2003). Autonomy could be said to exist 'when an individual has the capacity to make a choice among real alternatives and can make the choice for reasons with which he or she is comfortable' (Matz 1994).

Party autonomy can be defined as the 'freedom of the parties to construct their contractual relationship in the way they see fit' (Abdulhay 2004). It is the self arrangement of legal relations by individuals according to their respective will. This means that parties have the right to self arrange their arbitration agreement free from outside control.

A basic principle in international commercial arbitration is that of party autonomy. It is described by the authors Redfern and Hunter (2004: 315) in the following terms:

Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition.

In various national laws, international treaties on arbitration and arbitration rules, party autonomy is recognised and incorporated.

In Bangladesh, the Shalish Ain 2001 upholds the concepts of party autonomy. Parties have the autonomy to select the arbitrator, place of arbitration and the procedure of arbitration. Moreover, the provisions of the Act will be applicable when 'the parties agree' or 'unless the parties otherwise agree'.

In England, section 1 (b) of the Arbitration Act 1996 provides that 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'. The first part of the Act confirms the party autonomy principle as parties are free, for example, to agree on the choice of law, seat of arbitration and the procedure to be followed. One can see that this principle is evident

in this act because words like 'the parties are free to agree' or 'unless the parties otherwise agree' or 'unless otherwise agreed by the parties' demonstrate party autonomy (Arbitration Act 1996, ss 15-17).

The New York Convention 1958 is regarded as the most important treaty relating to international commercial arbitration. It recognises party autonomy in the agreement made in writing by the parties where they agree to submit to arbitration all or any of their differences, whether presently or in the future.

When the UNCITRAL Model Law was formulated in 1985, the principle of party autonomy was adopted without opposition.¹ This is further confirmed where it stated that 'subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings' [UNCITRAL Model Law art 19 (1)] and that 'in matters governed by this law, no court shall intervene except where so provided in this law' confirming the principle of party autonomy.

As it is said, with the aid of autonomy, parties may agree on institutional arbitration or ad hoc arbitration. When parties choose the arbitration institution, the institution will supervise the conduct of the arbitration with its wide-ranging experience [ICC Bulletin, vol 7(1)]. It will assist in the appointment of arbitrators and will give practical guidance on how to interpret its procedural rules. In *ad hoc* arbitration parties simply agree to arbitrate, without designating any institute to administer their arbitration. The arbitrator resolves the dispute without institutional supervision or assistance. Parties will sometimes also select a pre-existing set of procedural rules designed to govern ad hoc arbitration. It is possible to have an ad hoc arbitration with an institution designated as the appointing authority. This can solve one of the difficulties associated with ad hoc arbitration – namely, constituting the tribunal itself. In such circumstances parties can also choose, once the tribunal has been constituted, to have the arbitration administered by the institution as well.

In fact, the theory of party autonomy gives the parties ultimate power to formulate the agreement and resolve the dispute in the way they choose. But this power has been curtailed by *ordre public*. Public policy is a check-valve for the autonomy of parties.

5. DEFINITION OF *ORDRE PUBLIC*

Public policy which is also called *ordre public* is a sociological concept, it is so because it is made and enforced by members of the society. It comprises of different types of cultures and social and moral values. It is very dynamic in nature as it changes with time and place (Tamara 2007). This leads to uncertainty and unpredictability, which encourages the unsuccessful party in the arbitration to resist enforcement of the award or at least delays the payment.

There is no universal definition of public policy but there have been many attempts. It has been defined as 'the fundamental principles of a system... it is not the rules of positive legislation that constitute *ordre public*, but the principles that inspire these

¹See UN Doc. A/CN.9/207, Para. 17: 'probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitrations according to their expectation'.

rules' (Moss 2003). This means, for instance, that where an award is brought to the judges' attention, it is only when it is against the spirit behind the rules in a judge's social system and not the rules of positive legislation, will the judge refuse enforcement based on public policy.

