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THE ROLE OF JUDICIARY IN THE CONSTITUTIONAL DEVELOPMENT OF PAKISTAN (1947-1971)

by

Z.I. CHOUDHURY

The Government of India Act, 1935[1] established for the first time in British India a federal constitutional court-the Federal court of India-with powers and jurisdiction, *inter alia*, to adjudicate on the constitutionality of British Indian central and provincial legislation in the light of the provisions of the Constitution Act and other Imperial statutes.[2] On independence in 1947, a new Federal Court[3] had to be established as a successor to the British Indian Federal Court to exercise all its powers and jurisdiction with respect to the territories of the new state of Pakistan. The superior courts within the teritory of Pakistan including the new High Court for East Bengal at Dacca inherited all the power and jurisdiction as had been held by their repective predecessors in pre-independence days. These superior courts were also given special writ jurisdiction by the Constituent Assembly of Pakistan by inserting Section 223 A[4] to the Government of India Act, 1935. This Act, as adapted to suit the changed circumstances[5] together with the Indian Independence Act, 1947[6] formed the Constitution of independent Pakistan. Further, in 1950 by an Act[7] passed by the Constituent Assembly of Pakistan, the Federal Court was made the highest court in the judicial hierarchy of the country. The higher judiciary in Pakistan was, thus, arranged in conformity with the traditional concept of

1. 26 Geo. 5. c. 2.
2. Section 204 & 205 of Gov't. of India Act, 1935.
3. The Federal Court of Pakistan Order, 1948 (G.G.O. 3 dt. 23. 2. 48).
4. "Every High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue any person or authority including in appropriate cases any government within those territories writs including writs in the nature of *habas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* or any of them". inserted by Government of India (Amendment) Act. 1954, P.L.D. 1954 central statutes, 152.
5. Pakistan (Provincial Constitution) Order, 1947 (G.G.O. 22 of 14.8.47)
6. 10 & 11 Geo. 6, c. 30.
7. Privy Council (Abolition of Jurisdiction) Act, 1950.

its position and role under a political system with a written constitution as the supreme law of the land.

In the field of law-making, apart from the four provincial assemblies functioning under the Government of India Act, 1935, a Constituent Assembly was created for Pakistan under the Partition Plan[8] of 3 June 1947. The Constituent Assembly thus created was given statutory recognition by the Indian Independence Act, 1947, which defined its powers and functions. The main function of the Constituent Assembly was to prepare a constitution for Pakistan[9] and in addition to this constituent power, the Assembly was to exercise, during the interim period, the powers, and discharge the functions, of the Federal Legislature.[10] Subject to the law-making powers of these legislatures, the Ordinance-making power of the Govenor-General and the provincial Governors to meet immediate necessity of law-making was retained.[11] Thus under the arrangement of the interim Constitution, the legislative, executive and judicial powers of the state of Pakistan were to be exercised on the basis of the written provisions of the Constitution Acts which stood as the source of all Powers and jurisdiction.

As had been envisaged, soon after the establishment of Pakistan, its superior courts were called upon to examine the constitutionality of Acts passed by the Constituent Assembly. In *Khuhro* V, *Federation*[12] the action of the Governor-General under the Public and Representative Officers (Disqualification) Act, 1949, passed by the Constituent Assembly was challenged on the ground that the Act itself was void as it was not assented to by the Governor-General. It was contended on behalf of the Government that the impungned Act was passed by the Constituent Assembly in exercise of its constituent powers and as such the Governor-General's assent was not necessary. Accepting this argument the Sind Chief Court

8. The Partition Plan, popularly known as the Mountbatten plan, contained the terms and conditions of the political settlement for the future of British India creating two independent dominions-India and Pakistan-through partition of British India.
9. Section 8, sub-section (1) of the Indian Independence Act, 1947.
10. Section 8 (2) para (e) of the Act of 1947.
11. Government of India Act, 1935 section 42 (1) and 81 (1)
12. P.L.D. 1950 Sind 49

held that laws passed by the Constituent Assembly in exercise of its constituent power were valid constitutional laws without the assent of the Governor-General. In two other cases[13] before the Federal Court, the statutes purported to have been passed by the Constituent Assembly as constitutional laws were challenged on the ground that the statutes in question should have been passed by the Federal Legislature and should therefore, have been assented to by the Governor-General, without which they had no legal effect. The Federal Court, however, accepted the submission made on behalf of the Government that they were constitutional laws and so were fully valid without the assent of the Governor-General.

As things went on, by 1954 it would seem that the Federal Court of Pakistan and other superior courts had been able to establish their competence and authority to protect and uphold the principales and provisions of the Constitution of the country. But in late October, 1954 the nation was plunged into its first major constitutional crisis by an authoritarian action of the Governor-General who by a proclamation[14] dissolved the Constituent Assembly. The Governor-General claimed that the country was faced with a serious political crisis and that the constitutional machinery had broken down; that the Constituent Assembly had lost the confidence of the people and hence could no longer function; that fresh elections would be held and the newly elected representatives woutd decide all issues including constitutional issues. It may be recalled at this stage that the Constituent Assembly after seven years of relentless efforts had been able to resolve controversial issues and at last adopted a draft constitution at its last session ended a month before its dissolution. The Prime Minister had even set 25 December 1954 for implementation of the Constitution after which it was expected that general elections would be held to put the whole administration of the country under the long cherished constitutional rule.[15] The Constituent Assembly was not allowed to complete its work and by dissolving it the country was pushed to an unprecedented constitutional crisis and political uncertainly.

13. *Khan of Mamdot* V. *Crown*, P.L.D. 1950 F.C. 15; and *Akbar Knan* V. *Crown*, P.L.D. 1954 F.C. 87.
14. *Gazette of Pakistan*, 24 October, 1954.
15. For the political background of the Governor-General's action see generally, G.W. Choudhury, *Constitutional Development of Pakistan* 2nd Edition Longman, London.

The Governor-General's action was challenged in the Sind Chief Court by the Constituent Assembly's President Maulvi Tamizuddin Khan.[16] The petitioner applied to the Court under section 223A of the Government of India Act, 1935, for issue of writs of *mandamus* and *quo warranto* with a view to : (i) restraining the Federation from giving effect to the proclamation and obstructing the petitioner in the exercise of his functions and duties as the President of the Assembly; and (ii) to determine the validity of appointment of the recently appointed Ministers who were not members of the legislature. The respondents raised the preliminary objection that section 223A of the Act of 1935 which gave powers to superior courts to issue writs, was, in the absence of the assent of the Governor-General, not valid law and as such the Court had no jurisdiction to issue writs to the respondents. The same objection applied to new sectien 10 of the Government of India Act, 1935 which purported to limit the Governor-General's discretion in his choice of Ministers to the members of the Constituent Assembly.

The five judges of the Chief Court of Sind unanimously held that, to constitutional laws passed by the Constituent Assembly the assent of the Governor - General was not necessary and, therefore, the amended section 10 and section 223A of the Government of India Act, 1935, were valid constitutional laws, enforceable without the assent of the Governor-General. The Court also held that the Governor-General had no power to dissolve the Constituent Assembly which had no prescribed period of duration and could only be dissolved by itself on the fulfilment of its main task of making a constitution for the country.

The Government filed an appeal to the Federal Court against the judgment of the Sind Chief Court.[17] The Federal Court in its first vital decision in the field of constitutional process of the country reversed the judgment of the Court below. It held by a majority of four to one (Cornelius, J. dissenting) that all Acts passed by the Constituent Assembly including the Acts providing for constitutional provisions required the assent of the Governor-General for their validity. Since section 223 A of the Government of India Act, 1935, by virtue of which the Chief Court of Sind had assumed jurisdiction

16. *Maulvi Tamizuddin Khan* V. *Federation of Pakistan* P.L.D. 1955 Sind 96.
17. *Federation of Pakistan* V. *Maulvi Tamizuddin Khan* P.L.D. F.C. 240.

to issue writs did not receive such assent it was not yet a law, and hence that Court had no jurisdiction to issue the writs. In view of this finding the Federel Court did not go into the other issues.

The main judgment of the Federal Court was delivered by the Chief Justic, Muhammad Munir, who argued that being a Dominion within the British Commonwealth, Pakistan's constitutional structure and practices were like those of the United Kingdom and other Dominions. Legislation was the exercise of a 'high prerogative power' and even when it was delegated by statute or charter to a legislature, in theory, it was always subject to assent, whether that assent be given by the King or a person nominated by the King. The necessity of assent was enjoined in the case of Pakistan so long as it continued to be a Dominion, though it was open to that Dominion, if the Governor-General gave assent to a Bill of secession, to repudiate its Dominion status. Interpreting sections 6(1)[18] and 8(1)[19] of the Indian Independence Act, 1947, the Chief Justice held that the combined meaning of these two sections could not be other than that the Constituent Assembly, even when exercising the constituent powers in making constitutional laws, was the legislature of the Dominion. "That being the position," Munir, C. J. concluded, "There can be no escape from the conclusion that the Governor-General's assent to the laws made by the Constituent Assembly is as necessary as his assent to any future legislature of the Dominion brought into existence by the Constituent Assembly to replace itself."[20] The Chief Justice declined to consider the fact that since the inception of Pakistan all organs of the government including the judiciary had acted on the assumption that assent to the constitutional laws was not necessary. In this connection Munir, C. J., held that the doctrine of *contemporanea expositio* would apply only when there was any doubt about the meaning of the provisions of the statute. His lordship, in the instant case, did not entertain any doubt as to the meaning of the material provisions.

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18. "The Legislature of each of the new Dominions shall have full power to make laws for that Dominion . . ."
19. "In the case of each of the new Dominions, the powers of the Legislature of the Dominion, shall, for the purpose of making provisions as to the Constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion. . ."
20. P.L.D. 1955 F.C. 240, at p. 289.

Dissenting from the majority, Cornelius, J, as he then was, held that the 'independent' Dominion of Pakistan, though a member of the Commonwealth, was different in status from the older Dominions, and the Constituent Assembly having been created by a 'supra-legal' power to discharge the 'supra-legal' function of making a constitution for Pakistan, its constitutional laws were not subject to the 'qualified-negative' assent of the Governor-General.

Chief Justice Munir's judgment has been viewed variously by different authorities.[21] But on an analysis of the circumstances leading to the case it would perhaps not be an exaggeration to say that here in this case Munir, C.J., was certainly confronted with a dilemma as the Chief Justice of the United States of America, John Marshall, was confronted more than one hundred and fifty years ago.[22] If he were to uphold the judgment of the Chief Court of Sind probably in the face of almost certain disobedience by the Governor-General, the Court would be powerless, and if he were to reverse that judgment the authoritarian Governor-General would triumph. In such a situatton the Chief Justice found, as was found by his great American counterpart, that the law empowering the superior courts to issue writs was unconstitutional and invalid because of the lack of Governor-General's assent.

The allegation of subservience[23] of the Court to the wishes of the autocratic Governor-General would perhaps be a harsh remark on the Court. It may, however, be true that having closely observed the autocratic style of administration in the country since its inception, and being fully conscious of the contemptuous attitude of the ruling clique towards popular rule, principles of democracy and constitutionalism, Munir, C.J., wanted to avoid direct confrontation with the clique without, of course, tarnishing the authority

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21. See K.C. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford University Press 1960). p. 100; S.A. de Smith. "Constitutional Lawyers in Revolutionary Situations", (1968) 7 *Western Ontario Law* Review, 93; A. Gledhill, "The Constitutional Crisis in Pakistan", (1955). *Indian Year Book of International Affairs.*

22. *Marbury* v. *Madison*, 1 Cranch 137 (1803), See for the Amerian Dilemma Henry J. Abraham, *The Judicial Process* (OUP 1980) p. 329.

23. See, S.A. de Smith, "Constitutional Lawyers in Revolutionary Situations", (1968) 7 *Western Ontaio Law Review*, 93.

of the Court. Under the garb of apparent strict legality he tried to maitain a balance between the authority of the Court and the stubborn attitude of the executive. That the Chief Justice was not prepared to connive at every anti-constitutional and anti-people action was aptly proved by his strong observation he made in the case[24] that arose out of his judgment in *Maulvi Tamizuddin Khan's* case.

It may be noted that the Federal Court in *Tamizuddin Khan's* case refused to go into the legality of the Governor-General's action in dissolving the Constituent Assembly. However, as a result of the Court's finding forty-four Constitutional Acts, by implication, became invalid for want of assent of the Governor-General. The Governor-General, thereupon, declared a grave emergency throughout the country and purporting to act under section 42(1) of the Government of India Act, 1935, issued and promulgated the Emergency Powers Ordinance, 1955.[25] The Ordinance, after narrating that the Federal Court's judgment by invalidating certain constiutional Acts, had caused a breakdown of the constitutional machinery, purported to validate retrospectively thirty-five of the Acts, listed in the Schedule to the Ordinance.

The above Ordinance came for examination before the Federal Court in the case of *Usif Patel* v. *Crown.*[26] The Court held that the Governor-General could not, by Ordinance, validate any of the laws, which had become invalid for want of his assent. Muhammad Munir, C.J., held, on the authority of *Tamizuddin Khan's* case discussed above, that the Governor-General's power to make Ordinance did not go beyond the Federal Legislature's power to make laws. The power of the Legislature of the Dominion to make provision for the Constitution of the Dominion could, under section 8(1) of the Independence Act, 1947, be exercised only by the Constituent Assembly, and that power could not be exercised by the Assembly when it functioned as the Federal Legislature under the Govt. of India Act, 1935. Therefore, if the Federal Legislature was incompetent to pass laws amending the Constitntion Acts, the Governor-General possessing no larger power than the Federal Legislature was

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24. *Usif Patel* V. *Crown,* P.L.D. 1955 F.C. 387
25. Ordinance ix of 1955, P.L.D. 1955 *Central Statutes* 63.
26. P.L.D. 1955 F.C. 387.

equally incompetent to amend either of the Constitution Acts by Ordinance. The Governor-General could give or withhold his assent to the legislation of the Constituent Assembly. But the Governor-General, argued the Chief Justice, was not the Constitutent Assembly and, on its disappearnce he could neither claim power which he never possessed nor could he claim to succeed to the powers of the Assembly.[27]

In the course of his judgment the Chief Justice referred to the statement made by counsel for the Federation in *Tamizuddin Khan's* case regarding the constitutional position consequent upon the dissolution of the Constituent Assembly. His lordship cited a portion which implied that immediate steps were being taken to hold elections to a new Assembly. The Chief Justice observed that it might well be expected that the first concern of the government would be to bring into existence another representative body to exercise the powers of the Constituent Assembly. His Lordship, however, regretted that events showed that other counsels had since prevailed. The Ordinance (ix of 1955) contained no reference to elections, and all that the learned Advocate-General could say was that they were intended to be held.[28] It may also be noted that not only the Ordinance contained nothing about the representative body that the Chief Justice referred to, on the contrary, section 10 of the Ordinance (ix of 1955) contained an ominous provision empowering the Governor-General to make, by order, such provisions as appeared to him to be necessary or expedient for the future constitution of the country. The situtation was worsened by the irresponsible public utterances of Major-General Iskander Mirza, the then Minister of the Interior, who as the spokesman of the regime had nothing but contempt for democratic and constitutional processes.[29] In the circumstances, it was apprehended in the political and judicial circles that a constitution of the regime's liking would be promulgated by the Governor-General's decree. It was in this background that the Federal Court in *Usif Patel's* case rose to the occasion and held the Governor-General's Ordinance void which smacked of authoritarian rule devoid

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27. *Ibid* at p. 392
28. *Ibid* p. 401
29. See, for Mirza's Statements on Political process and 'controlled democracy', *Dawn*, 31 October and 15 November, 1954.

of democratic principles. It was the strong criticism of the Chief Justice that the Governor-General and his lackeys were dissuaded from exercising powers under the Ordinance (ix of 1966). Paying heed to the Chief Justice's remarks the Governor-General issued the Constituent Covention Order, 1955[30], providing for the setting up of a "Convention" to make a Constitution for the country and also issued and promulgated a new Emergency Powers Ordnances, 1955[31] assuming to himself, until other provisions were made by the Constituent Convention, such powers as were necessary to validate the invalid laws in order "to avoid a a possible breakdown in the constitutional and administrative machinery of the countrry and to preserve the state and maintain the Government of the country in its existing condition." In exercise of these powers the Governor-General retrospectively validated and declared enforceable the laws listed in the Schedule to the Emergency Powers Ordinace (ix of 1955). These powers were exercised by the Governor-General subject to any report of the Federal Court on the constitutional position referred to it by the Governor-General under section 213 of the Government of India Act, 1935[32].

Thus, at last the Governor-General had to seek the advice of the Federal Court to help him out of the constitutional crisis which he himself created. The question referred to the Federal Court[33] covered the scope of the Governor-General's powers and responsibilities in governing the country before the proposed 'Convention' passed the necessary legislation; and whether, in view of the Federal Court's decision in *Usif Patel*'s case, the Governor-General had any power under the Constitution or any rule of law to declare the invalid laws to be part of the law of the land until their validity was determined by the proposed 'Convention'. During the hearing of the *Reference*, however, at the instance of the Court, two more questions were added. One was whether the Constituent Assembly was rightly dessolved by the Governor-General, and and the other, whether the proposed Constituent Convention would be competent to exercise

30. G.G. 's O. VIII of 1955. P.L.D. 1955 *Central Statutes* 118.
31. P.L.D. 1955 *Central Statutes* 113.
32. *Ibid.* See the provisions of the Ordinance.
33. *Reference by H. E. the Governor-General* P. L.D. 1955 F.C. 435

powers conferred on the Constituent Assembly by section 8 of the Indian Indepence Act.

The majority opinion of the Federal Court given by Munir, C.J. held that the first question was too general and need not be answered. On the second question the court said that "in the situation presented by the *Reference*, the Governor-General has, during the interim period, the power under the common law of civil or state necessity, of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance 1955, and all these laws, until the question of their validation is decided upon by the Constituent Assembly, are during the aforesaid period valid and enforceable".[34] In expounding the doctrine of state necessity the Chief Justice referred to Lord Mansfield's address to the Jury in *George Stratton's* case[35] and the opinions of Chitty and Bracton on the doctrine of state necessity, and observed that "necessity makes lawful that which otherwise is not lawful". In this context considering the condition following the decision in *Usif Patel*'s case Munir, C.J., held that "the Governor-General must, therefore, be held to have acted in order to avert an impending disaster and to prevent the state and the Society from dissolution".[36]

On the all-important question of the dissolution of the Constituent Assembly, the Chief Justice examining the scheme of the Indian Independence Act, 1947, and following the principle enunciated by the House of Lords in *De Keyser's Royal Hotel* case[37] held that the absolute and unqualified prerogative right of the Crown and of the Governor-General as the representative of the Crown to dissolve the Assembly had clearly been taken away.[38] He, however, observed that where a statute made provisions for a particular situation it excluded the common law. But if the situation was entirely beyond the contemplation of the statute, it would be governed by common law. In the instant case the Constitution Acts assumed that the Constituent Assembly would frame a constitution within a reasonable time; it was not given power to function as long as it liked and

34. *Ibid.* at pp. 520-21
35. 21 *Howard's St. trial* 1046.
36. P.L.D. 1955 F.C. 435 at p. 486
37. *Attorney General* v. *De Keyser's Royal Hotel*, (1920) A.C. 508.
38. P,L.D. 1955 F.C. 435 at 452.

assume the form of a perpetual or indissoluble legislature. In this context, accepting the statement of facts made in the *Reference* that the Contsituent Assembly had failed to fulfil its task and acted illegally or in a manner different from the one it was intended to function, Munir, C.J., held that the common law prerogative, which was kept in abeyance must be held to have revived, when it became apparent to the Governor-General that the Constituent Assembly was unable or had failed to provide a constitution for the country. In view of this the Court came to the conclusion that "the Governor-General had under section 5 of the Indian Independence Act, legal authority to dissolve the Constituent Assembly."[39]

Dealing with the question of the competence of the proposed Constituent Convention, Munir, C.J., following the same principle, held that in the absence of statutory prohibition, the Governor-General had under common law the power to create a fresh Constituent Assembly to prepare a constitution for the country. The only legal requirement in setting up a new body was that it should be a representative one. The term 'Convention' being misleading, the new body should be called the Constituent Assembly which would have all powers exercised by the dissolved Constituent Assembly.[40]

Dissenting from the majority, Cornelius and Sharif, JJ, held that the Governor-General had no authority to validate the invalid laws, whether temporarily or permanently. On the application of the doctrine of 'state necessity', Sharif, J., pointed out that general application of this doctrine could lead to dangerous situation where the Head of the state might be tempted to tamper with the constitutional structure itself.[41]

In the *Special Reference case*, the Federal Court gave its opinion in the exercise of its advisory jurisdiction. The Governor-General's authority temporarily and retrospectively to validate the invalid laws was subsequently recognised by the Federal Court in a contentious case.[42] Munir, C.J., distinguished *Usif Patel's* case where validation by the Governor-General was held to be beyond his power "because by the validating Ordinance, the Governor-General claimed for himself

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39. *Ibid* at p. 486.
40. *Ibid* p.p. 472-475
41. *Ibid* at p. 519
42. *Federation of Pakistan* v. *A Ahmad Shah*, P.L.D. 1955 F.C. 522

the power to validate, without any reference to, and in the absence of the legislature, whereas, in the present case, the validation is only provisional and subject to legislation by the Constituent Assembly."[43] The end result of these judgments was that *status quo* in the legal structure was to be maintained till the new Constituent Assembly decided on the issue.