Public policy can be a 'double-edged sword' in international commercial arbitration, 'helpful as a tool, dangerous as a weapon' (Mistelis 2000). Judicial perceptions of public policy have changed from time to time. According to the rather pessimistic English view expressed in the case of *Richardson v Mellish* (1824)², 'public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail'.

Optimistic views emerged 150 years later in the case of *Enderby Town Football Club Ltd v The Football Association Ltd* (1971)³: 'With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice'.

Ordre public or public policy generally means those moral, social or economic considerations which are applied by courts as grounds for refusing enforcement of an arbitral award, either domestic or foreign. In the case of *Egerton v Brownlow* (1853) 4 HLC 1 the House of Lords described public policy as 'that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good'.

It is observed that the term *ordre public*, in most places, has been defined narrowly and indicates the moral, social and economic values of the country where the arbitral award is set to be implemented. But it is expected that in international commercial arbitration the courts should broaden the concept of *ordre public* and consider the definition of truly international public policy which can be defined as follows:

The concept of 'transnational public policy' or 'truly international public policy' is said to comprise fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as 'civilised nations' (Buchanan 1988).

5.1 Public Policy under International Conventions

Under the New York convention 1958, there are laid down grounds for the non-recognition and non-enforcement of arbitral awards and one of them is public policy. As it states:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

²(1824) All ER 258, 266.

³Ch 591, 606-607.

This limits party autonomy as awards are reached based on the arbitration agreement made by the parties. However, it refers to 'the public policy of that country'. Thus, the drafters of the 1958 Convention did not seek to establish a common international standard of *ordre public*.

The 1927 Geneva Convention stated that an award would be enforceable unless 'contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon' [Geneva Convention 1927 article 1(e)]. Article 2(h) of the 1979 Montevideo Convention goes further saying that the award be 'manifestly contrary to the principles and laws of the public policy [*orden publico*] of the exequatur state'.

Article 37 of the 1983 Riyadh Convention⁴ provides that enforcement may be refused if the award is 'contrary to the Moslem Shari'a, public policy or good morals' of the signatory state where enforcement is sought.⁵ On the other hand, the 1987 Amman Convention refers simply to public policy.

Thus, the New York and other enforcement conventions leave open the possibility for enforcement courts to apply public policy widely or narrowly, although the drafters of the New York Convention preferred a narrow application.

The 1965 Washington (ICSID) Convention does not expressly refer to public policy. Article 52 sets out various grounds for annulment, which includes: corruption on the part of a member of the tribunal; serious departure from a fundamental rule of procedure; and failure to state the reasons on which the award is based. The first two of these would generally fall within the scope of domestic and international public policy.

The 1985 UNCITRAL Model Law includes public policy as a ground for setting aside an award by the courts at the seat of the arbitration [article 34 paragraph 2 (b) (ii)] and as a ground for refusing recognition and enforcement of a foreign award [article 36 paragraph 1 (b)(ii)]. This poses to be a limit to party autonomy as parties' freedom is restricted.

5.2 State Legislations on Public Policy

The terminology used in referring to public policy in national legislation varies considerably, from expressly stipulating 'international public policy' through to referring to national norms.

The enforcement legislation in France (by title V of the New Code of Civil Procedure (1981), article 1498 and 1502), Portugal by the Code of Civil Procedure (1986), article 1096(f), Algeria by Decree No. 83.09 (1993), article 458 bis 23(h) and

⁴ The 1983 Convention was intended to replace the 1952 Convention of Arab Leagues. The earlier Convention is still in force in many countries because they have not yet ratified the 1983 Convention.

⁵ This Convention has not come into force, because it has not yet been ratified by the stipulated minimum requirement of seven states.

Lebanon by Decree-law No. 90 (1983), article 817(5)⁶ make references to 'the principles of international public policy'. The legislation of a number of countries refers simply to 'public policy'.