On an analysis of the above discussion it would be seen that although the Federal Court's decision in *Maulvi Tamizuddin Khan's* case and its opinion in the *Special Reference* case were not free from the allegation of having a taint of political bias,[44] these decisions, without doubt, contributed much in overcoming an unprecedented constiutional crisis created by an autocratic Governor-General. It might be alleged that the Federal Court's decision in the *Maulvi Tamizuddin Khan's* case might have encouraged the Governor-General with the support of his coterie, to take unto himself the power to give a constitution to the country according to his ideas. The fact that the Proclamation dissolving the Constituent Assembly contained a promise of fresh elections which was totally forgetten while issuing the Emergency Powers Ordinance (ix of 1955) which empowered the Governor-General to provide for a suitable constitution as he deemed fit and necessary, may be cited to support the allegation. But it must be admitted that the Court's strong observations in *Usif Patel's* case had been able to restrain the Governor-Genenral from exercising the constituent power and made him submit to the Court seeking its advice in tiding over the crisis. The Federal Court, not only advised the executive to leave the task of constitution-making to the representatives of the people, it at the same time, enabled the Governor-General to take appropriate measure to run the administration according to law temporarily for an interim period by invoking the common law doctrine of 'state necessity'. This was indeed a great contribution on the part of the Federal Court to guide the country on the path of democracy and constitutionalism.

Soon after the Federal Court's opinion in the *Special Reference* case, elections to the new Constituent Assembly were held and it was

43. *Ibid.* at p. 529
44. See S.A. de smith, "Constitutional Lawyers in Revolutionary Situations", (1968) 7 *Western Ontario Law Review*, 93.

convened forthwith to deliberate on the burning legal and constitutional issues. Apparently, having learnt a lesson through the fate of its predecessor, the second Constituent Assembly took only about two months from the date of the publication of the draft constitution to finally adopt it on 17 Februrary, 1956 which came into effect on 23 March, 1956.[45]

But "the Constitution which emerged nine years after independence, the product of so much turmoil and strife, had a very short life."[46] It could not give the expected political stability in the country due to dissension among political leaders on both fundamental and petty issues. However, in the course of thirty months of its working, when the country was preparing for the first ever general elections scheduled to be held in Februrary, 1959,[47] by a Proclamation[48] of the President issued on the night of 7 October, 1958, the Constitution of 1956 was abrogated, the national and provincial legislatures were dissolved, the Central and Provincial Governments were dismissed, all political parties were abolished and martial law was declared throughout the country. The President appointed General M. Ayub Khan, the then army Chief, as the Chief Martial Law Administrator with supreme command over all the armed forces. On 10 October, 1958, three days after the abrogation of the Constitution of 1956, the President issued the Laws (Continuance in Force) Order,1958[49], which turned out to be the principal constitutional document for the martial law period.

The Laws (Continuance in Force) Order, 1958 which was deemed to have taken effect immediately upon the making of the Proclamation, provided that subject to the Proclamation, any Order of the President or Regulation made by the Chief Martial Law Administrator, the country was to be governed as nearly as possible in accordance with the abrogated constitution. The powers and

45. See A. Gledhill, *Pakistan* (2nd Edition, Stevens 1967) pp. 81-83.
46. *Ibid.* p. 101.
47. See for election alliances and other political background, K.B. Sayeed, *The Political System of Pakistan* (Boston, 1967), pp. 90-91; G. W. Choudhury, *Constitutional Development in Pakistan* (Longman 1959) p. 255.
48. *Gazette of Pakistan*, 7 October, 1958, also, P.L.D. 1958 Central Statute 577.
49. President's Order (post-proclamation) No. 1 of 1958.

jurisdiction of civilian authorities were not interfered with, but all these had now to function subject to the orders and directions of the Chief Martial Law Administrator or authorities designated by him. The Supreme Court and the High Courts retained their powers and jurisdiction including their power to issue writs, but they were not to call in question the President's Proclamation of 7 October, any Order made under the Proclamation, or Martial Law Order or Regulation or findings or judgment of any military court. All orders, and judgments made or given by the Supreme Court before 10 October, 1958 were valid and binding, but saving those, no other order or writ made or issued after 7 October would be valid unless permitted by the Order, and all applications and proceedings in respect of any writ, which was not retained by the Order, would abate. All laws in force, except the late Constitution, subject to the Orders and Regualtians made by the President or the Chief Martial Law Administrator, were to continue in force until altered, repealed or amended.

In such extra-ordinary circumstances, the Supreme Court of Pakistan was called upon to determine the legality of the regime which had abrogated the Constitution of 1956, abolished or destroyed the legal order under it, and established entirely a new one backed by the armed forces of the country. There was no doubt in the minds of the people concerned, and the regime also did not attempt to hide the fact that the entire armed forces were behind the *coup*. In the *State* v. *Dosso*[50] the question arose whether a writ issued by the West Pakistan High Court under the provisions of the abrogated Constitution had abated by virtue of the provisions of the Laws (Continuance in force) Order. The Supreme Court, by a majoritty (Cornelius, J. dissenting) held that it had, inasmuch as the late Constitution itself had been abrogated; the Court recognised the Laws (Continuance in Force) Order as the 'new constitution' which determined the jurisdiction of all courts including the Supreme Court. The Court took judicial notice of the President's Proclamation of 7 October, 1958 abrogating the Constitution which both the President and the Judges were oath-bound to "preserve, protect and defend", and accepted the position provided for in the Laws (Continuance in Force) Order of 10 October 1958.

50. P.L.D. 1958 S.C. 533

Muhammad Munir, C.J., who gave the main judgment of the Court, in a detailed discussion of constitutional changes maintained that an abrupt political change, not contemplated by the existing constitution emerging as a 'victorious revolution' or a 'successful *coup d' etat*' was an internationally recognised method of changing a constitution. He said,

> 'It sometimes happens.... that a constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order'.[51]

The learned Chief Justice pointed out that a revolution was generally associated with public tumult, mutiny and bloodshed, but 'from a juristic point of view the method by which and persons by whom a revolution is brought about is wholly immaterial ..... Equally irrelevant in law is the motive for the revolution.....' For the purpose of the dectrine '..... a change is, in law, a revolution if it annuls the constitution and the annulment is effective'. In support of his view Munir, C.J. applied the positivist theory of 'efficacy' propounded by Hans Kelsen and quoted extensively from his famous work *General Theory of Law and State*[52] and came to the conclusion that the revolution having been successful, it had satisfied the test of 'efficacy' and become a basic law-creating fact. 'On that assumption', the Chief Justice held, 'the Laws (Continuance in Force) Order, however, transitory or imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and the correctness of judicial decisions has to be examined.[53]

This historic judgment of Munir, C.J., and endorsed by the majority of the judges of the Supreme Court gave approval to an utterly unconstitutional act of an autocratic President who had a tremendous hatred towards normal democratic political process and constitutional rule. He was instigated and backed by an ambitious army general, M. Ayub Khan, who had his own political designs.[54] The Court simply recognised the 'abrupt political change'

51. *Ibid.* p. 538.
52. Harvard University Press : 1946 (Tr, By Anders Wedberg).
53. *State* v. *Dosso*, Ibid, at p. 540.
54. See M. Ayub Khan, *Friends Not Masters*, (OUP : 1967) pp. 73-75

in view of its effectiveness', having no opposition from any quarter. It did not take into consideration the objective political condition obtaining in the country at the material time nor did it think it fit to examine the validity of the claim of the usurpers that the Constitution of 1956 was unworkable. It also ignored the fact that the constitution itself had provisions for its own amendment which was universally reconised method for bringing about any necessary change.

Thus, the Court, not only upheld the destruction of a legal order which was based on a Constitution enshrined with democratic values and principles, but also, implicitly allowed the usurpers of power to design and implement a constitution without any heed to the political sensitivities of the people of the country in general, and those of the eastern wing in particular. The presidential system with the extreme centralisation of powers in the hands of the President under the provision of the Conslitution of 1962 promulgated by Field Marshal Ayub Khan, was a single major factor alienating the people of the eastern wing from the main political stream of the country. The people generally suffered from a sense of deprivation and lack of participation in the state activities which ultimately led to the disintegration of the country.[55] The post-1958 political episode in Pakistan seems to have left an ominous legacy for the two successor states which are still in search of a political system based on democratic principles. The sad experience of Pakistan and Bangladesh since their seperation proves the correctness of the prophetic remark made by Professor Gledhill who, while commenting on the Supreme Court's judgment in the case of *Dosso* said, "the course taken by the Supreme Court] was calculated to encourage an individual weilding supreme power to seek the approval of the courts for unconstitutional action.[56]

The judgment of the Supreme Court of Pakistan in the *State* v. *Dosso* has since been referred to in many cases before the highest courts of different countries. In all these cases the courts were called upon to deal with the effects of 'abrupt political change'

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55. See Rounaq Jahan, *Pakistan, Failure in National Integration*, (OUP : 1973) Ch. VII pp. 143-177.

56. A. Gledhill, *Pakistan, the Development of its Laws and Constitution* (Sterens : 1967) p. 109.

in their respective jurisdictions and they seem to have agreed in substance with the views of Chief Justice Munir that such a change amounted to a 'legal revolution' which the courts perforce of the circumstances had to recognise.[57] The judgment of Munir, C, J., also drew criticison from commentators. Macfarlane, a political scientist observed that the manner in which the Supreme Court of Pakistan had interpreted the phenomenon of change was fraught with the danger that the arbitrary ruler would be free to take whatever measures he liked and even the courts might be required to find 'legal' reasons for his arbitrary measures. 'In such circumstances for judges to uphold the decrees of those in power in the name of law and *de jure* authority', Macfarlane pointed out, 'is to mock and undermine ordinary men's confidence in the rule of law. It is one thing to argue...that men cannot be required to behave in conformity with norms of a total legal order which has passed away; quite another to conclude, as the Pakistani ... judges have done, that this requires that the courts of the old order are required to validate the norms of its effective replacements.'[58]

It is to be noted that what happened in Pakistan in October, 1958 then an isolated incident in the Commonwealth became, with the exception so far, of India, Malaysia Singapore and a few other countries, a pattern for the newly liberated Commonwealth and other third world countries. In most cases the army and other forces established, patronised and used by the former colonial administrators to suppress popular movements for liberation and independence, in collaboration with each other, overthrew the constitutional regimes on allegations of corruption, inefficiency and oppression and usurped the power with the grand promise of establishing honest, efficient and forward-looking administration based on 'true' democratic principles.

57. See the Ugandan case of *Uganda* v. *Commissioner of Prisons, ex parte Matuvo*, (1966) E.A. 514; the Rhodesian cases of *Madzimbamuto* v. *Lardner-Burke*, (1968) 2 S.A. 284 (R.A.D.); *R.* V. *Ndholvu*, (1968) 4 S.A. 514 (R.A.D.) The Judicial Committee of the Privy Council though refused to accept the validity of Smith regime, because Britain as the legal sovereign was committed to put an end to the rebellion, accepted Munir, C.J., s contention as right, see *Madzimbamuta* v. *Lardner-Burke*, (1968) 3 All E.R. 561.

58. L.J. Macfarlane, "Pronouncing on Rebellion : The Courts and the U.D.I." (1968) *Public Law*, 323.

But the experience of nearly four decades of the era of decolonisation suggests that with a very few rare exceptions, the usurpers of state power have failed to deliver the promised good; rather, after a short while of their assuming power they indulged in the same vices, sometimes in greater scale, resulting in *coups* and counter *coups* or, in the words of Munir C.J., in the succession of 'abrupt political changes', without any substantial benefit for the suffering masses. The net result being interruption in the normal political process which, even the Marxists now admit, is vital for socio-eonomic development of the people and the mation. The administration set up by the new rulers invariably deprive the people of their basic democratic right to participate in the government of their country, a right for which the people had fought against their colonial masters.

A case study of Pakistan's constitutional and political development since the overothrow of the 1956- constitutional government would, it is submitted, provide a sample pattern of administration which the usurpers attempt to establish under the garb of a constitutional system of their own choice. Commenting on the Pakistan Constitution of 1962 given by the self-made Field-Marshal M. Ayub Khan, K.J. Newman observed that "the document bears all the hallmarks of a constitution devised by the Executive, to be imposed through the Executive, and for the Executive".[59] As for the motive behind such a constitutional system, Newman, who was a keen observer of Pakistan political development, said, "what emerges .. is the fact that the constitution has been drafted in such a way as to perpetuate the present regime, and to eliminate the competition of political parties for a long time to come."[60] The designs of the detractors of democracy, however, did not succeed and Ayub's regime was overthrown by a country-wide popular movement of 1968 - 69 demading establishment of democratic constitutlonal rule based on popular mandate. In the melee that followed, Ayub on 25 March 1969 handed over the power to the Commander-in-Chief of the army who poclaimed martial law throughout the country, assuimg to himself

59. K.J. Newman, "The Constitutional Evolution in Pakistan" (1962) 38 *International Affa rs*, 533.

60. K.J. Newman, "Democracy under Control", *The Times* (London), 16 March, 1962. p. 13.

"the powers of the Chief Martial Law Administrator and the command of all the armed forces of Pakistan."[61]

It is significant to note that though some concrete political demands had emerged out of the Round Table Coeference[62] convened by Ayub Khan in early March, 1969 to tackle the political crisis that had been raging the country during the past one year, Ayub Khan and his henchmen refused to accommodate them in the existing political system. They preferred to impose military rule which was bound to be West Pakistani dominated because of the composition of the armed forces and thus estranged the people of the eastern wing further. In the events that followed, the military rule could not hold the two wings together leading to the secession of the eastern wing to become the soverign state of Bangladesh.

The March, 1969 *coup d'etat* like its predecessor of October, 1958 also came for judicial scrutiny before the same Court in 1972. It is heartening to note that the Supreme Court, this time, overruled the *State* v. *Dosso* and held the military take over as illegal.[63] The Court headed by Hamoodur Rahman, C.J., refused to accept Hans Kelsen's pure theory of Law to find a 'legal revolution' in the change that took place in the country on 25 March, 1969. The Chief Justice noted with apparent approval the views of Mr. A.K. Brohi appearing as *amicus curiae*, that the Supreme Court in *Dosso's* case accepted Kelsen's theory as a "question of law itself, although it was nothing more than a 'question about law' and no legal judgment could possibly be based on such a purely hypothetical proposition".[64] In analysing Kelsen's theory he found that it was never accepted universally and that Kelsen never admitted to support totalitarianism. His lordship, therefore, agreed with the 'criticism' that "The Chief Justice of the Supreme Court [in *State* v. *Dosso*] not only misapplied the doctrine of Hans Kelsen but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence".[65] The Chief Justice held : "The Principle enunciated [in *Dosso's* case,] is wholly unsustainable and it cannot be treated

61. For full text of the Proclamation, see *Gazette of Pakistan*, 25 March, 1969.
62. See for details, S.M. Zafar, *Through the Crisis*, (Lahore : 1970)
63. *Miss Asma Jilani* v. *Govt of the Punjab*. P.L.D. 1972 S.C. 139
64. *Ibid.* at p. 171 and also see pp. 178-181.
65. *Ibid.* p. 181.

as good law either on the principle of *stare decisis* or even otherwise".[66] Having held that "the military rule sought to be imposed upon the country by General Agha Mohammad Yahya Khan was entirely illegal", His Lordship, however, proceeded to 'Condone' or 'maintain', on the basis of necessity, certain acts, legislative or otherwise, of the regime "notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization".[67]

The case of *Miss Asma Jilani* discussed above is quite relevant for our purpose because the Supreme Court in this case had ruled on a situation occurred during the period under our consideration. It is to be noted, however, that the same Court within five years of its pronouncement on Martial Law of 1969 had to deal with a similar situation in *Begum Nusrat Bhutto* v. *Chief of Army Staff & others.*[68] The constitutional government of Prime Minister Z.A. Bhutto was ousted by the Commander-in-Chief of Pakistan Army, General Muhammad Zia-ul-Haq on 5 July 1977 who proclaimed martial law throughout the country. A brief mention of this case would, it is submitted, also be relevant in the context of our discussion about the impact of abrupt political change on a country's political development. The Supreme Court of Pakistan, following *Miss Asma Jilani's* case, refused to validate the military rule of General Zia-ul-Haq on the basis of its 'effectiveness', and to see a 'legal revolution' in the change, and held that the abrupt political change was "merely a case of constitutional deviation for a temporary period and for a specified and limited objective, namely, the restoration of law order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution".[69]

In giving the main judgment of the Court the Chief Justice of Pakistan, S. Anwarul Haq discussed at length Kelsen's pure theory of law, other authorities on the subject and also similar cases decided in foreign courts and reached the conclusion, as did his predecessor Hamoodur Rahman, C.J., that the judgment of the

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66. *Ibid* p. 183.
67. *Ibid.* p. 207.
68. P.L.D. 1977 S.C. 657.
69. *Ibid.* p. 722, per S. Anwarul Haq C.J.

Supreme Court in *Dosso's* case was not based on correct interpretation of any legal doctrine. The Chief Justice reiterated that Kelsen's pure theory of law was not universally accepted as a legal doctrine; it was "also open to serious criticism on the ground that, by making effectiveness of the political change as the sole condition or criterion of its legality it excludes from consideration sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. The legal consequences of such a change must, therefore, be determined by a consideration of the total milieu in which the change is brought about including the motivation of those responsible for the change; and the extent to which the legal order is sought to be preserved or suppressed".[70]

Pointing out the fact that the Court in *Asma Jilani*'s case had to determine *ex post facto* the legality of the acts of the past military regime functioning since 25 March, 1969, till 20 December, 1971, and thus had enunciated the doctrine of 'condonation,' the Chief Justice observed that in the instant case the Court had to extend validity to certain acts of the regime aimed at achieving 'the specified and limited objectives' namely, the holding of general elections and restoration of democratic institutions under the Constitution. While the learned Chief Justice did not consider it appropriate to issue any directions as to a definite time-table for holding the elections, he made a significant observation expressing the Court's sincere expectation in that regard. His Lordship observed :

> "... the court would like to state in clear terms that it has found it possible to validate the extra-constitutional action of the Chief Martial Law Administrator not only for the reason that he stepped in to save the country at a time of grave national crisis and Constitutional breakdown, but also because of the solemn pledge given by him that the period of constitutional deviation shall be of as short a duration as possible, and that during this period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections, leading to the restoration of democratic rule in accrodance with the dictates of the Constitution, the Court therefore, expects the Chief Martial Law Administrator to redeem this pledge, which must be construed in the nature of a mandate from the poeple of Pakistan..."[71]

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70. *Ibid.* p. 721.
71. *Ibid.* p. 723.

Unfortunately, however, the expectation of the learned Chief Justice did not come true. The Chief Martial Law Administrator, contrary to his own solemn promise and the expectation of the Chief Justice, took a series of steps, including amending the Constitution by decrees, which would prolong his stay in power and ultimately creating a situation devoid of political process in the country leading to his own election to the office of the Pesident, weilding absolute powers according to the amended Constitution. After eleven years, of General Zia-ul-Haq's assuming power through a *coup d' etat*, on the eve of his death in a plane crash in August, 1988, there was no sign of normal democratic processes visible in the political horizon of Pakistan.

It was only after General Zia-ul-Haq's death that through a free and fair elections held in November, 1988 and participated by all main political parties that a democratic Government on the basis of popular mandate has been installed in the office. But in late 1989 it appears that Pakistan cannot possibly, be said to have overcome the political crises which have become endemic in its political life through frequent interruptions.[72] The same is the case, it can safely be submitted, with most other countries where normal political processes have been deliberately interrupted by anti-political forces.

In the light of the above discussion and having found that the judgment in the *State* v. *Dosso* has been rather connter-productive in the sense that instead of helping the country move towards progressive constitutional development, it had recognised a situation where might could be considered as right and as a 'constitutional fact' in the political arena, it remains for us to comment on the proper role of the judiciary in such a situation. It may at once be recalled that even the sincerest expectation of the highest court,[73] of going back to constitutional rule could be ignored with impunity by the usurpers who, in the name of the people's right and liberty suppress them without fail and establish personal rule in the country.

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72. See *Sangbad*, 28 August, 1989. An editorial entitled "Democracy under Challenge, Not Benazir Bhutto," analysed the political situation of Pakistan tracing the constitutional history since the first military *croup* in October, 1958.

73. *Begum Nusrat Bhutto* v. *Chief of Army Staff*, P.L.D. 1977 S.C. 657.

It is in the above context the judiciary, it is humbly submitted, should be willing to play a role commensurate with the hopes and aspirations of the people who have the fundamental right to participate in the government of the country. Any situation which is designed to stifle the democratic process must be opposed by all concerned including the judges. Admitting the long established principle that the courts function within the limited sphere of state activity to apply law as they are, which 'pre-supposes an established government capable of enacting laws and enforcing their execution',[74] would it not fall within the sphere of judicial power to examine the nature and status of the 'established government' within a constitutional framework which provides specific functions for each organ of the government and also the procedure for effecting necessary change in the framework through constitutional amendment ! In a modern written constitution the judiciary, generally, is given the constitutional right and duty to protect and uphold the principles of the constitution in accordance with its letter and spirit and the courts will be failing in their constitutional responsiblity, it is submitted, if they abdicate this authority in favour of a situation created deliberately countrary to constitutional contemplation.

If it is accepted to be a basic constitutional rule that the government must be run on the basic of the consent of the governed, the court must ensure, whenever situation warrants, the functioning of democratic process enabling the people to make their choice of governmet through free and fair eleetions. If the court fails to uphold this right of the sovereign people, its role could possibly be seen to be devoid of political reality, in the sense that its judgment would be contrary to the hopes and aspiration of the people.[75] The judgment in the *State* v. *Dosso* might be appropriate, indeed should be appropriate, in a situation where a foreign or dictatorial oppressive rule is overthrown by popular uprising establishing a new legal order on the basis of popular consent as the first constitution of extra-legal origin, as envisaged by authors of text-books on jurisprudence.[76] But such a change in the legal order must not be equated with

74. Per Taney, C.J. *in Luther* V. *Borden*, (1849)7 Howard 1
75. C.J. *Madzimbamuta* v. *Lardner-Burke* (1968)2 S.A. 284, observation of Beadle C.J. at pp. 329-330.
76. See, for example Sir John Salmond, *Jurisprudence* (12th ed. 1966) pp. 84-85 G.W. Paten, A Text-Book on *Jurisprudenee* (2nd. ed. 1951) p. 12.

unwarranted intervention in normal political process contemplated by the established constitutional arrangement.

Analysing the experience of decades of dictatorial or near-dictatorial rule in the countries of Asia, Africa and Latin America, it can be easily established that the system is neither capable of ensuring political stability nor can it advance the socio-economic and political interest of the people at large. Democratic system with all its shortcomings provides for a built- in system for its own correction through trial and error method by ensuring the right of the people to choose their rulers in free and fair elections. The judiciary must, it is submitted, discharge its constitutional responsibility to guide all concerned, whenever called upon to do so, to ensure this right of the people. The elections are costly and sometimes hazardous, but a nation must be made used to bear with the cost and hazards, if it wants to have a government running the administration on the basis of the consent of the governed. And only such a government can ensure basic funamental rights in the state and socio- economic devlopment in the interest of the people which are universally recognised to be the main objectives of any modern government.

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RULE OF LAW ASPECT OF THE JUDICIARY IN THE LEGAL SYSTEM OF BANGLADESH.

by

HAMIDUDDIN KHAN

Introduction

Evolution of the Rule of Law

It would be proper to trace the development of Rule of Law as enshrined in the International Bill of Human Rights as obtaining to-day, it being the foundation of all democratic values, universal for mankind.

The struggle for protection of human rights within the society is as old as humanity. Greek philosophers sought for legal ideas to protect individual against the strong under the concept of natural law, meaning the rule of reason, seers and prophets of great religions have challenged existing oppressive practices of exploitation of man by man and emphasized the dignity and worth of human person. In the Judaes-Christian tradition from Moses to Jesus there is a grand demand that society recognises fundamental human freedom. In Hindu Budhist conception there is the noble idea of divine in man. And in the Islamic tradition each can claim the right to brotherhood, equal justices and the equality before law.

Modern concepts of human rights and fundamental freedoms have taken shape during the long development of democratic society. Magna Carta of 1215, the Habeas Act of 1679, the Bill of Right of 1689, the American Declaration of Independence in 1776, the French Declaration of the Right of Man in 1789, were the milestones along the road in which the individual acquired protection against the repressive acts of kings and despots and the right to lead a free life in a free society. These documents made profound impact on the ebb and flow of the battle of personal liberty and have supplied inspiration for the acceptance as common standards for universal application.

The vast political, social and economic upheavals that followed two World Wars led to a realisation that the principles of the Rule of Law propounded by Dicey of England in the mid 19th century in the sense of absence of arbitrary power on the part of government and of equal protection to all, requird clearer definition and these democratic rights of man earlier conceived by Hugo Grotius as natural right were indeed of universal application and awakened world leaders to the need for concerted action to protect human rights under the Rule of Law which led to the adoption of the Charter of the United Nations and subsequently of the Universal Declaration of Human Rights formulated by the United Nations in 1948 which sets out a list of human rights which are similar to and include more important of the fundamental rights considered as essential for a society nnder the Rule of Law and as the Common standard that should apply to hnman race irrespective of race, religion, colour, sex, language, birth or other status. The provisions and ideals of the Charter and of the Universal Declaration have now been much more specific and obligatory in three international covenants :(1) The International Covenant on Economic, Social and Cultural Rights, (2) The International Covenant on Civil and Political Rights and (3) The Optional Protocol. After ratification by individual nations these covenants and the International Bill of Rights took on the force of International Law in 1976.

Apart from gaining the status of international law, the International Bill of Human Rights is also obligatory in its implemanatation by virtue of Article 56 of the U.N. charter which says : All members pledge themselves to take joint and separate action in cooperation with the Organisation for achievement of the purposes set forth in Article 55, and Article 55 includes as one of its purposes, the respect for and observance of human rights and fundamental freedoms declared by the United Nations. This article has created a sort of international accountability for all member states of U.N., so that we can say that a violation of human rights anywhere is the concern of democratic people everywhere, states not excluded.

Law is both an instrument of social control and social change. Like all other human institution, it is never static but dynamic. With the cnanging pattern of human relations resulting from technological change changing the productive forces of economy, Dicey's concept of the Rule of Law has undergone great changes with such

adaptation and expansion as was necessary to meet new changed circumstances. In this context the International Commission of Jurists and other international bodies undertook the task of defining the requirements of thy Law and elaborated the principles of the Rule of Law and Human Rrights at the Congresses and Conferences held from time to time from which there emerged the new dynamic concept of the Rule of Law which embraces a broader conception of justice than the mere application of legal rules.

An ananlysis of the thirty Articles of U.N. Universal Declaration of Human Rights reveals that the preamble postulates the basic aim of the International Bill of Human Rights to be the recognition of the inherent dignity and of the equal and inalienable rights of all members of human family and to provide a common standard of achievement for all people and all nations and that these rights are the foundation of freedom, justice and peace in the world.

The Rule of Law as understood today in its broadest connotation means a government of laws and not of men. It means that the exercise of power of government shall be coditioned by law and that the citizens shall not be exposed to the arbitrary will of the ruler i.e. the rulers are subject to laws, which means a Government controlled by laws framed by the people's representatives which uniformly binds the citizen and the Government as equal before law, where State powers are separate but co-ordinate into the executive, legislative and judiciary with emphasis on individual right to life, liberty, property and lastly of political participations, and where an independent judiciary has the right of judicial control over executive acts. In countries like Bangladesh where there is a written Constiution having entrenched Bill of Rights, the judiciary is also clothed with the power of juicial review of legislative enactments. In modern democracy, Parliamentry or Presidential, the executive and the legislature are either joint or separate but co-ordinate, but judiciary in either case is independent from interference in its function both from the legislature and the executive.

The Supreme Court's Appellate Division in a recent historic judgement on the Eighth Amendment of the Constitution in A. Hosain Chowdhury Vs. Govt. of Bangladesh on the decentralization of its High Court Division, has set aside the amendment of Article 100 along with consequential amendement of Article 107 on the ground that the basic structure of the Constitution cannot be altered by the

Legislature, since the impugned amendment is such an alternation, and thereby upheld the democratic structure of our Constitution deeming the expression of the will of the people.

BANGLADESH LEGAL SYSTEM UNDER THE RULE OF LAW.

While examining the aspects of our legal system under the Rule of Law, it should be noted, as to our legal heritage, that our system of law is partly the legacy from Islamic Fiqh and party from British jurishprudence, while remnants of Hindu and customary laws are also traceable, and much of the present judicial system of Bangladesh has its roots in that of the mediaeval Muslim period which was gradually anglicised during the British period but still the Muhammedan element did not disappear. In the family laws sector in respect of marriage, divorce, inheritance, guardianship etc the Muslims and Hindus follow the Islamic Law and Hindu Law respectively as well as the precedents laid down by the Law Courts. In respect of the procedural and other laws evolved due to advances in the commercial, industrial and other economic fields, we have, by and large, retained the British system.

As to the nature of the law of the land, unlike that of the U.K. having no written Constitution the main source of their law being unwritten common law as suitably amended and modified by Parliamentary statutes and supplemented by case law based on judicial decisions, in all other countries including Bangladesh having written costitution there are two kinds of law-(1) Constitutional law i.e. the law relating to and having its source in the written Constitution made by the Constituent Assembly and (2) Ordinary law made by the Legislative Assembly, (i.e. Parliament) in the ordinary process of legislation, which for its validity must be consistent with the Constitution, the Constitution being the supreme law of the land.

Bangladesh has been characterised in the Constitution of 1972 as a unitary, independent and sovereign republic to be known as the People's Republic of Bangladesh and is governed by a written Constitution which determines the framework and functions of the organs of the Government, distribution of powers between those organs, the principles governing the operation of these organs and relationship between them and the citizens. The Constitution proclaims sovereignty derived from the people and is the supreme law of the

Republic and if any other law is inconsistent with it, that other law shall be void to the extent of inconsistency (Article 7). It incorporates entrenched Bill of Rights known as the Fundamental Rights and any law inconsistent with those rights passed by the legislature shall be void to the extent of inconsistency (Article 26).. Article 31 proclaims Rule of Law and provides that to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. The Constitution maintains separation of powers between the executive, the legislature and the judiciary with checks and balances. Independence of the judiciary is proclaimed in the Constitution.

Since justice is administered according to law, constitutionality of legislative and executive acts are derermined and administrative actions are also controlled by the judiciary. While considering the relationship of the judicial system with the concept of the rule of law, it will be convenient to consider in brief the relationship of the executive and the legislative with the concept of the rule of law. Attempt will also be made to summarise the position and to draw certain general conclusions incorporating suggestions.

While considering the rule of law aspect of the executive and legislature it is observed that the Government of Bangladesh is a Combination of Presidential and Parliamentary forms of Government. There is a Prime Minister of Government and Speaker of of the legislature. Thus the Presidential system is not exclusive in that the Prime Minister is appointed by the Presideut from among the elected members of the legislature and is partly responsible to it. It envisages a democratic system of a Presidential form with a written Constitution, where the legislature has plenary power within its legislative field. Except the question of excluding the the Parliament's power from making the executive accountable to it, the Parliament is the supreme law making body and its Acts, subject to the constitufional restrictions, are binding on all Courts, taking precedence over all other sources of law.

Judiciary under the Rule of Law.

The Judiciary occupies a very important position in the political system of democratic country. It is everywhere one of the three principal organs of government and is closely associated with the other two organs of government and with the rights and duties of the governed. According to the resolution of the Internaiional Commision of Jurists as well as the Universnl Declaration on the Independence of Justice unanimously held at Montreal in 1983, an independent Judiciary is an indispensable requisite of a free society under the Rule of Law. The maintenance of independence and impartiality of the Judiciary both in letter and spirit is the basic condition of the operation of the Rule of Law, and as such ensuring the liberty of the people and human progress. Such independence implies freedom from interference by the executive or legislature with the exercise of the judicial functions but does not mean that the judges are entitled to act in an arbitrary manner.

We may here cite a passage from the noted activist Iudge of India, V.R. Krisna Ayer of the Supteme Court : "I may briefly deal with the fascinating and fashionable topic of 'judicial 'independence'. A dependent judiciary, like a powerless power, is a contradiction in terms, but what is the judiciary independent of ? Is it independent of the nation? No. Is it independent of the Constitution ? Emphatically no. Is it independent of accountability of the people in the final analysis as a court ? No. Is arrogance independence ? No. Is improper yet unpunishable conduct independence ? Is concealed social philosophy at war with constitutional sympathies independence ? Justice being taken away then what are kingdoms but great robberies ?" One or two observations of our Suppreme Court will not be out of place. The Appellate Division of the Supreme Court in Abdul Latif Mirza vs. Govt. of Bangladesh observed: "It is now well-recognised that the principle of natural justice is a part of the law of the country." A further observation is there that interpretation of the statute or law which preserves a fundamental human right is to be given rather than one which destroys it. In the true sense of justice no judge has the right to be independent of the social philosophy if he wants to serve under

Let us now turn to the constitutional provisions on Judiciary specially the superior Judiciary. Bangladesh has a hierarchy of courts in three tiers, with the Supreme Court at the apex, comprising two Divisions-the Appellate Division and the High Court Division. In the lower Judiciary in civil side there are District Judges, Subordinate Judges and Assistant Judges Courts, and in Criminal side, Sessions Judges, Assistant Sessions Judges aud Magistrates Courts.

The Supreme Court which is a court of record has the contempt of court powers. The law declared by the Appellate Division shall be binding on the High Court Division, and the law declared by either Division of the Supreme Court shall be binding on all Courts subordinate to it, a provision setting up a centralized judiciary. Under Article 94(4) of the Constitution the Chief Justice and other Judges shall be independent in the exercise of their judicial functions. Article 147 protects some of the constitutional incumbents of whom a Judge of the Supreme Court is one, as to his remuneration, privileges and other terms and conditions of service by saying that they shall not be varied to his disadvantage during his term of office. This relates to the econmic independence of the Judges. The Supreme Court Judges satisfy almost all the rules of independence, economic, political and administrative. We find that the constitutional provisions with regard to appintment, tenure, rumuneration and removal correspond substantially and compare favourably with the declaration of the World Congress on the Independence of Justice at Montreal relating to national judiciary.

The District Courts' Judicial officers from Munsif (now Assistant Judge) to District Judge enjoy substantial safeguard to their independence being mostly under the Control of the High Court Division. The Magistracy is the weakest point of our judicial system. They are executive officers dischaiging judicial and executive work interchangeably and are under executive control. However, there is a part separation of judicial function from the executive at the metropolitan level and an attempt at district and upazila levels. The Constitution however, is not oblivious of this draw back and so Article 22 of the Fundamental Principles of State Policy Chapter has commanded : 'the state shall ensure the separation of the judiciary from the executive organ of the state." In fact since the passing of the East

Pakistan Act XXIII of 1957 providing for separation of thn executlve from the judiciary, the law is hanging calling for its application. The sooner it comes into operation the better for the Rule of Law in this country.

With regard to the appointment of Judges, the present Constitutional position is that the President is the sole authority to appoint a Judge, though previously there was a constitutional provision of prior consulation with the Chief Justice. Apparently there is a deviation, but as briefly mentioned, the consultative practice followed earlier is conventionally followed, and if convention is entrenched firmly, it will furnish more effective safeguard than a mere written precept. It is therefore, suggested that the appointment of the Judges of the Supreme Court except the Chief Justice may be made by the President after consulation with the Chief Justice, and the appointment of the Chief Justice be made on the inflexible rule of seniority as this method is likely to be independent of popular influence as well as of political and sectional consideration and is considered to be the most common and best method. Article 95 of the Constitution should be amended accordingly to restore the same to its original position as it was before the amendment of 1977.

Similarly with regard to the control and discipline of the subordinate courts, Article 116 of the Constitution should be amended and restored to its original position as it was before the amendment of 1975 and the supervising authority over the subordinate judiciary as to control including the power of posting, promotion, grant of leave and discipline of persons employed in the judicial service and the Magistrates exercising judicial functions should vest in the Supreme Court instead of the executive authority.

Criminial Justice

Now a word may be said with regard to the administration of of criminal justice. Besides the existence of the enlightened and independent judiciary, ultimate protection of the individual in a society depends also upon acequate provision for speedy trial of accused. But if we turn from judicial interpretation of laws and the principles enunciated in the Constitution to actuality, we find wide gap between the ideals and the actual iu respect of trial and treatment of prisoners. Under Article 35 of the Bill of Rights every person

accused of a criminal offence shall have the right to speedy trial and none shall be subjected to cruel, inhuman and degraded treatment. But accommodating 20 thousand under-trial prisoners in place of only 17 thousand registered accommodation, excluding convicted prisoners and political detenues, as found in 1979-80, shows a very dismal picture about the condition of undertrial prisoners of criminal cases. Morever, the prison custody goes upto four/five years, even for petty crimes, where the custodial sentence would not exceed more than three months. One of the reasons for this diplorable state of affairs is the appalling poverty of most of the prisoners which stands on their way to find bail when they are brought before the Magistrate after their arrest, as a result they continue to rot in prison for indefinite period, till the delatory machinery of law puts them on trial after long delay. In many a cases of appeals by the convicted prisoners the judgment of acquittal is passed by the superior courts long, some times several years, after the expiry of the period of sentence passed by the court below. These are cases of massive denial of rights inasmuch as, it is not only that the liberty of the prisoner is denied, but in many cases he being the only earning member of his family of several members, it brings misery to untold number of people.

Writs.

The High Court Division of the Supreme Court, which is otherwise the highest court of appeal, civil and criminal, and only from High Court Division appeals, some as of right and the rest by special leave lie to the Appellate Division, which is the highest court of law, specially in constitutional matters, has specified criminal jurisdiction in some company and Admiralty matters and a special jurisdiction commonly known as Writ jurisdiction, in that it has the power of judicial review of executive acts by issuing orders analogous to the high prerogative writs of Mandamus, Prohibition, Certiorari, Habeas Corpus and quo Waranto. But under the relevant Article 102 of the Constitution only an aggrieved person can apply, and the High Court Division of the Supreme Court can issue writs and no other person interested in any such matter can move a writ petition for public benefit except the writ of Habeas Corpus in which case any person can

move a petition for release of a person under detention and of Quo warranto against usurpation of a Publie office.

It is therefore, suggested that suitable provision should be made in the Constitution so as to enable a person to move the Supreme Court's High Court Division for such writs on the ground of pro bono publico for the public good in order to sefeguard public interest and thereby to meet the ends of justice or the Supreme Court may put an extended interpretation to include public interest matter on the article as the Indian Supreme Court has done.

Legal Aid

A society that requires its citizens to live within law must ensure that they have access to the remedies of legal system regardless of their economic conditions. In an unequal society, equality before law implies rendering of legal aid to the poor litigants. Equal access to law for the rich and the poor alike is essential to the maintenance of Rule of Law. But in a poor country like Bangladesh common man can ill efford to pay the high costs of getting justice and as such the highly expensive judicial procedure keeps justice beyond their reach. But the problem is not irremediable though formidable. The remedy lies in legal aid by the State, law associations and individual lawyers.

The reasons behind the idea of legal aid is that judicial machinery for redress or defence should not be denied because of financial need. Achievement of justice, social, economic and political and of equality of status and opportunity are the aims enshrined in our constitution but financial inability of a poor person to obtain access to a court either for redress of wrongs or for defending himself makes justice unequal as he is denied equality of opportunity to seek justice. Legal aid to the poor litigant is therefore, not a minor problem of procedural law but a question of fundamental character. The solution of this problem lies in legal aid by the state, law association and individual lawyers. It is, therefore, essential to provide adequate legal advice and representation to all those threatened as to their life, liberty, property and reputation who are unable to pay for it.

In Bangladesh the provision for state legal aid is very inadequate. In criminal matters only in death sentence cases a poor accused is

given state defence free of costs. There is of course rule for jail appeal, where a convicted person can file appeal through jail authority for consideration of judges sitting in chambers without the presence of a lawyer or the prisoner. In such appeals however, the accused persons do get relief. In civil matters a pauper who is unable to pay court fees and does not own property exceeding one hundred taka can, on establishing his pauperism, bring civil action, but all other legal costs have to be borne by him.

As regards institutional efforts the Bangladesh Bar Council, the statutary body of lawyers, Bar Associations, and voluntary non-governmental legal aid societies have shown an awareness of necessity for rendering legal aid to the poor and some steps have been taken in this regard, but the efforts are not substantial as to have any impact on the litigant public as a whole. Individual efforts are there but not very extensive.

Reconciliation of the freedom of the citizen with the authority of the state has been the recurring problem of civilization throughout the ages. The struggle for freedom against arbitrary power and unjust laws has always been to secure self-governwent, which lie at the very foundation of democratic society. Democracy is the structural or constitutional parameter of state power for the preservation and protection of universal human right of today under the Rule of Law. So in a modern welfare democracy, law is the opinion, reason and will of the society as expressed and formulated through their representantatives, the legislatures, and it took its birth with the birth of man and has grown with the growth of the society, its function being always to regulate the conduct of human affairs so as to balance the competing rights and freedom of those who comprise the socity.

The ultimate protection of individual in a society governed by Rule of law depens upon the existence of on enlightened and independent judiciary and upon adequate provision for the speedy and effective administration of justice. It may be noted that although duty of the judge is not to make law be but to apply law made by the legislature, yet the judiciary has to play a very important role in making case laws by way of interpretation of ambiguous statutory provisions and by enunciating principles of law which is translated into the fact of recognised and enforced law. We may quote here

a seminal observation of a political personality like Roosevelt : "The chief law makers in our country may be and often are the judges because they are the final seat of authority. Every time they interpret the contract, property, vested rights, due process of law, liberty, they necessarily enact into law, a part of a system of social philosophy and, as such interpretation is fundamental, they give direction to all law making, and we shall owe most to those judges who hold a twentieth century economic and social philosophy." So the role of judiciary will not merely be legal interpretation but to serve as an instrument of social engineering.

Achievement of justice, social, economic, political and of equality of status and opportunity are the aims enshrined in our Constitution and full judicial powers have been conferred by the Constitution on the judiciary as an independent organ of the state, but the financial inability of a poor person to obtain access to a court makes justice unequal as he is denied equality of opportunity to seek justice. Hence the necessity of legal aid which has been discussed earlier. We also find a wide gap between ideals and actuals in administration of criminal justice. Crtminal offence is regarded as an offence against the society and the law is set in motion as soon as an F.I.R. (First Information Report) is lodged in the police station and the state becomes the prosecutor. But information gathered from daily newspapers reveals that the complainants don't dare filing an FIR out of fear and even if they can manage to do so under compelling circumstances, the police officers refuse to record the FIR and sometimes they record the case of dacoity as that of simple theft and no step is taken in some cases to apprehend the criminals, who, on getting scent of the F.I.R., fall on the complainant who cannot even stay at his home under threatening circumstances, resulting in punishment of the complainants instead of the criminals. If the criminal law cannot even be set in motion, the question of justice by redressing wrong does not arise and the very existence of law, lawyer and courts becomes meaningless, and the judiciary quite helpless. In this situation effective steps must be taken by the Government to tighten the the executive machinery at lower levels in order to provide safeguards against any abuse or misuse of power and to ensure security and protection of the fundamental right to life, liberty and property of the citizen as guranteed by the Constitution.