Most countries, however, refer to public policy of 'Country X', which is the wording of the New York Convention and the UNCITRAL Model Law, or else they have simply adopted the New York Convention. Some countries refer to public policy (or public order) and good morals, for example: Japan by the Code of Civil Procedure (1996) article 118(3); Libya by the Code of Civil and Commercial Procedure, articles 407(4) and 408; Oman by the Arbitration Act 1997, article 53; Qatar by the Code of Civil and Commercial Procedure, article 380(4); the United Arab Emirates by the Code of Civil Procedure (1992), article 235(vi) and Yemen by the Code of Civil Procedure, article 285 make reference to public order and the Islamic *Shari'a*.

A number of countries do not refer to public policy *per se*, and provide that enforcement of a foreign award should be refused if it goes against social and public interest. Australia (in 1989) and New Zealand (in 1996) have both enacted modified versions of the UNCITRAL Model Law. The Australian legislation refers simply to public policy (International Arbitration Act 1974 sec 8(7)(b)) whereas the New Zealand legislation refers to the 'public policy of New Zealand' [Arbitration Act 1996, article 36(1)(b)(ii)].

In the UK, The latter part of section 1(b) of the Arbitration Act 1996 shows that the freedom of party autonomy is limited to protect the public interest and one of the safeguards is public policy. The English courts are also allowed to refuse recognition and enforcement of an arbitral award where it is against public policy [s 103 (3)].

Bangladesh has taken the narrower view of *ordre public* and declares that an arbitral award may be refused if it is contrary to public policy of Bangladesh [Shalish Ain 2001, s 43(1)(b)(iii)].

5.3 Approaches of the Courts on Party Autonomy and the Effect of Public Policy

In the history of party autonomy, it was not readily accepted or approved by the courts because they saw arbitration which was based on party autonomy as a threat to their jurisdiction; and so closely regulated and supervised it. They also feared that party autonomy would restrict the powers of the judge to the arbitration agreement (Tamara 2007). Judges in England in the case of *Re Missouri Steamship Company* (1889)⁷ favoured party autonomy, while other judges in other states like Switzerland, for example, limited the parties' freedom to choose the rules governing performance of the contract and they did not allow parties to choose the applicable law with regards to the validity of the contract (Ruhl 2007).

⁶It is notable that this was enacted at a time when Lebanon had not yet ratified the New York Convention. See El-Ahdab. (1996). The Lebanese Arbitration Act. *Journal of International Arbitration* 13: 39.

⁷42 Ch. D 321, 326.

The Swiss Federal Tribunal in *W v F and V* (1995)⁸ favoured universal conception of public policy and declared that 'an award will be incompatible with public policy if it is contrary to the fundamental moral or legal principles recognised in all civilised countries'.

As noted above, the legislation of France and Portugal prescribes the application of international public policy. The courts of several other European civil law countries expressly apply international public policy, for example: Germany; Italy and Switzerland. Commentators from other countries state that their courts apply public policy restrictively, for example: Denmark; the Netherlands; Norway; Spain; and Sweden (Sheppard and Chance 2004).

In France, the Paris Court of Appeal in the case of *Fougerolle v Procofrance* (1990) Rev. Arb. 892 has expressed a degree of scepticism in relation to applying such a concept⁹ although, in later case of *European Gas Turbines SA v Westman International Ltd* (1994) Rev. Arb. 359 it has noted that certain activities, such as corruption, violate both French public policy and international business ethics.

When commenting on the French approach, it is noted that (Gaillard and Savage 1999):

The international public policy to which Article 1502.5 refers can only mean the French conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the French legal order, even in international cases.

Earlier in the US, the American courts regularly invalidated arbitration agreement, they saw it as an encroachment on the judicial province and hence contrary to public policy. In *Parsons & Whittemore Overseas Co., Inc. v Société Générale de l'Industrie du Papier RAKTA and Bank of America* (1974),¹⁰ the court held that 'enforcement of a foreign arbitral award may be denied on public policy grounds'. In the same year (1974), the Supreme Court of the USA in *Scherk v Alberto-Culver Co* (1974)¹¹ differentiated between international and domestic public policy and the freedom of parties to their choice of law was established.

Furthermore, the Supreme Court of the US in *Volt Information Science, Inc. v Board of Trustees of Leland Stanford Junior University* (1989)¹² confirming the party autonomy principle stated that 'the court's role is to ensure that private agreements to arbitrate are enforced according to their terms'.