As regards delay in administering justice, the formidable criticism against the existing common law judicial system is that its procedure is delatory and expensive, the legitimacy of which cannot be denied. But it is however, to be admitted that certain minimum procedural rules of 'due process' according to American terms, or of 'natural justice' according to English phrase are to be observed if the judges are to render justice according to law and that while dispensing justice the judges cannot dispense with justice. The use or abuse of procedural delay, however, depends upon how the Bench and the Bar behave. An earnest desire on the part of both with an understanding will surely curtail procedural delays. All the blame of delay cannot, however, be laid at the door of procedure or the lawyers. In most countries like Bangladesh inadequacy of the number of judges is the chief cause of accumulation of cases and delay in their disposal. To crown all is the torrent of new legislations, both civil and criminal, which bring the fresh crop of law suits but no increase in the existing strength is made. But the problem of delay though endemic is not incurable.

The foregoing discussion about the judiciary in a democratic state, where human dignity is protected in terms of the U.N. Human Rights Declaration, shows that they have been substantially provided in Bangladesh. The problem with us, like many other developing countries, is not so much with providing the basic formulation of the principles of Rule of law, but the real problem is to translate them into actuality in the life of the people, but that does not mean that we are going to abandon our adherenes to or lose faith in the Rule of Law. In our attempt to state in rough outline the Bangladesh's experience like many other developing countries about the aspect of legal system under the rule of law in an immature political and economic background, we have observed that problems are many, intractable in some, but not insurmountable. Development in reality means economic growth and social change and the legal institution like an independent, enlightened and courageous judiciary, in our experience, is an indispensable instrument to achieve peaceful transition from a traditional rural society to a modern industrial society, and our courts pretty obviously have a job of formidable proportions on their hands to strike a balance balance between the private interest and public need and thereby to maintain its creative role to mould the system of justice to respond

the aspiration and needs of the common man keeping in view the promotional role of an welfare state.

Let objective reasons shape all of our state activities, under the Rule of Law, so as to as to strike the balance between the authority of the state and the fundamental human rights of the citizen by proper and prompt application and enforcement of the law on which rest the peaceful and civilized existence of the society.

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ADMINISTRATION OF ESTATE UNDER MUSLIM LAW—A REVIEW

MD. NURUL HAQ

Introduction

The existing law of administration of a dead man's estates as applied in this sub-continent is a total misrepresentation of the genuine principles of the Muslim law. It is quite unaware of the basic theory of the Muslim law of succession. So there is ao logical relation or coherence between the various rules applied by courts. Some of its rules are contrary to the genuine Muslim law, some rules are more in agreement with the English law of succession and some are arbitrary and peculiar to themselves. The fundamental Muslim principles to the effect that the payment of the deceased must precede the exercise of the rights of inheritance by the heirs is defeated completely. Before paying the debts of the deceased the heirs are allowed to pass an absolute title.

So, the law applied in this sub-continent is very unsatisfactory. It is neither conducive to substantial justice nor is it in accordance with the genuine principles of Muslim law. It is not even English law. For the ends of justice the payment of the deceased's debt should be made before the acquisition and disposal of the inheritance. This is expressly laid down in the Qur'an[1].

In this article attempts will be made as to how far the Muslim law i.e. *Sharia* law of administration of estate of a deceased person, devolution of inheritance and right of alienation is affected by legislations and judicial decisions.

A. Administration

An executor under the Muslim law is called *Wasi*, derived from the same root as *Wasiyyat* which means a will. But it did not recognise an administrator. The executor under the Muslim law was merely a manager of the estate and no part of the estate of the deceased vested in him as such. As a manager all that he was

1. The Qur'an, IV : 11-12

entitled to do was *to pay the debts* and distribute the estate as directed by the will. But he has no power to sell or mortgage the property of the deceased, not *even for the payment of the debts.* The first time this power was conferred upon him was by the Probate and Admistration Act, 1881. Under section 4 of that Act the whole of the property of a Muslim testator vested in his executor, and it does so now under section 211 of the Succession Act, 1925.[2] The property vests in the executor even if no probate has been obtained. But section 211 of that Act must be read along with the limitation which are imposed under the Muslim law on the rights of a testator to dispose of his property.

As a result of the vesting of the estate in the executor, he has the power to dispose of the property vested in him in the course of administration, a power which he did not possess before the probate and Administration Act, 1881. This power given by section 90 of the Probate and Administration Act, 1881 and by section 307 of the Succession Act, 1925. Section 307, however, is to be read subject to the provisions contained in the Muslim law limiting the powers of disposition of the Mulim testator; the powers of the executor cannot be extended over the entire estate without being limited by the provisions contatined in the Muslim law which restricts the power of testamentory dispostition by a Muslim. In the Hanafi system of of law it is not the duty of an executor to partition the property amongst the heirs.

So, we find that as regards the administration of the estate of a deceased person, the Muslim law has been superseded in Indo-Bangladesh sub-continet by the Succession Act 1925, and such administration is carried out by the executors or administrators under the provisions of the said Act. They are active trustees for the purpose of the will as to one-third of the estate, which remains after the payment of the funeral expenses and the debts and bare trustees for the heirs as to the remaining two third.[3] The powers and the duties of the executors and administrators are defined in the Succession Act, 1925 which applies to all persons in this sub-continent including Muslims.

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2. Act. No. XXXIX hereafter cited as the Succession Act.
3. *Mirza Kurrat-ul-ain Bahadur* V. *Nawab* Nuzhat-ul-dowla 33 Cal. p. 116.

Some of the rules of the pure Muslim law have been compared below with the provisions of the Succession Act, 1925, so that it may be clear how far the Muslim law has been superseded in this respect by the said Act.

Where there are several executors, there is a conflict amongst the Muslim jurists as to whether one of several executors can act by himself, without the concurrence of others, and the better opinion is that he cannot act alone, except for the preservation of the estate of the deceased, or for providing his funeral expenses, or for the immediate necessity of his family or property.[4] But under section 311 of the Succession Act, co-executors have been regarded as individual persons and consequently the acts of any one of them, in respect of the administration of the estates, are deemed to be the acts of all, for they have all a joint and several authority over the whole property.[5] Its application is confined in its operation to cases where the obtaining of probate is compulsory before dealing with property.[6]

Under section 226 of the Act, it is provided that on the death of one of several executors, the power goes to the survivor or survivors, so also in case of administrators. This is more in consonance with the Shia law[7] ; But there is some difference amongst the Hanafi authorities, and apparently the executor of a deceased executor is substituted in place of the latter.[8]

Under the Muslim law, the Court has been vested with power to appoint a joint administrator when the executor is weak or incompetent. There is no such power under the Act. [9]

Under the Muslim law, a minor may be an executor and may act as such, but on application being made, the Qazi may remove

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4. Nail B.E. Baillie's *Digest of Moohummudan law* : Part I (Hanafi Law, Sunnite) 2nd edn., London, 1875, p. 670, part II, 1st edn., London, 1896; *Hyderman Kulti* V. *Syed Ali* 37 Mad. p. 514.
5. *Owen* V. *Owen* 1 Atk p. 494.
6. *Chidambara* V. *K.ishnasami* 39 Mad. 365.
7. Nail B.E. Baillie's *Digest of Moohummudan Law* : Part II (Ithna Ashari law, Shiite), 1st edn, London 1896. p. 250, 251, 240.
8. Nail B. E. Baillie's *Digest of Moohummudan Law* Part I (Hanafi law Sunnite) 2nd edn. London, 1875 p. 671, 572, 678.
9. Sections 222 and 229 of the *Succession* Act, 1925.

him.[10] Under section 223 of the Act, a minor cannot apply for probate but it is silent as to his capacity to act without obtaining probate. The Shia authorities, and the two disciples, Abu Yusuf and Imam Muhammad, have allowed the limited grant of administration where the executor is a minor, similar to the provisions of the Act.[11]

The Muslim law does not allow the appointment of a non-Muslim as an executor,[12] but under the act until his removal, his appointment remains valid and his administration is effectual. [13]

Under the Muslim Law, an executor nominated by the testator cannot be removed exeept for breach of trust, though an administratior may be appointed to act jointly with him. Under the Act refusal of the probate is not allowed on the ground that Court does not think that the duly appointed executor, not incapacitated by law, is a fit person to act as sush .[14]

In the Hanafi system of law, it is not the duty of an executor to partition the property amongst the heirs, but in a partition he represents the minors and the legatee of any fraction of the estate, and occupies the same position an heir.[15]

Except by operation of the succesion Act the estate of the deceased does not vest in an executor under the Muslim law.[16]

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10. Nail B. E. Baillie's *Digest of Moohummuhan law* : Part II (Ithna Ashari law, Shiite), 1st edn. London, 1896 p. 248, 249; sections 244, 245 of the Succession Act, 1925.

11. *Fatawa-i-Alamgiri* Vol. VI, p. 214; Nail B.E. Baillies' *Digest of Moohummudan law* : Part I p. 669; part II p. 249, 251.

12. Ibid.

13. *Moohummud Ameenoodee* V. *Mohd. Kuberoodeen* (1825) Sel; Rep. IV, p. 49, 55; *Henry* Imlach V. *Mt. Zuhurunnissa Khanum* (1828) Sel. Rep. IV, p. 301.

14. Sections 223, 298 of Succession Act, 1925.

15. Nail B.E. Baillie's *Digest of Moohummudan law* : Part I, (2nd end. London 1875) p. 67-74; section 211 of the Succession Act, 1925.

16. Sections 211, 307; *Joykali* V. *Sibnath Challinga* (1866) 2 Beng. L. R (O.C.J.) 1; *Kherodemoney Dassee* V. *Doorgamoney Dassee* 4 Cal. p. 455; (Mirza) *Kurrat-ul-ain* V. *Nawab Nushat-ud-dowla* 33 Cal. p. 116, 32 I.A. 244.

The Muslim Law does not make any distinction between the moral duty of accepting an executorship when asked to do so and the legal incapacity to renounce after acceptance.[17]

Whether an executor can purchase any property of the deceased or not is a conflicting question in the Muslim system, but it appears that he can do so so at a fair price;[18] while under section 310 of the Act such transfer is voidable at the instance of any interested person.

In the Muslim system, the law as to the liability of an executor or administrator is that "an executor is an ameen or trustee and, therefore, not responsible for any loss or destruction of the deceased's property unless occasioned by his departure from the conditions or rules of his office or by some personal neglect;[19]" while under sections 368 and 362 of the Act, the executor or administrator is liable to make good the loss or damage so occasioned if he misapplies the property of the deceased.

Under the Muslim law, "in the case of a bequest, the transfer is to be decreed from the date of death of the testator and not from the time of taking possession."[20] This rule has now been superseded by section 337 of the Act which lays down that the executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death,

The executor is allowed remuneration for his work as such under the Muslim Law;[21] while in this sub-continent a guardian or an executor is considered as a trustee, and as such, is not allowed to derive any sort of benefit from his office.[22]

B. Devolution

According to the Hanafi, Shafi'i and Maliki schools, the heirs become independent owners of the solvent estate at death in spite of the existence of debts owned by the deceased. Only the Shii (Ithna

17. Nail B. E. Baillie's *Digest of Moohummudan law* : Part II, p. 250, 665, 667; *Ayesha Bai* V. *Ebrahim Haji Jacob*, 32 Bom. 364.
18. *Ibid* p. 250; section 310.
19. Nail B.E. Baillie's *Digest of Moohummudan law* : Part II. p. 250 ; sections 368, 369.
20. *Ibid.* p. 207, section 337.
21. *Durr-ul-Muhtar*, Ch. on Nafaqa, fasi 1, Trusts Act, sections 50, 51.
22. F.B. Tyabji, *Muhammadan Law*, p. 736.

Ashari) School maintains that until the payment of debts the devolution of ownership to the heirs is postponed. But although according to the former schools the heirs become the owners of the solvent estate they cannot exercise their rights of ownership by transfering an absolute title to the transferee by sale, gift, division, composition or other means until they have paid the deceased's debts. Without exception all the schools admit the principle that there is no inheritance until after the payment of debts. We are not concerned with the insolvent estate where there is no inheritance at all.

Succession of the heir is postponed to the payment of debts.[23] The heir does not take any thing until after the payment of debts.[24] There is no inheritance until after payment of the debts.[25] It is consensus of opinion of the Muslims that there is no inheritance until after the debts ... are paid.[26]

But it is laid down by judicial decisions that the whole estate of a deceased Muslim devolves upon his heirs at death in specific share. This is so even where there is existence of debts owned by the deceased. It is immaterial whether the amounts of debts are smaller or larger than the value of the assets. The estate devolves upon the heirs whether the estate is solvent or insolvent or whether the debts are paid or not. The view that the insolvent estate devolves to the heirs is contrary to the genuine Hanafi law. It is also contrary to the Hanafi law that the heirs of an insolvent estate may even proceed to distribute it and pass an absolute title to a bonafide acquirer.

In 1883, a Full Bench of the Allahabad High Court decided the question of devolution in the case of *Jafri Begum* V. *Amir Mahammad Khan*.[27] His Lordship Mr. Justice Mahmood appears to have dealt with the question exhaustively. In this case[28] Mr. Justice Mahmood searched out the texts for himself. He tried to support his conclusions by citing original authoritities of Muhammadan law. Mahmood, J. said : "Upon the death of a Mahammadan owner, the inheritance vests immediately in his heirs and is not suspended by reason of

23. Akmaladdin Mohammad Ibn Mahmud al-Babart's *Inayah*, iii p. 374.
24. Shams al-A'immah Abu Bakr Muhammad ibn Ahmad, *al-Sarakhsi's* Mabsut, XV, p. 59
25. Sahnun ibn Said al-Tanukhi's *Mudawwanah*, xiii p. 86.
26. Imam Muhammad ibn Idris al-Shafi's *Kitab al-Umm*, iv. p. 29.
27. (1885) 7 All. 822
28. *Ibid* p. 827.

debts, being due from the estate of the deceased ... the existence of debts whether larger or smaller is quite immaterial.[29] Mahmood, J. uses the word 'inheritance' which apparently means the estate. Inheritance is not the asset.

Prior to 1885, in two earlier cases the court relying upon certain passages of Hedaya translated by Hamilton expressed the correct views, though as obiter.

In *Syeed Imad Hossein* V. *Musammat Hosseinee Buksh*[30] "decided in 1870 by Phearson and Turner" and it (the passage) seems also to demonstrate that where the owner had died free from debts his estate will pass to the heirs, when the owner has died involved in debt his estate does not pass to the heirs".[31] Without mentioning their earlier case the same judges in 1875 in the case of *Hamir Singh* V. *Musammat Zakia*[32] quoted with approval passages from the Hedaya to the same effect.

Mahmood, J. commenting upon the correct view in the latter of the above two cases opined : "... but the point remains whether the extent or amount of the debts, affects the question. Some of the passages quoted from Mr. Hamilton's Hedaya in the Full Bench case of *Harir Singh* V. *Musammat Zakia*[33] would go to indicate an affirmative answer. But the translation is only a loose paraphrase of the original Arabic and is liable to convey a wrong meaning. What is meant by the heirs to the insolvent estate being prevented from inheriting simply refers to the rule that nothing will be left to them to inherit if the liabilities of the deceased swallow up whole estate".[34]

Mahmood, J. in support of his own view of the Muslim law, relied upon the Privy Council case of *Bazayet Hossein* V. *Dooli Chand*[35] decided in 1878. He also relied upon certain citations of the original authorities on Muslim law. In *Bazayet Hossein's* case it was observed that an heir "had the right to convey his own share of the inheritance and was able to pass a good title to the alienee notwithstanding any

29. *Jafri Begum* V. *Amir Mohammad Khan* (1885) 7 All. 822, p. 828.
30. (1870) 2 North West Frontier Province High Court Report, p. 327.
31. *Ibid.* p. 333.
32. (1875) All 57 p. 58, 59.
33. *Ibid.*
34. *Jafri Begum* V. *Amir Muhammad Khan* (1885) 7 All. p. 839.
35. (1878) 51 A. 211.

debts which might be due from his deceased father."[36] Mahmood, J. goes on saying that the ruling of Privy Council "cannot be understood without holding that upon the death of a Mohammadan owner, the inheritance vests immediately in his heirs, and is not suspended by reason of debts being due from the estate of the deceased. The Privy Council ruling is, therefore, a clear authority in support of my view, and indeed I may go to the length of saying that no other view can reconcile the ruling with the undoubted principles of law and equity in such cases...."[37]

Now, at the first hand the case of *Bazayet Hossein* was decided upon the earlier case of *Wahidunnissa* V. *Shubrattun*[38] and on some authorities such as William on '*Eexecutors*' and Sugden on '*Vendors and purchasers*'. These two books are not authorities on Muslim Law. Reference to the original authorities was ever made in neither of these cases. On the contrary, the principle in *Wahidunnissa's case* is more in conformity with the English Law as applicable to to heirs and devisees as to real estate and executors as regard personality.[39] Secondly the original *authorities cited relate and are true of* the devolution of inheritance to the heirs but these do not relate to the devolution of estate in which the debts exceed or are equal to the assets. They all pre-suppose the existance of surplus of assets or of an inheritance. In other words, they relate to solvent estate. At page 832 Mahmood, J. quoted some passages from *Baidawi Sirajiyyah.*

These passages pre-suppose the existence of an inheritance which is to be distributed after the payment of debts. In the same way at page 833 and 834 Mahmood, J. quoted Passages from Ibn Najaim's Ashbah Wa'n–Noza'ir and these relate to inheritance "which enters the ownership of a man without his consent" and the moment of inheritance. At page 837 Mahmood, J. also quoted a passage from the *Hedaya* of Hamilton. This passage relates to the right of the heirs and this is a right which is established at the death of the testator. At page 839 he quoted a pertinent passage and this passage was from Qadi Khan. The passage runs thus : "Debt

36. *Bazayet Hossein* V. *Dooli Chand* (1878) 5 I.A. 211 p. 220.
37. *Jafri Begum* V. *Amir Muhammad Khan* (1885) 7 All. 822 p. 829 & 829.
38. Beng. L.R. 54.
39. *Ibid.*

neither prevents the setablishment of the heir's proprietorship nor division."

By this passage Qadi Khan means that if the debts do not exhaust the assets, the ownership of the heirs is not prevented. This meaning of the above passage of Qadi Khan finds support from the passage of Qadi Khan quoted below—"The debts exhausting the asset prevent the ownership of the heirs." [40]

Mahmood, J. is silent about those passages of the Hadaya which support the view contrary to his own. Apparantly he was silent about those passages of the Hedaya on the basis of which one can arrive at a correct conclusion.

Some of these passages of Hedaya correctly translated by Hamilton are : ".....a debt.....equal to the whole (estate).....prevents the estate from being the property of the heirs."[41] "If the estate be completely overwhelmed with debt neither composition nor division of it amongst the heirs is lawful, because the heirs are not in this case, masters of the property."[42]

Even he does not controvert the passages from Mucnaghten.[43]

In fact, there is not even a single authority cited by him to substantiate his view that when the debts exhaust the estate it devolves to the heirs. On the contrary, there are numerous authorities which substantiate the opposite correct view that where the debts exhaust the assets the heirs do not acquire ownership of an estate (much less than they distribute it) and that in such a case it remains in the fictitious ownership of the dead man.

It is true that the contention of M. J. has been followed in the latter decisions. Moreover, it has been approved by the Privy Council.[44]

If the law enunciated by Mahmood, J. that the heirs become owners of the insolvent estate is accepted as correct it would lead

40. *Qadi Khan* iii p. 552.
41. *Hadayah*, translated by Charles Hamilton, 2nd edn. by S.G. Grady, London, 1870, p. 575.
42. *Ibid* p. 454.
43. Sir W. Macnaghten's *Principles and Precedents of Muhammadan law* (ed. by W. Sloan, 7th Reprint, Mad. 1890) p. 87, 88, 94.
44. *Kazim Ali* V. *Sadiq Ali* (1938) 65 I. A. 219 p. 232; F.B. Tyabji's Muhammadan Law (3rd ed. Bombay, 1940) p. 735.

to obvious inconsistences. In that case the heirs will proceed to disiribute the insolvent estates among themselves paying no attention to the debts of the deceased and the creditor will not be in a position to declare their distribution invalid. They are to be satisfied with the unsatisfactory remedy of suing each one of the heirs for a proportionate part of the deceased's debt and up to the value of the estate.

Of course a creditor being aware of the insolvency of the deceased can file a petition under the Insolvency Act for the administration of the estate. In a case where this is not done the correct law is that the heirs ought to be made personally liable for all the debts of the deceased as they have voluntarily merged the property of the deceased with their own peoperty.

This is so because the faults are the theirs. For they being aware of the extent of debts, have not taken the step of keeping the property of the deceased seperate from their own. Now they have taken the precaution of having the estate administered by the Court by drawing an inventory.

In support of this view we have an old case [45] decided in 1859. The judgement of this case speaks of the heirs as 'wrongdoers' because they have intermeddled illegally their own property with the deceased estate. [46] So far as Shia Law is concerned the estate does not devolve upon the heirs so long as the debts remain unpaid. In Iran the prevailing view is this.[47] It is, in principle, agreed that the law governing the administration and distribution of the estate of a deceased Shia, is the Shis law.[48] Very little is known of the Shi'i law of inheritence. Perhaps, no case has come up to the Courts for decision upon that subject. As has been the general practice prior to about 1841, the Court would be compelled to apply the Hanafi law to the deceased Shia's estate.[49]

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45. Decision of *Sader Dewanny Adalat* (Bengal) 30th April, 1859, p. 540.
46. *Ibid.*
47. Iranian Civil Code, Art. 868.
48. "The Mohammadan Law of Succession applicable to each sect ought to prevail as to litigation of that sect". *Rajah Deeder Hossein* V. *Ranee Zuhoor-un-uissa* (1841) 2 M. I.A., p.'441, p. 447.
49. *Mussammat Hayatun-nissa* V. *Sayyid Muhammad Khan* (1890) 17 I.A. p. 73 p. 78; *Akbar Aly* V. *Mohammed Aly* (1931) 57 Bom. p. 551, 559; *Aghaali Khan* V. *Anjuman Ara Begum* (1903) I.A. 94. p. 110 ; *Aziz Banu* V. *Mohammad Ibrahim Hossein* (1925) 47 All. p. 823, 835.

C. Alienation

The Qur'anic principle, "There is no inheritance until after the payment of debt"[50] is undoubtedly the substantive law and so this should be regulated by the Muslim Persanal Law only. But it will be seen that the Court regulated this principle in name.

In *Syed Shah Enaet Hossein* V. *Syed Ramzan Ali*[51] the Court said, "It is the duty of the heir to pay all debts before appropriating any portion of assets to his own use." In *Bhola Nath* V. *Maqbul-un-nissa*[52] the Court said : "It cannot be disputed that the liquidation of the debts of a deceased Muhammadan should precede the distribution of the property among his heirs..... The heir, in fact, takes no beneficial interest excepect..... after payment of the debts of his ancestor."

In *Abdul Majceth* V. *Krishnamachariar*.[53] the Court held : "..... ..in the administration of the estate the funeral expenses, debts and legacies must be paid first and it is only the residue that is available for distribution among the heirs."[54] In *Kazim Ali Khan* V. *Sadiq Ali Khan*[55] the Court said : "That the right of the heir under the Mohammadan law is a share in the estate after debts and valid legacies have been provided for is undeniable. It is laid down no less than three times in the fourth sura of the Qurau. The principle is not disputed by any one..... In providing that the heir takes a share in the net estate after the deduction of the debts of the deceased, the Mohammadan law is in line with the other laws."[56] Though in the first three cases the correct view was given the Courts continued to go on wrong. As shown in the fourth case above, in 1938 Sir George Rankin made a vigorous statement of the correct view in the Privy Council. It was too late to correct mistakes which had been made by the Courts which said that the heirs can distribute

50. The Qur'an iv : 11.
51. (1868) 1 Beng. L.R. Appellate side p. 172 p. 173.
52. (1903) 26 All. 28 p. 33-34.
53. (1916) 40 Mad. 243
54. *Ibid* p. 253.
55. (1938) 65 I.A. 219.
56. *Ibid* p. 231.

and transfer the estate (even insolvent estate) and pass a good title to a modified transferee before the actual payment of the debts.[57].

So the Muslim law on the point is totally defeated and the creditors of the deceased are also seriously prejudiced. If the heirs transfer the property before the payment of the debts, the creditors cannot challenge it to be declared invalid and so they are deprived of this instrument to compel the heit to pay the debts. They are left somewhat at the mercy of the heirs. They are to be contended with the unsatisfactory remedy of having to sue the alienating heir and also every other heirs personally for a proportionate share of the debts. So after the death of the debtor their rights become weakened inttead of becoming stronger as in Muslim law. Their rights against the property of the deceased have been taken away. Their rights against the property have been replaced by their Inferior rights against the person of the heirs for a fractional share of the debt.

If the heir becomes insolvent after having transerred his share in the property, the creditors have no other alternative but to compete in equality with the personal creditors of the heir. As revealed by the decisions of the Court in the history of this principle one can see two distinct phases. Upon questions of Muslim law the British Judges of the Sadder Court invariably consulted the Muslim law officers attached to their Courts prior to about 1864. Thus the principales ofMuslim law were, to a large extent, admitted and given practical effect. Eor example, in 1852 in the case of *Mohammad Noor Baksh* V. *Budun Chand Bebe*[58] the principle was positively recognised until the heir had first paid the debts of the deecased he had no right to alienate the property.

In the above stated case, as creditor of her dower, the widow was in possession. The fact of the case, in brief, was that the

57. *Compbell* V. *Delany* (1863) Marshall's Rep. p. 509; *Mt. Wahidun-nissa* V. *Mr. Shabrattun* (1870) 6 Eeng L.R. 54; *Bazzayet Hossein* V. *Dooli Cnand* (1878) 5 I.A. 211; *Land Mortgage Bank* V. *Bidyashari* (1879) 7 C.L.R. 460, 463; *Jafri Begum* V. *Amir Mohammad Khan* (1885) 7 All. 822; *Abdul Majeeth* V. *Krisnamachariar* (1917) 40 Mad. 243 244, 253-254; Sir D.F. Mollah's Principales of Mahameddan Law, 11th edn. by Sir G. C. Rankin Cal. 19; Ameer Ali's Mahomedan law 2 Vols. 4th edn. Cal. 1912, 1917.

58. Decisions of the Sadder Dewanny Adawlat, 2nd Sept. 1852, p, 885.

heir sold certain properries to party who in his turn sold it to the plaintiff who filed the suit for recovery of possession from the widow. The two judges named Sir R. Barlow and Mr. Jackson opined as follows : "the claim for the ground of dower takes precedence over all clains of inheritance; consequently, the heir Moheeooddeen had no power to transfer the property by sale till he had first paid the dower; and the claim by virtue of sale from him must be held contingent on the fact that the claim of the widow for dower has been satisfied".[59]

In the avove case it was held by the judges that until the plaintiff had paid the dower debt he could not recover possession and thus it is implied thereby that the transferee from the heir took the property subject to dower debt which was a kind (sort) of lien upon the deceased's estate. The above view is questionable but it is significant that the principle was admitted and that until the heir had paid the debt he had no power to dispose of the property.

According to Muslim law the correct view is that the alienation made by the heir is valid subject to the condition that the heir pays the debt. In default the widow i.e. the creditor has the right to annual the transfer.

In the case of *Khajah Abool Hossein* V. *Maharahiah Heetnarain*,[60] the heirs appropriated the inheritance and distributed the deceased's property before payment of the debts of him. In the above case the heirs wilfully fused the deceased's property with their own personal property and as a result the personal property of the heirs became undistinguishable from the former. In this circumstances, the Court allowed the creditor a decree to be executed from all the properties which were in possession of the heirs.

The burden of proof was upon the heirs that the attached property was not an asset of the deceased nor that it was acquired out of the funds derived from him. By the judgement of the above case, the Court clearly recognised the rule that until after the payment of debts the heirs have no inheritance.

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59. *Ibid*, 885.
60. Decisions of the Saddar Dewaanny Adawlat (Bengal), 30th April, 1859 p. 539.

The Court said : "In appropriating the inheritance and distributing it without providing for the payment of their father's debts, there is no doubt, therefore, that the appellants have placed themselves in the position of the wrong-doers.

They have violated the rules of Mohammadan law, which seems to have been expressly intended for the protection of creditors against the risks to which they would otherwise have been exposed from the practice of confining the liability of heirs to the amount of assets they have received ...." They have intermeddled illegally with the assets which ought to have been devoted to the payment of their father's debts and must take the consequences. The heir of a Mohammadan owner has his duties as well as his privileges and cannot be allowed to claim the one without fulfilling the other."[61] It is to be noticed here that the right of the creditor to set aside the distribution of assets had not been mentioned. In 1870,, in the case of *Syed Imad Honsein* V. *Musammat Hoosseinee Buksh,*[62] this right of the creditors general were reviewed. Though this case was decided after the abolition of the institution of law officers it is more in spirit with the above mentioned cases decided in 1852 and 1859.

Before we pfoceed to see how after 1864 this principle is grdually lost sight of it is convenient to deal with it here. In this case the widow in possession resisted the claim of the heirs for distribution on the allegation that her dower was not paid. In the iadgement the Court is silent about the right of the widow to retain possession so long as her dower debt was not paid. Their lordships Phearson and Turner, JJ. said : "i) that the debts of the deceased must be paid before the estate is pivided but ii) if creditors are not present to assert their claims, the division of the estate need not be postponed, iii) creditors who later appear and assert their claims are entitled to set aside the partition of the estate so as to render it available for the satisfaction of their claims, or to hold the heirs personally liable to the extent and in proportion of shares taken in the estate".[63]

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61. Decisions of the Sadder Dewanny Adawlat (Bengal), 30th April, 1859 p. 539.
62. 1870 North West H.C.R . Vol. 2 p. 327.
63. *Ibid.*

Now we are proceeding to deal with the second and present phase of this principle. The system of attaching Muslim law officers to Court was abolished in 1864. The Judges were left alone and they themselves were to decide issues upon the Muslim law as they could. In the absence of Muslim law officers the available information upon Muslim law was not sufficient to enable them to come to a correct interpretation of the law.

As a result, their interpretation and consideration of this principle is totally contrary to the Muslim law. They were well-conversant with the English law of debt and of the bonafide acquirer from the heir and so they were wholly influenced by the above English laws. They often equalised or assimilated the position of a Muslim heir to that of an old English heir-at-law, "to devissees as to real estate and to executors as regards personality."[64] To well-understand the matter we propose to discuss it by illustration.

Let us discuss the case of *Campbell* V. *Delany* decided in 1863. The fact of this case was that the heirs had mortgaged the property to the dependent before paying the debts. A creditor of the deceased instituted a suit and obtained a decree and he executed the decree by selling the property. The plaintiff purchased the property. The plaintiff purchased the property in execution proceedins, So the plaintiff claimed possession of the property. The Court's decision, in this case, was that the heir was free to transfer the property like the old English heir-at-law of landed estate before payment of debts. The Court also decided that the bonafide acquirer who is a mortgagee took a better title than the execution purchaser.

Bayley, J. held : "Both the Ennglish law and our practice are opposed to this view (that the mortgage was not valid unless it was to pay debts). As to English law, the passage cited by Mr. Doyne from Williams on '*Executors*' page 838 clearly shows that executors acting for the benefit of the estate are entitled to sell and that the purchasers are not bound to follow the purchase money to its ultimate application".[65]

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64. *Bazzayet Hossein* V. *Dooli Chand* (1878) 5 I.A. 211 p. 221.
65. *Ibid* p. 512.

Cambell, J. observed : "There can be no doubt of the obligagation of heirs to apply the proceeds of the estate to discharge the debts; but I do not think that it necessarily follows that he is deprived of all power of alienating or dealing with the property. Under the strict construction of Mohammadan law regarding the obligations of heirs, I think that the heir must at best be considered to be in as good a position as an English executor. And an English executor has the fullest power to deal with the property for reasons of good equitable policy.....I conclude then that..... even under the Mohammadan law, the heir has full power to deal with the property".[66]

So it is apparent that Campbell, J. had a misapprenhension of the Muslim law of succession. His lordship erred in law when he remarked that he was unable to be convinced of the existence of a law in which the heir cannot alienate so long as the debts had not been paid.

In the similar case of *Syed Shah Enaet Hossein* V. *Syed Ramzan Ali* [67] decided in 1868 the Court recognised the principle by saying, "that it is the duty of the heir to pay all debts before appropriating any portion of the assets to his own use."[68]

But in the next breath they contradicted their above observation by saying that the heir could transfer a good title before paying the debts. The two judges, Macpherson and Bayley, further said : "but although that is unquestionably so, it does not follow that a third party who purchases from the heir bonafide and for full consideration, may not by his purchase acquire a good title as against a creditor."[69]

In the case of *Wahidunnisa* V. *Mussamat Uhufratun* [70] decided in 1870 the judges followed the same English principles of former cases. They carried the English principles of the former cases further by saying that upon the death of a Muslim owner the heirs themselves but not the estate, become answerable for the debts.

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66. (1863) Mashall's Rep. 509 p. 514, 515.
67. (1868) 1 Beng. L.R. Appellate side p. 172.
68. *Ibid* p. 173.
69. *Ibid* p. 172, 173.
70. (1870) 6 Beng. L.R. p. 54.

So before paying the debt the heir was at liberty to dispose of the property and pass a good title to a bonafide acquirer for value. The creditor had no right to set aside the transfer but up to the amount of the asset he could sue the heirs personally. The creditor had no lien to follow the property disposed of by the heir.

Hobhouse, J. observed : ".. so that it seems to me it is not the estate as it stood, be it... .. in land or in money, or in what not, which is itself answerable for the debts of the deceased ; but it is the heirs themselves who are anwerable and that to the extent of any asset which they may have received."[71]

In 1878, in *Bazzayet Hossain* V. *Dooli Chand*[72] the Privy Council followed the above case of 1870. The Privy Council observed : "The principle of that case (Wahidunnisa's case) is applicable to the present, and the ruling is quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personality. In Sugden on '*Vendors and purchasers*'.....In Williams on '*Executors*' a similar rule of Law is laid down with regard to executors.....It is said, "it is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate and that they cannot be followed by creditors into the hands of the alienee."[73]

In this case it has been decided that the heir had "the right to convey his own share of the inheritance and was a ble to pass a good title to the alienee notwithstanding any debts."[74]

Conclusion

It is apparent that the existing law ought to be allowed to prevail for various reasons. Firstly, in this sub-continent the law of administration of the estates of the deceased persons purports to be the Muslim law and so there arises a necessity of reversal to the genuine principle of that law. In this sub-continent the restoration of the genuine Muslim law by legislative action is no new thing. The Mussalman Wakf Validating Act, 1913, 1930

71. (1870) 6 Beng. L.R. p. 59.
72. 5 I.A. p. 211.
73. *Ibid* p. 211.
74. *Bazayet Hessein* V *Dooli Chand*, 5 I.A. p. 220.

and the Muslim Personal law (Shariat) Act of 1937 were passed to restore the genuine Muslim law.

The principles of the genuine Muslim law of administration of the estate of the deceased are more just and equitable than those of the existing law in this sub–continent. This is the second and most important reason.

The whole Muslim personal law as applied in Bangladesh should be codified. Until the moment is ripe for a thorough condification of the whole Muslim Personal Law the the legislature ought to make the administration of the deceased's estate compulsory. If this is done it would make certain that the deceased's debts are paid before the property is vested in the heirs. The Succession Act, 1925 is a partial measure because according to this Act where there is no executor, the administration of the estate is optional.[75]

For the compulsory administration of the estate of the deceased more thorough measures have to be taken in Bangladesh.

It may be suggested that in Bangladesh a Code of Muslim Succession ought to be enacted emboding the principles of the Shari'ah which are in conformity with modern requirements to form a part of a general Code of Muslim Personal Law. Amongst others the propose Code slould contain the following : (a) The law of will and life estate ; (b) probate and administration of the estate when all heirs are adult ; (c) Rules relating to the administration of the property of minors. It should be made obligatory to appoint a guardian of property ; and (d) Rules of inheritance.

75 Succession Act, 1925, Secs. 212(2), 213, 269.

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THE IMPOSITION OF MARTIAL LAW IN BANGLADESH, 1975: A LEGAL STUDY.

DR. M. ERSHADUL BARI

1. Introduction

The term 'Martial Law' in its proper sense[1] means that kind of law which is generally promulgated and administered by and through military authorities in an effort to maintain public order in times of insurrection, riot or war when the civil government is unable to function or is inadequate to the preservation of peace, tranquillity and enforcement of law and by which the civil authority is either partially or wholly suspended or subjected to the military power. Therefore, it is an emergency measure and is the great law of social defence. In Constitutional Law, Martial Law finds its justification in the common law doctrine of necessity for its promulgation and continuance; all measures taken in exercise of the power of Martial

1. The expression 'Martial Law' has also been used in three other senses by various authors at different times. Firstly, in earlier times 'Martial Law' was used to mean what we now call military law, the law for the discipline and government of the armed forces. It had this connotation up to the latter part of the eighteenth century. Prior to that period, no distinction was made between the military law and the Martial Law of the present day as they had a common historical origin in the law that had been administered in medieval England in the Court of the Constable and the Marshal. Secondly, the expression 'Martial Law' was commonly used in the sense of "military government in occupied foreign territory" and meant the law administered by a military commander in occupied foreign territory in time of war. Martial Law in the sense of 'military government' took the place of a suspended or destroyed sovereignty and replaced the previous government agencies. In this sense, Martial Law is quite outside the seope of municipal or constitutional law; it is a part not of municipal but of international law. Thirdly, 'Martial Law' is used to mean the deployment of troops, in aid of, and under the direction of, the civil authorities to suppress riot, insurrection or other disorders, in the land with out the proclamation of Martial Law. It is to be noted that the right to enlist the support of the military forces by the civil authority in its effort to restore order is common to the law of every civilised country. This right of the executive cannot be properly called Martial Law. It seems that, for the lack of an alternative name the expression 'Martial Law, is used to mean the use of military forces in the aid of the civil authorities in suppressing riots and other public disorders"

Law must be justified by requirements of necessity alone, the necessity to restore law and order. Thus it can be declared in times of grave emergency, when society is disordered by civil war, insurrection or invasion by a foreign enemy, for speedy restoration of peace and tranquillity, public order and safety in which the civil authority may function and flourish. The declaration of Martial Law would in case of foreign invasion, mainly serve the purpose of enabling the forces of the country to be better utilized for its defence and in cases of rebellion or other serious internal disorders would enable the government to arrest persons resisting its authority, summarily try and promptly punish them when the ordinary course of justice is, for its slow and regulated pace, utterly inadequate in an emergency when every moment is critical.

However, for the first time in the history of sovereign and independent Bangladesh, Martial Law was declared throughout the country on 15 August 1975. The purpose of this paper is to examine the legal aspect and impact of this imposition of Martial Law.

II. The Coup d'Etat and the Proclamation of Martial Law

The fundamental character of the 1972 Constitution of Bangladesh, which was passed by the Constituent Assembly on 4 November and put into effect on 16 December, was changed by the Constitution (Fourth Amendment) Act, 1975, passed on 25 January 1975, during the civilian regime of the Awami League. This Fourth Amendment replaced parliamentary democracy with a presidential form of government, curbed the independence of the judiciary, abolished judicial power to enforce fundamental rights, invested the President with the power of withholding assent to a Bill passed by Parliament, made the procedure for the impeachment of the President very difficult and gave the President the power of declaring Bangladesh a one-party state, a power which he exercised to establish a one-party state from February 1975. Sheikh Mujibur Rahman used the phrase 'second revolution' to describe this adroit political manoeuvre, which proclaimed him President of Bangladesh for a five-year term from 25 January 1975 to 24 January 1980.

It may be mentioned that under the Fourth Amendment, an initiative to introduce a motion for impeaching the President on a charge of violating the Constitution or of grave misconduct

required the support of at least two-thirds of the total number of Members of Parliament, and had to be passed by at least three-fourths of the total number of Members. Moreover, as Bangladesh had become a one-party state from 24 February 1975, all Members of Parliament were members of the National Party headed by President Sheikh Mujib. In these circumstances, a constitutional change of government had become wellnigh an impossibility. Consequently, it seemed to Mujib's opponents that the only course open to them to remove Mujib from power was by violent means or assassination. Eventually, a group of forty-seven army officers, who were in the main majors, captains, and lieutenants under the leadership of six majors—Shariful Hossain Dalim, S.H.M.B. Nur, Farook Rahman, Khandaker Abdul Rashid, Abdul Hafiz and M. Huda—supported by more than one thousand troops under their command carried out a coup in the early morning of 15 August 1975, and assassinated Sheikh Mujib.

Thus the politics of the 'second revolution' came to an abrupt end only about seven months after its inception. In fact, the August coup was a culmination of a long period of disenchantment with the Awami League regime of Sheikh Mujib because of its "corruption, mismanagement and autocratic proclivities". However, the coup was announced on the morning of 15 August over Radio Bangladesh Dhaka by Major (retd.) Shariful Hossain Dalim, one of the coup leaders, in these words :

> "I am Major Dalim announcing the fall of the autocratic government of Sheikh Mujib. Sheikh Mujib has been killed and the armed forces have seized power in the greater interest of the country under the leadership of Khandaker Moshtaque Ahmed, who has taken over as President of Bangladesh. Martial Law is declared."[2]

It is evident from the foregoing announcement that Martial Law was declared by Major Dalim, and not by Khandaker Moshtaque Ahmed in whose name the armed forces had seized power. But the proclamation made on 20 August 1975 by Khandaker Moshtaque Ahmed, who was Minister for Trade and Commerce in Sheikh Mujib's cabinet at the time of the coup and a senior Vice-President of the National Party, stated that he had "placed, on the morning

2. Quoted in Lifschultz, Lawrence, "The Army's Blueprint for a Takeover", Far Eastern Economic Review, 5 Sept. 1975, p. 16 ;

of the 15th August, 1975, the whole of Bangladesh under Martial Law by a declaration broadcast from all stations of Radio Bangladesh".

It is to be noted that in an interview[3] with the the author, Moshtaque went on to say that he had not declared Martial Law, that he had no connection or association with the coup, that he had no prior knowledge of it and that he had first heard the news of the coup and the declaration of Martial Law over the radio. According to him, the coup leaders chose to use his name because of his political prestige and the differences with Mujib in certain policy matters. He further asserted that he had been taken on the morning of 15 August 1975 by one of the coup leaders from his house to the Dhaka Radio Station and, after about three hours of discussion, he had agreed to accept the office of President on the condition that he would establish a civil administration, that the 1972 Constitution of Bangladesh would remain in force, that Parliament would remain in existence, and that the army would return to barracks giving him a free hand to run the country.

However, we have a somewhat different version of the involvement of Moshtaque in the coup from one of the coup leaders, Major Farook. In November 1975, while in Thailand, Farook disclosed that he had planned the August coup, that he himself had drawn up the tactical plan for the coup, and that Moshtaque knew roughly what was going to happen although he did not know the detailed plan.[4]

Whatever his involvement in the coup, Moshtaque in his broadcast[5] to the nation over radio and television on 15 August 1975 justified the action of the armed forces in seizing power.