The English courts have also endorsed a restrictive concept of public policy (Sheppard and Chance 2004). A classic case supporting party autonomy is *Vita Food Products Inc v Unus Shipping Co. Ltd* (1939)¹³, where Lord Wright stated:

⁸ Bull. ASA 217.

⁹ See also *Republique de Cote d'Ivoire v Norbert Beyrard*, 12 Jan. 1993, (1993) Rev. Arb. 685.

¹⁰ 508 F. 2d 969 (2nd Cir. 1974).

¹¹ 417 U.S. 506.

¹² 489 US 468, 479.

¹³ AC 277, 270.

[T]he express choice of law by the parties would be regarded as conclusive, even if the law chosen by the parties is not connected to the parties or the transaction, ...and there is no basis for avoiding the choice of the grounds of public policy.

In *D.S.T. v Ras Al Khaimah National Oil Company* (1987)¹⁴, the Court of Appeal stated that 'considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution ... It has to be shown ... that the enforcement of the award would be clearly injurious to the public good.'

In India, the Supreme Court, in *Renusagar Power Co. Ltd v General Electric Co.* (1994)¹⁵ interpreted public policy more restrictively than it had done previously. The Court held that in order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of the law of India. It held that the phrase 'public policy' must be construed in the sense in which the doctrine of public policy is applied in the field of private international law; and that enforcement of a foreign award would be contrary to public policy if it was contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice and morality.

In *Re an arbitration between Hainan Machinery Import and Export Corporation and Donald & McCarthy Pte.ltd* (1996)¹⁶, Justice Judith Prakash of Singapore, observed that, 'the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist'.

A recent decision of the Hong Kong Court of Final Appeal in *Hebei Import and Export Corporation v Polytek Engineering Co. Ltd* (1999)¹⁷ highlights the issues faced by many courts the world-over and gives a dynamic guidance. The Court addressed whether the applicable public policy was that of Hong Kong or some shared public policy, and to what extent a national court could or should look at the practice of other courts. The Court rejected the suggestion that public policy under the New York Convention meant some 'standard common to all civilised nations'. Nevertheless, it construed public policy narrowly. It stated that in order to refuse enforcement of a New York Convention award on public policy grounds, 'the award must be so fundamentally offensive to that jurisdiction's notion of justice that, despite it being a party to the Convention, it cannot reasonably be expected to overlook the objection' and the Court accepted that, in many instances, the relevant public policy of the forum would coincide with the public policy of other countries, and that it would be appropriate to examine how far the courts of other jurisdictions had been prepared to go in enforcing Convention awards made in circumstances that did not meet their domestic standards.

¹⁴ 2 Lloyd's Rep. 246 at 254.

¹⁵ AIR 1994 SC 860.

¹⁶ 1 SLR 34 at 46.

¹⁷ 2 HKC 205.

6. CONCLUSION

In recent times international commercial transactions have been increased immensely and international arbitration is becoming the most favoured mechanism for dispute resolution. This is primarily because of the party autonomy principle whereby parties can mould their arbitration procedure according to their wills. There are, however, limits to this principle and one of them is public policy. The discussion above reveals that public policy is narrowly interpreted in various legislations, treaties and courts' decisions in order to encourage party autonomy and most of the Conventions and national legislations consider public policy in the context of the country where award is executed, they do not take the international view of public policy. Uncertainty and inconsistencies concerning the interpretation and application of public policy by state courts encourage the losing party to rely on public policy to resist, or at least delay, enforcement. Nonetheless, it is still regarded as a strong weapon to prevent international arbitration from being abused. Due to the courts' appreciation of party autonomy a high standard is set and must be provided before an arbitration agreement reached. An award can be refused only where the fundamental principle of the state's public policy is violated and this ground can limit party autonomy. Therefore, it is recommended that parties have to seek professional advice from experienced and knowledgeable people when they draft an arbitration agreement concerning any limitation to party autonomy particularly that of public policy.

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