In his address, Moshtaque accused Sheikh Mujibur Rahman of conspiring "to monopolise power and cling, to it permanently" instead of devoting his efforts to improve the lot of the people. He further alleged that Mujib had ignored the task of nation-building and had frittered away his energy in endless moves on the political

3. The interview with Khandaker Moshtaque took place on 10 October 1984.
4. The Asian Recorder, 10-16 Dec. 1975.
5. The Bangladesh Times, Dhaka, 16 Aug. 1975.

chess board while corruption and nepotism were allowed to run rampant and the reasources of the country were concentrated in the hands of a few favoured persons. As regards the country's economy, Moshtaque said that it was on the brink of collapse. The jute industry was almost destroyed and people had become helpless victims of hunger and starvation. He also declared that all avenues for the expression of the grievances of the people were closed. Furthermore he asserted that the coup had become inevitable as the suffocating political atmosphere created by Mujib had made its impossible for a peaceful and constitutional change of government.

Therefore, it is clear that Moshtaque, like a typical leader of a *coup d'etat*, sought to justify the extra-constitutional action of the army by quoting the misdeeds of the overthrown regime of Mujib with which he had been associated first as a Minister for Irrigation and Flood Control up to 1973 and later as a Minister for Trade and Commerce until the August coup. However, it can scarcely be denied that many of Moshtaque's statements could be objectively justified with regard to the prevailing condition of the country. It is noticeable that Moshtaque did not pose as the saviour of the nation, but gave all the credit to the armed forces for rescuing the country from political and economic chaos.

However, in the true tradition of a coup leader, Moshtaque made alluring promises for the future when he said :

> "Justice has to be established in the country and the values have to be rehabilitated in the society, so that a man could establish himself with dignity. Our Government will take the necessary steps quickly for achievement of these goals and will extend strong support to measures taken at individual and collective levels to fulfil this objective . . . this Government has no compromise with corruption, nepotism or social vices".[6]

III. The Justification of the Promulgation of Martial Law

Although Martial Law was declared in Bangladesh on 15 August 1975, immediately after the assassination of Sheikh Mujib, no proclamation was issued, as had been done in Pakistan in 1958 and in 1969 by Iskander Mirza and General Yahya Khan respectively, stating the circumstances which had paved the way for it. It is noteworthy that even Moshtaque, in his address of 15 August 1975

6. Ibid.

to the nation, made no reference whatsoever to the declaration of Martial Law or its continuance, although he had justified the overthrow of the government of Mujib by the armed forces.

It is worth mentioning that the Proclamation, which was issued on 6 April 1979 and contained the declaration of the withdrawal of Martial Law, described the causes of the promulgation of Martial Law in these words : "in the interest of peace, order, security, progress, prosperity and development of the country, the whole of Bangladesh was placed under Martial Law on the 15th August 1975."

In fact, Martial Law was declared in Bangladesh at a time when the country was peaceful and the civil courts were open and exercising their ordinary jurisdiction in the normal way. In view of the common law doctrine of necessity, under which the imposition of Martial Law could be justified out of the necessity to suppress riot, rebellion or insurrection, and to restore peace and order, the promulgation of Martial Law on 15 August 1975 in Bangladesh in peace-time cannot be justified. In this respect, the observations of Justice Cornelius of the Pakistan Supreme Court in the *Province of East Pakistan v. Md. Mehdi Ali Khan*[7] are noteworthy :

> "We think of Martial Law generally in terms of military occupation . . . within the municipal sphere, as the entrustment of plenary powers to the armed forces for the purpose of restoring law and order in a part of the municipal territory where conditions have reached a point of disturbance beyond the capacity of the civil authorities to control. It is not at all common to find Martial Rule being introduced over a whole country in circumstances of general peace."[8]

A similar view was expressed by Justice Hamoodur Rahman in *Asma Jilani V. Government of the Panjab and another* :[9]

> "...Martial Law as a machinery for the enforcement of internal order... is normally brought in by a proclamation issued under the authority of the civil Government and it can displace the civil Government only where a situation has arisen in which it has become impossible for the civil courts and other civil authorities to function ... The maxim *inter armes leges silent* applies in the municipal field only where a

7. PLD 1959 SC 387
8. Ibid.' at 439
9. PLD 1972 SC 139

> situation has arisen in which it has become impossible for the Courts to function, for, on the other hand, it is an equally well-established principle that where the civil courts are sitting and civil authorities are functioning, the establishment of Martial Law cannot be justified."[10]

However, it seems that Martial Law was declared in Bangladesh on 15 August 1975 to meet any disturbances which might arise as a consequence of the assassination of Sheikh Mujib and the military takeover. It is to be noted that Martial Law was proclaimed at a time when Bangladesh was already under an emergency which had been imposed on 28 December 1974, but the emergency powers evidently seemed to the authorities to be inadequate to deal with the situation.

It should be stressed here that not only in Bangladesh, but in many other countries (such as Pakistan), the usual practice by which Martial Law comes into existence is that a group of army officers (sometimes in partnership with some politicians) overthrow a legitimate civilian regime by means of a *coup d'etat* and proclaim Martial Law, not for the purpose of restoring law and order and for establishing peace and security, but to obviate any public opposition to their extra-constitutional acts. The authorities on Constitutional Law in Great Britain do not deal with this kind of Martial Law. However, in 1963 Justice Murshed of the East Pakistan High Court in *Lt. Col. G.L. Bhattacharya V. the state*[11] held, with reference to the imposition of Martial Law in Pakistan in 1958, that the declaration of Martial Law after a revolution constituted a new departure and had little to do with 'Constitutional Martial Law'. He observed that there is a

> "Kind of Martial Law brought about by a successful revolution which had abrogated an 'existing Constitution' thereby bringing about a total new dispensation . . . (this) kind of Martial Law, that is, one brought by a revolution or a *coup d'etat* . . is outside the scope of constitutional law...What had happened on the 7th of October 1958, was in fact, a revolution and *coup d'etat* which imposed a Martial Law on the entire country. This kind of revolution or imposition of Martial Law constitutes a class apart and has nothing to do with 'Constitutional' Martial Law."[12]

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10. Ibid., at 187
11. PLD 1963 Dhaka, 377
12. Ibid., at 431, 420-421

It is to be noted that although Martial Law was declared in Bangladesh on 15 August 1975, the basic norm or the total legal order of the country, the 1972 Constitution of the People's Republic of Bangladesh, was neither abrogated nor suspended. The Martial Law government decided to govern the country by means of the 1972 Constitution and Proclamation and Martial Law Regulations. The Constitution remained the fundamental law of the country subject to the Proclamations, Martial Law Regulations or Martial Law Orders. (The position of the 1972 Constitution under the new regime will be examined in greater detail at a later stage in this paper.) The judiciary continued to function normally, subject to any limitations placed on its jurisdiction by the Martial Law Authorities. The judges of the Supreme Court were not required to take a new oath of office under the Martial Law regime.

Therefore, it appears that, since the existing legal order was not destroyed and replaced by a new one, the change-over which occurred in Bangladesh on 15 August 1975 cannot be properly described as a 'revolution' in Kelsenian terms.[13] In fact, it seems that the military takeover in Bangladesh was in the nature of a constitutional deviation rather than 'total new dispensation', and the declaration of Martial Law by the army was a precautionary measure against possible resistance to the regime.

The 1975 Martial Law of Bangladesh can, therefore, be described as Martial Law *Sui Generis* - fundamentally different from Martial Law in the sense in which it is generally used in the common law. It is in a class by itself and, to repeat justice Murshed's phrase, "has nothing to do with Constitutional Martial Law".

IV. The Legality of the Imposition of Martial Law

The declaration of Martial Law in Bangladesh in 1975 was an extra-legal act inconsistent with the 1972 Constitution of Bangladesh. The 1972 Constitution does not envisage the imposition of

13. According to Prof. Hans Kelsen of the (Analytical) Positivist School of Jurisprudence, "From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated... it is never the constitution merely but always the entire legal order that is changed by a revolution" Quoted in PLD 1958 SC 539

Martial Law. Throughout the text of the Constitution, no reference has been made to Martial Law. Although the term 'Martial Law had duly occurred in Article 196 of the 1956 Constitution and Article 223-A of the 1962 Constitution of Pakistan, the Articles which enacted provision for passing an Act of Indemnity in relation to acts done in connection with Martial Law administration, it has significantly been omitted from corresponding Article 46[14] of the 1972 Constitution of Bangladesh that empowered Parliament to pass an Act of Indemnity in respect of any act done in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh. This shows that although in Pakistan Articles 196 and 223-A of the 1956 and 1962 Constitutions respectively, recognised the possibility that Martial Law might be imposed under the common law doctrine of necessity for the purpose of "the maintenance or restoration of order in any area in Pakistan", no such recognition was given in Bangladesh where the phrase Martial Law was omitted from the analogous Article 46 of the 1972 Constitution.

Therefore, it appears that in the 1972 Constitution of Bangladesh there is no provision whatsoever for the imposition of Martial Law under any circumstances, even for the sake of restoring law and order. Thus it can be strongly argued that the declaration of Martial Law in Bangladesh in 1975 was illegal.

However, it is noteworthy that, unlike the cases of *Dosso*[15] and *Asma Jilani*[16] (the cases in which the legality of the imposition of Martial Law in Pakistan in 1958 and 1969 was examined), in Bangladesh the legality of the declaration of Martial Law in 1975 was not discussed by the Supreme Court in any case either during the continuance of, or even after the withdrawal of Martial Law.

14. Art. 46 of the 1972 Constitution of Bangladesh states that "Notwithstanding anything contained in the foregoing provisions of this part (i. e., part III which guarantees some important fundamental rights to the citizen), Parliament may by law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area."

15. PLD 1958 SC 533

16. See Supra footnote 9

It is true that if, during the continuance of Martial Law, the Supreme Court, established under the 1972 Constitution of Bangladesh, had declared that the imposition of Martial Law on 15 August 1975 was illegal, it might itself have been suspended or had its jurisdiction restricted, or the judges concerned might have been removed by the new regime. Moreover, it is improbable that the judgment of the Court as to the legality of Martial Law would have made the slightest difference to the continuance of the Martial Law in practice. In this context, the observations of Justice Fieldsend, A.J.A. of the Appellate Division of the Rhodesian High Court in *Madzimbamuto V. Lardner-Burke N.O. and another*[17] are worth quoting :

> "It may be a vain hope that the judgment of court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality"[18]

It should, however, be added that after the withdrawal of Martial Law when the threat to the existence or jurisdiction of the Supreme Court has disappeared, it could have determined the legality of the declaration of Martial Law in Bangladesh in 1975 as it interfered with many decisions of Martial Law courts.

V. The Legality of the Assumption of the Office of President by Khandaker Moshtaque Ahmed

Khandaker Moshtaque Ahmed, in whose name the August coup was announced, was sworn in as the President of the country by the acting Chief Justice of the Supreme Court, Syed A.B. Mahmud Hossain, at *Bangabhaban* (office & residence of the President) in Dhaka in the afternoon of 15 August 1975.

It is to be noted that the assumption of the office of President by Khandaker Moshtaque was not in accordance with Article 55 of the 1972 Constitution, according to which the Vice-President will succeed the President if there is a vacancy until a new President is elected. Moreover, the administration of the oath of office to the President by the acting Chief Justice was also contrary to the provisions of Form I of the Third Schedule of the Constitution, which required the President to be sworn in by the Speaker of

17. (1968) 2 SALR 284
18. Ibid. at 430

the House of the Nation. It is noteworthy that the oath of office of the President was administered by the acting Chief Justice at a time when the Speaker of the House had not ceased to hold office, since Parliament had not then been dissolved by Moshtaque.

Eventually, Khandaker Moshtaque Ahmed issued a Proclamation on 20 August 1975, five days after the declaration of Martial Law, in an attempt to legalise the new situation. In fact, this Proclamation was a brief but comprehensive document which completed the legal and constitutional formalities of his taking over "all and full powers of the Government of the People's Republic of Bangladesh with effect from the morning of 15 August 1975". This Proclamation, however, was itself unconstitutional.

The Proclamation of 20 August 1975, which provided the legal framework for Moshtaque's new government, stated that with effect from the morning of 15 August 1975 he had suspended the provisions of Articles 48[19] and 55[20] and modified the provisions of Article 148[21] and Form I[22] of the Third Schedule of the 1972 Constitution to the effect that oath of the President of Bangladesh would be administered by the Chief Justice of Bangladesh and that the President might enter upon office before he took the oath.

Therefore, it is clear that these amendments were introduced by this Proclamation in order to provide a retrospective legal sanction for Moshtaque's assumption of, and succession to, the office of the President.

VI. The Position of the 1972 Constitution of Bangladesh

Unlike the 1956 and 1962 Constitutions of Pakistan abrogated on 7 October 1958 and 25 March 1969 respectively, the 1972 Con-

19. Art. 48 of the 1972 constitution relates to the election of the President of the country.
20. Art. 55 states, *inter alia*, that if a vacancy occurs in the office of President or if the President is unable to discharge the functions of his office on account of absence, illness or any other cause, the Vice-President shall act as President until a new, President is elected to fill such vacancy enters upon his office, or until the President resumes the functions of his office as the case may be.
21. Art. 148 provides for taking the oath of office before entering upon the office of President.
22. Form I of the Third Schedule of the Constitution required the President to take the oath administered by the Speaker.

stitution of the People's Republic of Bangladesh was not abrogated at the time of the proclamation of Martial Law on 15 August 1975, neither was it suspended at any time.

Although the 1972 Constitution remained in force throughout the period of Martial Law, it was reduced to a subordinate position to that of Proclamation of 20 August 1975, known as the First Proclamation. The unamended and unsuspended constitutional provisions were kept in force and allowed to continue subject to the First Proclamation and Martial Law Regulations or Orders made by the President. As the Proclamation declared that "the Constitution of the People's Republic of Bangladesh shall, subject to this Proclamation and the Martial Law Regulations and Orders made by me (i.e., the President) in pursuance thereof, continue to remain in force".[23] Moreover, it was stated that the First Proclamation and the Martial Law Regulations and Orders should have effect, notwithstanding anything contained in the 1972 Constitution or in any law for the time being in force.[24]

Therefore, it is evident that the Constitution of Bangladesh was allowed to remain in force on the condition that the Proclamation, Martial Law Regulations and Orders, made by the President, would prevail over the provisions of the Constitution during the Martial Law period. In other words, under the First Proclamation the Constitution lost its character as the supreme law of the country. In this respect, the observations of Justice Fazle Munim in the case of *Halima Khatun v. Bangladesh*[25] are worthly of note :

> "What appears from the Proclamation of August 20, 1975, is that, with the declaration of Martial Law on August 15, 1975, Mr. Khandaker Moshtaque Ahmed who became the President of Bangladesh assumed full powers of the Government and by clauses (d) and (e) of the Proclamation made the Constitution of Bangladesh, which was allowed to remain in force, subordinate to the Proclamation and any Regulation or Order as may be made by the President in pursuance thereof. It may be true that whenever there would be any conflict between the Constitution and Proclamation or a Regulation or an Order the intention, as appears from the language employed, does not, seem to concede such superiority to the Constitution. Under the Proclamation which contains the aforesaid clauses the Constitution has lost its

23. Clause (e) of the First Proclamation
24. Clause (d) of the First Proclamation
25. DLR 1978 SC 207

character as the Supreme Law of the country. There is no doubt, an express declaration in Article 7(2) of the Constitution to the following effect : 'This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void.' Ironically enough, this Article, though it still exists, must be taken to have lost some of its importance and efficacy. In view of clauses (d),(e) and (g) of the Proclamation the supremacy of the Constitution as declared in that Article is no longer unqualified. In spite of this Article, no constitutional provision can claim to be sacrosanct and immutable. The present constitutional provision may, however, claim superiority to any law other than a Regulation or Order made under the Proclamation."[26]

Thrrefore, it is evident that the 1972 Constitution of Bangladesh ceased to exist as the supreme law of the country as it was circumscribed by the First Proclamation and Martial Law Regulations or Orders made by the Proclamation (later by the Chief Martial Law Administrator).

Although the President took an oath under (Form I of) the Third Schedule of the 1972 Constitution "to preserve, protect and defend the Constitution," he amended the Constitution from time to time during the Martial Law period by issuing Proclamations (Amendments) Orders. It is noteworthy that, under Article 142 of the 1972 Constitution, only Parliament could amend any provisions of the Constitution and by a majority of not less than two-thirds of the total number of its Members. Moreover, at any time when Parliament stood dissolved or was not in session, the President had no authority under Article 93 of the 1972 Constitution to make and promulgate any Ordinance for altering or repealing any provision of the Constitution.

VII. The Position of Other Laws

Along with the 1972 Constitution, all laws in force, before the declaration of Martial Law on 15 August 1975, were to continue in force subject to the Martial Law Regulations and Orders made by the President. The Proclamation of 20 August 1975 declared that "All Acts, Ordinances, President's Orders and other Orders, Proclamations, rules, regulations, bye-laws, notifications and other

26. Ibid at 218

legal instruments in force on the morning of the 15th August 1975, shall continue to remain in force until repealed, revoked or amended".[27]

Thus the legal continuity of the country was not interrupted by the 1975 Martial Law regime of Bangladesh. In this respect, it followed the constitutional practice in the subcontinent where at any time an existing legal order had ceased to be operative, whether legally or illegally, the new dispensation allowed the existing laws to continue in force. Beginning from the Government of India Act, 1919 (consolidated in 1924) down to the Laws (Continuance in Force) Order, 1958, and the Proclamation of Martial Law by General Agha Muhammad Yahya Khan, issued on 25 March 1969 the existing laws continued to be valid in this way.

VIII. Conclusion

The foregoing discussion reveals that, for the first time in the history of Bangladesh, Martial Law was declared on 15 August 1975, immediately after the assassination of the President of the country, Sheikh Mujibur Rahman. Martial Law was declared not to restore law and order, but to forestall any possible resistance which might arise consequent upon the assassination of Sheikh Mujib and the seizure of power by the army. It was declared at a time when the country had already been in a State of Emergency imposed on 28 December 1974. It seems that emergency powers were not considered adequate and that Martial Law was declared as a precautionary measure to meet any public opposition and a possible threat to the newly established regime. Since Martial Law was proclaimed in Bangladesh in peace-time and there was no question of suppressing riot, rebellion or insurrection, the proclamation of Martial Law on 15 August did not satisfy the test of the doctrine of necessity and, as such, was unjustified. It was not realized that Martial Law is an extreme measure used in the last resort and can only find its justification in the necessity to restore law and order. Martial Law promulgated in Bangladesh on 15 August 1975 represents a radical change from both its traditional and modern meanings. Although Martial Law had been applied in Pakistan in 1953, and 1969 (before the birth of Bangladesh),

27. Ca use (f) of the First Proclametion.

Martial Law as declared in Bangladesh represents a significant departure even from the Pakistani precedents; for unlike Pakistan, Martial Law was proclaimed in Bangladesh as a means to implement a *coup d'etat.*

The declaration of Martial Law in Bangladesh in 1975 has to be seen as an extra-constitutional act since throughout the text of the 1972 Constitution no reference whatsoever has been made to Martial Law. As the Constitution is the supreme law of the land and does not contain the term Martial Law, it seems that it excludes the common law rule as a basis for Martial Law for the purpose of restoring law and order. Thus it is not possible to maintain that the proclamation of Martial Law in Bangladesh on 15 August 1975 had any legal basis.

Martial Law was declared in Bangladesh, as mentioned earlier, after a *coup d'etat* in order to forestall any public opposition. This kind of Martial Law is in a class by itself and "has nothing to do with constitutional Martial Law." The military takeover in Bangladesh could not be, properly called a revolution from a juristic point of view, as the basic norm or the total legal order of the country, the 1972 Constitution of Bangladesh, was neither abrogated nor suspended. The Constitution remained the fundamental law of the country and, in fact, co-existed with Proclamations, Martial Law Regulations or Orders. Therefore, it seems that the military takeover in Bangladesh constituted a constitutional deviation rather than a "total new dispensation".

It should, however, be stressed here that although the 1972 Constitution of Bangladesh continued in force during the period of Martial (1975 to 1979), it ceased to exist as the Supreme Law of the country as it was made subject to the First Proclamation, Martial Law Regulations or Orders. Hence, it assumed a subordinate status.

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COLONIAL CLAUSE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 1950, AND THE UNITED KINGDOM AND THE COMMONWEALTH

A.B.M. MAFIZUL ISLAM PATWARI

1. Adoption of Colonial Clause

The European Convention on Human Rights in 1950, and its ratification by the United Kingdom in 1953 was great "political and legal land mark"[1] in the history of Europe in general and the United Kingdom in particular. Besides the rights and freedoms contained in the Convention, there was an international aspect of the civil liberty which has been recognised in Article 63 of the Convention. This Article was known as the 'colonial clause' of the Convention. This Article provided that any Contracting Party might at the time of ratification or at any time extend the application of the Convention to "all or any of the territories for whose international relations it is responsible."

There is a short history of insertion of this colonial clause.[2] From the history of adoption of the Convention it is revealed that during the negotiations among the Contracting Parties question arose whether the Convention would apply to the overseas and colonial territories of the Contracting Parties. There were two schools of thought in this regard. One school expressed the view that the Convention would be so drafted as to apply automatically to such territories unless they were specifically excluded. The other school expressed the opinion that it would apply in the first place only to the metropolitan territories but would be capable of extension to overseas territories by express declaration. The protogonists of the first school were anxious to secure as extensive an application of the Convention as possible and felt that the governments of the Contracting Parties were less likely to exclude the colonial territories

1. S.A. de Smith, *The New Commonwealth and Its Constitutions* (London : Stevens and Sons Ltd., 1964) at p. 180.

2. This history was described by A. H. Robertson in his *Human Rights in Europe*, at pp. 26-28. The following discussion is based on the work solely.

if such exclusion involved a public declaration. The protagonists of the second school maintained that certain countries, particularly the United Kingdom, could not constitutionally apply the Convention to their colonoial territtories without first consulting the colonial legislatures. Thus, if the extension to the colonies were automatic it would not be possible for the governments of these countries to ratify the Convention before consulting a large number of separate legislatures to obtain their approval. Consequently the practical result of the formula proposed would be to delay the ratification of the Convention by some of the principal signatories for such period as would be necessary for these consulations to take place-which might mean a very considerable delay. France, the Netherlands and the United Kingdom were all directly interested in this question which, of course, had important political aspects.

So, these two schools of thought gave rise to a problem which was was referred for decision to the Committee of Ministers. The Committee of Ministers in August, 1950, decided to insertion Article in the proposed Convention on Human Rights requiring express declarations by the Contracting Parties before the Convention would extend to their colonial territories. This text provoked a lively discussion in the Assembly during the course of its examination of the draft Convention later in the same month, and some members were of the view of automatic extension. The Assembly made a recommendation 24 (1950) asking the Ministers to delete the 'colonial clause' which they had incorporated in their draft Convention. The effect of the recommendation would be, if it would be implemented, this that the Convention would apply automatically to overseas territories.

However, the question of colonial clause was then reconsidered by the Committee of Ministers in November, 1950, but the Assembly's proposal was not found acceptable, with the result that Article 63 remained in the final text as approved by the Committee of Ministers in August, 1950. Therefore, the Convention had no scope of automatic application to any overseas territory without the formal declaration of extension by the metropolitan country, whether the declaration would be made at the time of ratification or subsequently; which was responsible for the international relations of the said territory.

In accordance with the colonial clause provision of the Convention the Government of Denmark, in April, 1953, extended the application of the Convention to Greenland, the Government of the Netherlands, in November, 1955, to Surinam and the Netherlands West Indies, and the Government of the United Kingdom in October, 1953, to forty-one overseas territories[3]. With the passage of time many of these overseas countries attained their independence, by 1969 a declaration by the Government of the United Kingdom attached a revised list of eighteen overseas territories to which the Convention still applied[4] Moreover, the Netherlands had also extended the right of individual Petition to Surinam[5] and the United Kingdom to the overseas territories to which the Convention had been extended.[6] This was another land mark in the history of the colonial individuals who, like the individuals of their metropolitan countries, acquired the right of Petition before the European Commission of Human Rights and through it before the European Court of Human Rights against any infringement of the rights enshrined in the Convention.

This was an excellent development".[7] Side by side of this development, there raised the problem of what would happen when those territories become independent. In such circumstances, the metropolitan countries would then cease to be responsible for their international relations and the provisions of the Convention would thus automatically cease to apply. On this point A.H. Robertson writes: "It would, however, be highly regrettable if one of the results of independence was the diminution in the protection to human rights in the newly-independent country. Some other means of ensuring their Potection must therefore be found and this is precisely what is happening"[8]

From the above observation it is clear that the colonial clause as contained in Article 63 of the Convention was of vital importance in ensuring the rights of the colonial people who were under the control of the metropolitan country. This sort of protection under the

3. (1955-1957)1 *Yearbook of the European Convention on Human Rights* 1950. pp. 40-47.
4. (1969)12 *Yearbook* p. 24.
5. *Ibid.*
6. *Ibid.*, at pp. 26-28,
7. A.H. Robertson, *Law of International Institution in Europe*, at p. 62.
8. *Ibid.*, p. 62.

Convention would cease if their territory earned independence. It meant these people would have no protected rights until and unless alternative arrangement was made. This sort of alternative arrangement was made and these rights were incorporated in their constitutional instruments a discussion of which has been made in the following sections of this chapter.

2. Nigerian Model

The alternative arrangement referred to in the preceding section had been made in the case of Nigeria to which the colonial clause of Convention had been extended by the United Kingdom in 1953. Thus, after 1953 when the decision was taken to grant Nigeria independence, it became necessary to ensure that human rights would continue to be protected, all the more so as one of the major problems that arose in determining its future political structure was that of the status of important minorities in the country. With this end in view, in 1957, there was a constitutional conference in London at which it was agreed that fundamental rights should be included in the proposed constitution of independent Nigeria.[9]

The delegates of certain minority ethnic groups demanded for definite provisions to be written into the independence constitution to serve as a "bulwark against any invasion of their rights and libertries by the majority groups after the British power would have been withdrawn."[10] The Constitutional Conference set up a Minority Commission to ascertain the fact about the fears of minority in any part of Nigeria and to propose means of allaying those fears. The Report of the Commission[11] recommended *inter alia* that one of the principal means of allaying the fears of minorities should be the inclusion in the constitution of detailed provisions based mainly on the European Convention on Human Rights, 1950. In September and October, 1958, the Constitutional Conference resumed and approved clauses containing enforceable fundamental rights model-

9. Report of the Constitutional Conference held in London, May and June, 1957 (Comnd. 207, 1957) p. 67.

10. T.O. Elias, Nigeria : *The Development of Its Laws and the Constitution* (London : Stevens and Sons, 1967). 141.

11. Comnd. 50 H.M.S.O. London. 1958, para, 38.

led on the European Convention.[12] After a detailed discussion of these draft clauses and other supplementary papers the Constitutional Conference agreed that provisions should be made in the constitution under these fourteen heads; (1) right to life; (2) freedom from inhuman treatment; (3) freedom from slavery and forced labour; (4) right to personal liberty; (5) rights concerning civil and criminal law; (6) right to private and family life; (7) rights concerning religion; (8) right to freedom of expression; (9) freedom of peaceful assembly and association; (10) freedom of movement and association; (11) right to compulsory acquisition of property (12) enjoyment of fundamental rights without discrimination and freedom from discriminatory legislation; (13) derogation from fundamental rights; and (14) power of the Federal Government to safeguard the nation. A fifteenth heading entitled the enforcement of fundamental rights concluded these vital provisions of the modern constitution of Nigeria.[13]

This list showed that the proposed constitution of Nigeria contained almost all the rights and freedoms guaranteed in the European Convention on Human Rights, 1950.

The constitutional Conference held in London in 1959 constidered the Report and recommendations of the Minority Commission formed in 1957. It again directed that the constitution should contain human rights guarantees on the model of the European Convention on Human Rights.[14] The human rights adopted by the Constitutional Conference of 1958 became part of the pre-independence Nigerian Constitution[15] and was recognised as the Nigerian Bill of Rights, 1959. However, the code of fundamental rights was subsequently reproduced in Chapter III of the independence constitution of the Federation of Nigeria, set out in the Second Schedule to the Nigeria (Constitution) Order in Council, 1960.[16]

12. Comnd. 569, London, 1958, para, 7. See also E. Michael Joye and Kingsley Igweike, *Introduction to the 1979 Nigerian Constitution* (London: Macmillan Press Limited, 1982) at p. 292.
13. See T.O. Elias, *op. cit.*, at p. 143.
14. D.I.O. Ewezukwa *et al.* in Albert. P. Blaustein and Gisbert H. Flanz (ed.), *Constitution of the Countries of the World* : *Nigeria* (New York : Oceana Publications Inc. 1988) at P. 17.
15. Nigeria (Constitution) (Amendment No. 3) Order in Council 1959 (S.I. 1959 No. 1772), Article 69 and the Schedule.
16. S.I. 1960. No. 165.

It would be relevant here, to give a short description of the rights guaranteed by the pre-independence Nigerian Constitution of 1959 called Nigerian Bill of Rights. The Bill of Rights provided that any law inconsistent with the Bill of Rights would be void to the extent of the inconsistency.[17] During the continuance of emergency derogation from certain fundamental rights by the Federal Parliament was permissible.[18]

According to the provisions of the Bill no person would be—deprived of life; subjected to torture or inhuman ar degrading treatment; held in slavery or required to perform forced labour.[19] Any person who was arrested on a criminal charge was to be promptly informed of the reasons for this arrest. He was to be brought before a court without undue delay, and if not tried within a reasonable time he was to be released either unconditionally or subject to reasonable condition.[20] One who was unlawfully arrested or detained was entitled to compensation. Retrospective penal legislation and double jeopardy were prohibited ; the accused could not be compelled to give evidence at his trial: all criminal offences and penalties save in respect of contempt of court was to be laid down in written laws of the country.[21] Freedom of conscience, expression and peaceful assembly and association, subject to reasonable restrictions, would extend to all persons.[22] Guarantee of respect for private and family life, home and correspondence was also offered to all persons.[23] But the guarantees of freedom of movement and freedom from discrimination extend only to the citizens of Nigeria.[24] No citizen might be expelled from or refused

17. Section 1 of the Bill of Rights, 1959.
18. Section 28(1) *Ibid. Adeglunro* v. *Att. General of the Federation*, (1962)11 I.C.L.Q. 920.
19. Sections 17-19 of Nigerian Bill of Rights, 1959.
20. *Doherty* v. *Balewa*, 4 Nig. Barr, Jr. (June 1962) ; *Balewa* v. *Doherty*, (1963)1 W.L.R. 949.
21. Sections 20-21 of Nigerian Bill of Rights, 1950. See *Aoko* v. *Fagbemi*, (1961)1 All. W.L.R. 400 *Gokpa* v. *Inspector-General of Police*, (1961)1 All. N.L.R. 423.
22. See *R* v. *Amalgated Press of Nigeria Ltd.* (1961) All N.L.R. 199; *Director of Police Prosecutor* v. *Obi*, (1963) All N,L.R, 186.
23. Sections 22-25 of Nigerian Bill of Rights, 1959.
24. Sections 26-27, *Ibid.*

entry into Nigeria; but this guarantee did not cover freedom to leave the country.

This Bill of Rights in a modified form became the model for the codes of fundamental rights which were to be found in the great majority of independent Commonwealth countries. There were large number of the Commonwealth countries into whose independent constitutions the Convention in general and the Nigerian version in particular, were transplanted in chronological order : Sierra Leone, Jamaica, Uganda, Kenya, Malawi, the Gambia, Mauritius, Swaziland, Fiji, the Bahamas, Granada, the Seychelles, the Solomon Island, Dominica, St. Lucia, Zimbabwe, and Belize. The Constitutions of Cyprus and Malta, also contained provision deriving from the European Convention but differing in important respect from the Nigerian model. The Nigerian model was however used also for the constitutions which gave dependent territories a substantial measure of self-government : Bermuda, Gibralter, the Gilbert and Ellis Island. A brief discussion of the rights contained in the constitutions of some of these above-mentioned countries will be made in the following pages with a view to showing how far these constitution followed the Nigerian model.

To begin with Sierra Leone which achieved independence and dominion status within the Comonwealth on the 27th April, 1961, under the Sierra Leone (Constitution) Order in Council, 1961.[25] A Constitutional Conference for Sierra Leone sat in April and May, 1960 and it was agreed in that Conference that a new constitution would be framed for Sierra Leone in which certain fundamental rights on the Nigerian Model, should be included in the independence constitution.[26] A list of human rights and freedoms was annexed to the report of the Conference and again reproduced almost exactly the text of the relevant provisions of the European Convention. However, following the Conference a constitution[27] was framed in that year in which it was incorporated as Chapter II "Protection of the Fundamental Rights and Freedoms of the individual."[28]

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25. H.M.S.O.S.I., 1961, No. 741.
26. T.O. Elias, *Ghana and Sierra Leone : the Development of their Laws and the Constitutions* (London : Stevens and Sons, 1962) at p. 259,
27. Comnd. 1029, 1960.
28. See (1961)61 *Yearborsl* 656.

It was provided in that Constitution that every person in Sierra Leone was entitled to the fundamental rights and freedoms whatever might be his race, tribe, place of origin, political opinions, color, creed or sex.[29] But subject to respect for the rights and freedoms of others and for the public interest he was entitled to the following rights and freedoms : (a) life, liberty, security of person, the enjoyment of property and the protection of law; (b) freedom of conscience, of expression and of assembly and association; (c) respect for his private and family life.[30]

The constitution guaranteed that no person would be deprived of his freedom of movement.[31] No person would be held in slavery or sertitude or required to perform forced labor.[32] No person would be subject to torture or to inhuman or degrading punishment or other treatment.[33] Except with his consent, no person would be subjected to the search of his person or his property or the entry by others on his premises.[34] Whenever any person was charged with a criminal offence he would, unless the charge was withdrawn, be afforded fair hearing within a reasonable time by an independent and impartial court established by law.[35] Enjoyment of freedom of conscience would not be hindered, which included freedom of thought and of religion, freedom to change of religion or belief.[36] No law would make any provision which was discriminatory either of itself or in its effect.[37] For the contravention of the rights every person had the right to the Supreme Court for redress.[38]

From the above discussion on the rights guaranteed by the Constitution of Sierra Leone it is evident that in these rights there was mixed-influence of the European Convention on Human Rights and the Nigerian Bill of Rights. This might be regarded as neo-Nigerian Bill of Rights.

29. Article 11 of the Constitution of Sierra Leone, 1960.
30. Article 11 read with Articles 20-22 a 12-13, *Ibid.*
31. Artiele 14, Ibid.
32. Article 15, *Ibid.*
33. Article 16, *Ibid.*
34. Article 16, *Ibid.*
35. Article 18, *Ibid.*
36. Article 19, *Ibid.*
37. Article 20, *Ibid.*
38. Article 23, *ibid.*

Cyprus became independent on the 16th Augst, 1960, and the Constitution of Cyprus[39] came into force on the 6th April, 1960, was operative until the outbreak of the anomalous situation in December, 1963. Part II of the Constitution contained an extremely comprehensive list of rights and freedoms to be protected. "Here again, it is evident that the European Convention has been the source of inspiration, but various additional provisions have been included, in particular, to deal with the special problems arising in Cyprus."[40] Thus, there were unusual clauses in the relevant Article guaranteeing freedom of religion to the effect that "religions whose doctrines or rites free,"[41] that the use of force to make a person change was prohibited and in addition, that no one would be compelled to pay taxes the proceeds of which were allocated for the purpose of a religion other than his own. The minority groups were catered for in the Articles concerning education and marriage.[42] The Article prohibiting discrimination that in the case of Nigeria, including membership of a community or social class.[43]

Moreover, the Constitution contained right to life and corporal integrity;[44] prohibition against torture or inhuman or degrading punishment or treatment;[45] prohibition against slavery;[46] right to liberty and security of persons;[47] protection in respect of trial and punishment;[48] right to freedom of movement and residence, of speech and expression, of thought, conscience and religion, of speech and expression of peaceful assembly, of freedom of profession;[49] protection against punishment;[50] right to respect for a person's private and family life and correspondence;[51] right to

39. Article 24, *ibid.*
40. Cyprus Comnd. 1093 H.M.S.O. London, 1960.
41. A,H. Robertson, *Law of International Institutions in Europe*, at p. 64.
42. Article 18 of the Constitution of Cyprus, 1960.
43. Article 20 and 22, *ibid.*
44. Article 6, *ibid.*
45. Article 7, *ibid.*
46. Article 8, *ibid.*
47, Article 10, *ibid.*
48, Article 11, *ibid.*
49. Article 12. *ibdi*
50. Articles 12, 18, 19, 21, and 25, *ibid.*
51. Article 14, *ibid.*

property;[52] right to strike;[53] right to election;[54] right to equality before the law.[55] The right to petition and access to the court was also guaranteed.[56]

Though the rights guaranteed by the Constitution were much wider than the European Convention, but the influence of the Convention and its Nigerian version was very much apparent therein.

The influence of the European Convention and its Nigerian version was apparent in the case of Malta which earned its independence on the 21st September, 1964 by the Malta Independence Order, 1964.[57] The Constitution of Malta which was annexed to the Schedule to Malta Independence Order, 1964, contained a list of rights in its Chapter IV under the heading "Fundamental Rights and Freedoms of the Individual." The Constitution provided that every person in Malta was entitled to the fundamental rights and freedoms whatever might be his race, place of origin, political opinions, colour, creed or sex.[58] But subject to respect for the rights and freedoms of others and for the pulic interest he was entitled to the following rights and freedoms: (a) life, liberty, security of the person, the enjoyment of property and the protection of the law; (b) freedom of conscience, of expression and of peaceful assembly and association; and (c) respect for his private and family life.[59]

Moreove, the Constitution contained protection from arbitrary arrest or detention;[60] protection from forced labour;[61] protection from inhuman treatment;[62] protection for privacy of home;[63]

52. Articles 15 and 17, *ibid.*
53. Article 27, *ibid.*
54. Article 27, *ibid.*
55. Article 31, *ibid.*
56. Article 28, *ibid.*
57. Article 29, *ibid.*
58. Malta Government Gazette No. 11, 688, September 18, 1964.
58. Article 33 read with Article 46, of the Constitution of Malta, 1964.
59. Article 33 read with Article 34, 38, 40, 41, 42 and 43 *ibid.*
60, Article 35, *ibid.*
61. Article 36, *ibid,*
62, Article 37, *ibid.*
63. Article 39, *ibid.*

prohibition of deportation;[64] protection of freedom of movement.[65] These rights could be enforced by the civil court of Malta.[66] Moreover derogation was permitted during the public emergency.[67]

From the above observation on the rights guaranteed by the Constitution Malta it is evident that the modified version of the Nigerian Bill of Rights had been incorporated in the Constitution of Malta. Moreover, similar rights and freedoms and similar pattern of their description had been provided in the Constitution of Kenya, 1963,[68] Constitution of Uganda, 1962,[69], Constitution of Jamaica, 1972,[70] Constitution of Zambia, 1964,[71] Constitution of Guyana, 1966,[72] Constitution of Malawi, 1964,[73] Constitution of Mauritius,[74] etc.

Another pattern was followed in the case of Tanganyika which earned independence on the 9th December, 1961. The Constitution of Tanganyika, 1961, was replaced by that of 1962.[75] The new

64. Article 44, *ibid.*
65. Article 45, *ibid.*
66. Article 47, *ibid.*
67. Article 48, *ibid.*
68. See Chapter II of the Constitution of Kenya, *Kenia Gazette* Supplement 105, December 10, 1963 (Legislative Department No. 69).
69. See Chapter III of the Constitution of Uganda, 1962, *Uganda Constitutional Instruments*, Government Printers, Entabbe, 1962.
In this context H.F. Morris and James S. Read observed that "the Uganda provisions show certain notable improvements on the earlier froms adopted in Nigeria, Sierra Leone, and elsewhere."
See *Uganda : the Development of Its Laws and Constitution* (London : Stevens and Sons, 1966) p. 169.
70. See Chapter III of the Constitution of Jamaica which was annexed to the Second Schedule of the Jamaica (Constitution) Order in Council, 1962 (S.I. 1962, U.K. No. 1550).
71. See Chapter III of the Constitution of Zambia, 1964.
72. See Chapter II of the Constitution of Guyana, 1966, which was annexed to the Second Schedule to Guyana Independence Order, 1966, published by Government Printers, George Town, C.G. P & S 1179/66.
73. See Chapter II of the Constitution of Malawi, 1964, which was annexed to the Malawi Independence Order, 1964 (S. I. 1964, No. 916, H. M. S .O.).
74. See Chapter II of the Constitution of Mauritius, 1968, For the text see Albert P. Blaustein and Gisbert H. Flanz (ed). *Constitutions of the Countries of the World* : Muritius.
75. C.A. No. 7, Government Printers, Dares Salam, 1962.

Constitution of 1962, in its "Preamble" contained some rights. It stated that recognition of the inherent dignity and of equal and inalienable rights of all members of the human family was the foundation of freedom, justice and peace. It also stated the rights included the right of the individual, whatever might be his race, tribe, place of origin, political opinions, colour, creed or sex. But subject to respect for the rights and freedoms of others and for public interest, the right further included the rights to—life, liberty security of person; the protection of the law; freedom of conscience, of expression, of asssembly and association; and respect for his private and family life. It was also commented that "the said rights are best maintained and protected in a democratic society where the government is responsible to a freelyelected Parliament representative of the people and where the courts of law are independent and impartial."[76]

The rights which were mentioned in the Preamble to the Constitution of Tanganyika, 1962, were the echo of the rights guaranteed by the European Convention on Human Rights, 1950, and which earned independence in 1960s.

In should be noted in this connection that all these countries were the colonies of the United Kingdom and when they earned independence the colonial clause as provided in Article 63 of the Convention would case to be extended by the United Kingdom and in consequence the people of these countries would have been deprived of rights and freedoms which they had enjoyed through that extension of the colonial clause by the United Kingdom.

With this end in view, "Parliament of Westminster had exported the fundamental rights and freedoms without parallel in the rest of the world."[77] In those Commonwealth countries which have preserved their democracies since independence, judges habitually review the constitutionality of legislation and administrative action against standards derived from the Convention. Some of these Commonwealth countries preserve appeals to the Judicial Committee of the Privy Council and accordingly the British judges, as discussed earlier, perform the same constitutional role.

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76. See Preamble to the Constitution of Tanganyika, 1962.
77. Anthony Lester, "Funamental Rights : the United Kingdom Isolated!" at p 56.

It should be pointed out that in some of countries which earned independence from the United Kingdom during 1960s the constitution entailing a list of rights framed by the British experts were either abrogated or suspended by the new government overthrowing the existing one either by *coup d' etat* or other way. Accordingly the fundamental rights incorporated in the said constitution ceased to exist, at least for some time, and in this way the alternative arrangement made for the continuation of the protection of the rights and freedoms under the European Convention on Human Rights failed to succeed and the people of these countries, who had been apparently deprived or usurped of their rights by the colonial rulers, became again deprived of the rights by their own rulers, the neo-colonial rulers. During the colonial period even after 1953 the people of the colonies, due to the extension of operation the Convention made to these regions, by the United Kingdom, were entitled to seek protection and enforcement of the rights enshrined in the Convention, but after independence when the existing constitutions were abrogated and the rights entailed therein became — incapable of being enforced the position of the people became worse than they had been during the colonial period.

3. Canadian Model

In the preceding section the impact of the European Convention on Human Rights, 1950, on the incorporation of human rights in the constitutions of the newly independent countries has been discussed. In the present section it will be shown how the Convention created an impact on the adoption of a Bill of Rights in an old Commonwealth country, like Canada, and how the Canadian model was followed in other parts of the world.

In 1960 Parliament of Canada passed an Act for the recognition and protection of human rights and fundamental freedoms known as Canadian Bill of Rights.[78] The Preamble to the Act affirmed the "ethical principles"[79] on which the Canadian nation was founded and expressed the desire of Parliament to enshrine those principles and the human rights and fundamental freedoms derived therefrom in a

78. 8 & 9 Eliz, 2 C. 44 (1960),
79. S.A. de Smith, *the New Commonwealth and Its Constitutons* (London : Stevans and Sons Ltd. 1964) P. 162.

Bill of Rights which shall "reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada."[80]

Part I of the Canadian Bill of Rights recognised and declared the existence and continuance of the following rights and freedoms without discrimination by reason of race, national origin, colour religion or sex. The Act declared the right of the individual to equality before the law and to equal protection of the law. It ensured the right of the individual to life, liberty, security of the person and enjoyment/property, and the right not to be deprived thereof except by "due process of law." Freedoms of religion, speech, assembly, association and press were also recognised.[81]

No such law would be so construed or applied as to authorise or effect arbitrary detention, treatment or exile; to impose or authorise cruel or unusual treatment or punishment; to deprive a person arrested or detained of his right to be informed promptly of the reasons for his arrest or detention, to have counsel and to apply for *habeas corpus*; to allow a person deried certain basic safeguards to be compelled to give evidence; to deprive a person of the right to a fair hearing in accordance with fundamental justice for the determination of his rights and obligations; to take away the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal in a criminal case, the right to reasonable bail in the absence of just cause; or to deprive a person of the right to an interpreter when needed in judicial or quasi-judicial proceedings. All these provisions were contained in Section 2 of the Bill of Rights. On these provisions Bora Laskin commented, "any positive effect which the Bill of Rights is likely to have will more probably be founded on the stipulations in Section 2 respecting substantive and procedural regularity, mainly in criminal prosecutions and in administrative proceedings; and the effect will be more corroborative of existing statutory and common law precepts than original."[82]

However, the interesting and original provision of the Canadian Bill of Rights, 1960, was Section 3 which required the Minister of

80. See Preamble to the Canadian Bill of Rights, 1960.
81. Section 1 of the Canadian Bill of Rights, 1960.
82. Bora Laskin "Canada's Bill of Rights : A dilemma for the Courts" (1962)11 I.C.L.Q. 519 at 531-

Justice to examine every bill introduced in the House of Commons and every draft regulation submitted to the Privy Council in order to determine whether they were consistent with this Bill of Rights; if they were not, he was required to report the fact to the House of Commons at the first convenient opportunity.

Part II of the Canadian Bill of Rights provided that nothing in the Bill of Rights was intended to derogate from any right or fundamental freedom not expressly enumerated. It also provided that the Bill of Rights applied only to matters within the authority of the Federal Parliament. It also permitted derogation from the Bill of Rights during times of war, invasion, or real or apprehended insurrection though not in other classes of emergencies.[83]

Though the Canadian Bill of Rights was not incorporated into the constitution as an amendment to the British North America Act, 1867, now the Constitution Act, 1867, because the Canadian Parliament was not empowered to amend its own Constitution, the Bill of Rights had a great influence on the legislatures and executive in the exercise of their powers and authority.

"The Bill surely is destined to enjoy a status higher than that of other enactments of the same Parliament."[84] Whatever status it might enjoy, it was surely capable of being amended or repealed by the Federal Parliament by ordinary legislative procedure. Because "the Canadian Bill of Rights is not constitutionally entrenched ; it is an ordinary statute of the Parliament of Canada, applicable only to matters within the Federal sphere of jurisdiction, and subject to alteration by the normal legislative process."[85]

Taking these factors into consideration Clara F. Beckton went to the extent of saying :

> "*** The Bill was not going to protect rights for several reasons. First it was not entrenched so the concept of parliamentary sovereignty continued to dominate the interpretation of these rights by the courts. If the court could find a valid Federal objective for limiting the legislation would not

83. Section 6 of the Conadian Bill of Rights, 1960.
84. Z. I. Choudnury, "Universal Declaration of Human Rights and Its Impact on the National Constitutions" (1977)1 *the Rajshahi University Law Review* 20, at p. 26.
85. Dale Gibson, *the Law of the Charter : General Principles* (Toronto : Carswell, 8986) at p 12.

be considered as an infringement on the guarantees contained in the Bill. Secondly, the Bill did not prescribe the consequences of a finding that a statute infringed upon one of the guaranteed rights."[86]

So, it can be said that new legislation would prevail over the Bill of Rights and to this extent the Bill of Rights was merely" admonitory enunciating a rule of conduct for Parliament and a rule of interpretation of federal statutes for the courts."[87] That was why the Canadian model would prove less obtrusive to the legislative freedom of action and would cast a higher burden on the courts than would provide a set of fundamental rights similar to the Nigerian provisions.

In 1982, however, a radical change took place in the history of development of human rights in Canada. In that year the Constitution Act, 1982, was passed in Part I of which Canadian Charter of Rights and Freedom was accorded the constitutional status. Under the heading of Guarantee of Rights and Freedoms it is provided that the Canadian Charter of Rights and Freedoms guarantees to rights and freedoms set out in it subject only and to such reasonable limits prescribed by a law as can be demonstrably justified in a free and democratic society.[88] Under the heading of Fundamental Freedoms the Charter declared the following fundamental freedoms : (a) freedom of conscience and religion ; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication ; (c) fredom of peaceful assembly ; and (d) freedom of association.[89] Under the heading of Democratic Rights every citizen has the right to vote in an election of members of the House of Commons of a legislative assembly and to be qualified for membership therein.[90] Under the heading of Mobility Right every citizen of Canada has the right to enter, remain in and leave Canada ; and every citizen and permanent resident in Canada has the right (a) to move and to take up residence in any province, and (b) to pursue the gaining of a

86. Clare F. Beckton in Albert P. Blaustein and Gisbert H. Flanz (ed)., *Constitutions of the Countries of the World, Canada*, at p. 12.

87. Bora Laskin, *op. cit.*, at p. 527.

88. Article 1 of Canadian Charter of Rights and Freddoms 1982.

89. Article 2, *ibid.*

90. Article 3, *ibid.*

livelihood in any Province.[91] Under the heading of Legal Rights the following rights are guaranteed : (a) right to life, liberty and security of person;[92] (b) right to be secured against unreasonable search or seizure;[93] right not to be arbitrarily detained or imprisoned;[94] rights concerning criminal and penal matters;[95] right not to be subjected to any cruel and unusual treatment or punishment ;[96] and the right against self-crimination.[97]

Under the heading of Equality Rights the Charter provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination basedon race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[98] Under the heading Minority Language Educational Rights Citizens of Canada—(a) whose first language learned and still understood is that of the English ar French linguistic minority population of the Province in which they reside or (b) who have received their primary school instruction in Canada in English or French and reside in a Province where the language in which they received that instruction is the language of the English or French linguistic minority population of the Province—have the right to have their children receive primary and secondary school instruction in that language in that Province.[100] It is also provided that citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.[101]

Under the heading of General it is provided that the aboriginal rights and freedoms and other rights and freedoms are not affected

91. Article 6, *ibid.*
92. Article 7, *ibid.*
93. Article 8, *ibid,*
94. Article 9, *ibid.*
95. Article 11, *ibid.*
96. Article 12, *ibid.*
97. Article 13, *ibid,*
98. Article 15, *ibid.*
99. Articles 16-23, *ibid.*
100. Article 23(1), *ibid.*
101. Article 23(2), *ibid.*

by the Charter.[102] It is provided that the Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.[103] The rights and freedoms referred to in the Charter are guaranteed equally to male and female persons.[104] The rights respecting denominatonal, separate or dissentient schools are preserved.[105]

Under the heading Enforcement it is provided that anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or drived may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.[106]

The some basic concepts of the Charter share their origin in the American Bill of Rights but the enforcement provision is unique and there is no comparable section in the American Bill of Rights. "The Charter impose substantal new responsibilities on the courts. It requires not only that they deal with new issues but that they reconsider traditional methods of reasoning. The Supreme Court of Canada has clearly recognised this challenge and has adopted a broad, purposive analysis, which interprets specific provisions of a constitutional document in light of its larger objects."[107]

The Charter is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[108] With the Charter come "a new dimension, a new yardstick of reconciliation between the individual and the Community are their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the court"[109]

This is a substantial development which must be recognised. However, the present discussion is related to the Canadian Bill

102. Article 25 and 26, *ibid.*
103. Article 27, *ibid.*
104. Article 28, *ibid.*
105. Article 29, *ibid.*
106. Article 24(1), *ibid.*
107. *Hunter* v. *Southam Inc.*, (1984) 2 S.C.R. 145 at p. 156.
108. Article 52(1) of Canadian Charter of Rights and Freedoms.
109. *Law Soc. of Upper Can.* v. *Skapinkar*, (1984)9 D. L. R. (4th) 161, per Estery J. at pp. 167-161 (S.C.C.).

of Rights which was used as a model for Chapter I of the Independence Constitution of Trinidad and Tobago of 1962.[110] The Preamble to the Constitution proclaimed that "the people of Trinidad and Tobago... have affirmed that the nation is founded upon principles that acknowledge the supremacy of God, faith in fundamental human rights and freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person, and the equal and inalienable rights with which all members of the human family are endowed by their Creators..."

Chapter I of the Constitution dealt with "the Recognition and Protection of Human Rights and Fundamental Freedoms." Article 1 of this Chapter recognised that in Trinidad and Tobago there existed without discrimination by reason of race, origin, colour religion or sex, the following human rights and fundamental freedoms, namely, (a) The right of the individual to life, liberty security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law, (b) the right of the individual to equality before the law and the protection of the law; (c) the right of the individual to respect for his private and family life; (d) the right of the individual to equality of treatment from any public authority in the exercise of any function; (e) the right to join political parties and to express political views; (f) the right of a parent or guardian to provide a school of his choice for the education of his child or ward; (g) freedom of movement; (h) freedom of conscience and religious belief and observance; (i) freedom of thought and expression; (j) freedom of association and assembly; (k) freedom of the press.

Article 2 provided that subject to exceptions no derogation, abrogation, infringment was allowed. Article 4 provided that during the continuance of emergency derogation was permitted. Under Article 6 the High Court was entrusted to enforce these rights.

From the above discussion it is evident that the wording and substantive content of the rights contained in the Constitution of Trinidad and Tobago were similar to those of the Canadian Bill of Rights., 1960. In this respect the European Convention on Human

110. The Constitution was scheduled to Trinidad ad Tobago (Constitution) Oder in Council (S.I. 1962 Nn. 1875).

Rights, 1950, was not used but it did not mean that the Covention did not have any impact in the incorporation of human rights and fundamental freedoms in the Constititution in a general way.

The Canadian model was used in a limited sense in New Zealand which still retains an unwritten costitution on the British model. It has imported Ombudsman to ensure justice and fair play to all in the hands of officials. In 1977 some positive improvement and development was made in the field of human rights because in that year Human Rights Commission Act, 1977,[111] was passed. The Preamble to the Act, proclaimed that the aims of the Act was to promote "the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights."

Section 5 of the Human Rights Commission Act, 1977, states the general functions of the Commission. The general function of the Commission shall be (a) to promote respect for and observance of human rights; (b) to encourage and co-ordinate programes and activities in the field of human rights (c) to receive and invite representations from members of the public on any matter affecting human rights; (d) to make public statements in relation to any matter affecting human rights; (e) to report to the Prime Minister from time to time under section 6 of the Act on the progress being made towards—the repeal or amendment of provisions in any enactment which conflict with the provisions of Part II of this Act, and the elimination of discriminatory practices, being laws and practices which infringe the spirit and intention of the Act.

Section 6 of the Act deals with the **Report to the Prime Minister**. According to sub-section (1) the Commission shall have the function of reporting to the Prime Minister from time to time on—any matter affecting human rights, including the desirability legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards on human rights, the desirability of the acceptance by the New Zealand of any international instrument on human right: the implications of any proposed legislation or prosposed policy of the Government-which the Commission considers may affect human rights.

111. For the text of the Human Rights Commission Act, 1977, See Albert P. Blaustein and Gisbert H. Flanz (ed.) *Constitution of the Countries of the World : New Zealand*, Vol. XI, at p. 409.

Sub-section (2) of Section 6 states that where the Commission makes to the Prime Minister a report pursuant to this section, it may, thereafter, subject to this Act, publish the report or such parts of the reports as it thinks fit.

Thus, it is observed that in New Zealand though there is no writen Bill of Rights, but it does not deny the existence of rights. The Human Rights Commission Act, 1977, is a great step in the development and promotion of the protection of Human Rights. The Canadian Bill of Rights, 1960, was not a constituent part of the Constitution of Canada, yet it was recognised as a great step in the protection of human rights of the people of Canada, and following it in 1982, the Canadian Charter of Rights and Freedoms was adopted, Like the Canadian Bill of Rights, the Human Rights Commission Act of New Zealand, 1977, is not also a constituent part of the Constitution of New Zealand - the New Zealand Constitution Act, 1852—and it is expected within a short time a new entrenched Bill of Rights would be adopted in New Zealand.

From the above discussion it is found that in the case of Canada within two decades a substantial improvement is marked and the Charter of Rights and Freedoms has been accorded constituional status by the Constitution Act, 1982, In the case of New Zealand some sort of improvement is made in the sense that in 1977 the Human Rights Commission Act was passed which was not a constituent part of the Constitution but which gives some sort of protection of human rights in New Zealand. As Nigarian Bill of Rights became the model of for the New Commonwealth, so the Canadian Bill of Rights became a model for the old Commonwealth, at least in the sense of application of its provisions to New Zealand.

4. Indian Model

In the preceding sections it has been shown how the provisions of the European Convention on Human Rights, 1950, was incorporated, in a modified form, in the constitutions of the new Commonwealth or in independent Acts of the Old Commonwealth. In the present section the issue will be discussed in the Indian context,

In theory, the convention did not have any impact on the incorporation of human rights in the Constitution of India, because the Constitution of India was adopted in 1949, though it came into

force in 1950, one year before the adoption of the Convention. But in fact, there was a parallel of thinking which arose after the second world war, in the case of India it has also a long history behind it.[112] Both the Convention and the Fundamental rights under the Indian Constitution owed their origin to the Universal Declaration of Human Rights, 1948. So, there were similarities among the wording and substantive provisions of these two instruments.

However, the Indian venture in 1949, was a great break-through in the attitude of the lawyers and political leaders trained in the Anglo-Saxon traditions. Following the British practice it was thought that the inclusion of a Bill of Rights in the constitution was futile exercise, and was apt to create complications in enforcing these rights by the court. The statutory Commission on the Indian Constitution in 1930, rejected the demands of the Indian leaders for insertion in the future constitution of India, guarantees for certain rights. The Commission referred to the constitutions of some European countries, and remarked that experience had not shown them to be of any great practical value.' 8 Its abstract declarations were 'useless' unless there existed 'will' and 'means' to make them effective.[113] "...The Indian leaders in 1949 in incorporating human rights in their Constitution showed their determined 'will' to make them useful and provided 'means' for making them 'effective."[114]

The Constitution of India, 1949, provides that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far they are inconsistent with the provisions of fundamental rights, shall to the extent of such inconsistency, be void.[115] The State is forbidden to "make any law which takes away or abridges the rights conferred... and law made in contravention of this clause shall, to the extent of the contravention, be void."[116]

112. For history of development of Human Rights in India see A.B.M. Mafizul Islam Patwari, "*Development of the Concept of Fundamentai Right during the British India Regime*", I. A. S. B. (Hum) Vol. XXX(2) 1985 at P. 208.

113. *Report of the Statutory Commission on Indian Constitution*, vol. II. (London : H.M.S.O. 1930) Para, 36.

114. A.B.M. Mafizul Islam Patwari, *Fundamental Rights and Personal in India, Pakistan and Bangladesh*, (New Delhi : Deep & Publications, 1988) p. 64.

115. Article 13(1) of the Constitution of the Republic of India, 1949.

116. Article 13(2), *ibid.*

Under the heading of Right to Equality the following rights are guaranteed: equality before law; prohibition of discrimination on grounds of religion, race, caste, sex or place of birth ; equality of opportunity in matters of public employment; abolition of untouchability and abolition of titles.[117] Under the heading of Right to Freedom the following rights are guaranteed to all citizens: rights to freedom of speech and expression; right to assemble peaceably and without arms; right to form associations or unions ; right to move freely throughout the territory of India; right to reside and settle in any part of the territory of India; right to acquire, hold and dispose of property; and right to practise any profession, or to carry on any occupation, trade or business.[118] Under the same heading protection in respect of convictions for offences of life and personal liberty; and against arrest and detention in certain cases, has been guaranteed.[119]

Under the heading of Right against Exploitation prohibition of traffic in human beings and forced labour, and of employment of children in factories has been made.[120] Under the heading of Right to Freedom of Religion freedom of conscience, of religion of management of religious affairs, of payment of taxes for promotion of any particular religion of attendance at religious instruction or of religious worship in certain educational institutions have been guaranteed.[121] Under the heading of Cultural and Educational Rights protection of interests of minorities and right of minorities to establish and administer educational institutions have been guaranteed.[122] Under the heading of Right to Property protection against deprivation of property and against undue compulsory acquisition of property has been guaranteed.[123]

Under the heading of Right to Constitutional Remedies right to move the Supreme Court by appropriate proceedings for the enforcement of the rights has been guaranteed[124]. Accordingly, the Supreme Court has the power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition,

117. Articles 14-18, *ibid.*
118. Articles 19, *ibid.*
119. Articles 20-22, *ibid.*
120. Articles 23-24, *ibid.*
121. Articles 25-28, *ibid.*
122. Articles 29-30, *ibid.*
123. Articles 31-31-C, *ibid.*
124. Article 32(1), *ibid.*

quo warranto and *certiorari*, whichever may be appropriate, for the enforcement of any of the abovementioned rights.[125] Besides the Supreme Court, the High Courts were also empowered to issue appropriate orders and writs to enforce these rights.[126]

However, the Indian model was followed by a number of the Commonwealth countries. In the fundamental rights provisions of the Constitutions of these countries the impacts of the Indian Constitution and the European Convention on Human Rights, 1950, along with the Universal Declaration of Human Rights, 1948, were/ are clearly evident.

To begin with the case of fundamental rights as guaranteed by the Constitution of Malaya[127] in which mixed-impacts of the Indian provisions, European Convention and the Universal Declaration are observed. In part II of the Constitution liberty of the person; prohibition against slavery and forced labour; protection against retrospective criminal laws and repeated trials; equality before law; prohibition against punishment; freedom of movement, of speech, of assembly, of association, of religion; rights in respect of education and right to property have been guaranteed.[128]

The Constitution of Pakistan, 1956, contained a better darfted Chapter on fundamental rights similar in nature to that of the Constitution of India.[129] The Supreme Court of Pakistan and the High Courts were empowered to enforce these rights through there writ jurisdiction.[130] The Constitution of Pakistan, 1956, was abrogated in 1958 and Martial Law was declared throughout the country. In 1962 a new Constitution was "enacted" by the Chief Martial Law Administrator and the President, Field Marshal Mohammad Ayub Khan. In the Constitution of Pakistan, 1962, fundamental rights were reduced to non-justiciable "Principles of Law-making."[131] "Here one detects a soldier's exasperation with the delays of the law, coupled perhaps with an unstated determination not to allow political

125. Article 32(2), *ibid.*
126. Article 226, *ibid.*
127. Federal Constitution Ordinance, 1957. (Ordinance No. 55 of 1957).
128. Articles 5-13 of the Constitution of Malaya.
129. Articles 3-21 of the Constitution of Pakistan, 1956.
130. Articles 22 and 170, *ibid.*
131. Articles 5 and 6 of the original Constitution of Pakistan 1962.

battles to be waged through the medium of courts of law."[132] Here it is found Ayub khan's love of concentration of all powers in his hands like any other military dictator of the world. It is significant to note that the First National Assembly summoned under the Constitution of Pakistan, 1962, had substituted for the Principles of Law-making the fundamental rights of the Constitution of 1956 without remarkable change.[133] This was done by enacting the Constitution (First Amendment) Act, 1963 (Act I of 1964), under heavy pressure of public opinion. The Constitution of 1962 was abrogated in 1969, and again martial law was declared throughout Pakistan. In 1973, a new Constitution was framed for new Pakistan in which fundamental rights have been guaranteed.[134]

The influence of the fundamental rights as incorporated in the Constitutions of India, 1949, of Pakistan, 1956 and 1962 (as amended) is evident in the fundamental rights incorporated in the Constitution of the People's Republic of Bangladesh, 1972.[135] The influence of the fundamental rights incorporated in the Constitution of India is also evident in the fundamental rights incorporated in the Constitution of Democratic Socialist Republic of Sri Lanka, 1978.[136]

5. Conclusion

From the above discussion it is seen that the fundamental rights incorporated in the Constitution of India, 1949, was influenced by the provisions of the Universal Declaration of Human Rights, 1948.

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132. S.A. de Smith, *op. cit.*, at p. 214.
133. See Arlicles 5-6 of the Constitution of Pakistan 1962 as amended.
134. Articles 7-28, 184 and 199 of the Constitution of the Islamic Republic of Pakistan, 1973.
For a detailed Study See A. B. M. Mafizul Islam Patwari, *Protection of the Constitution and Fundamental Rights under the Martial Law in Pakistan*, 1958-1962 (Dhaka : Uhiversity of Dhaka, 1988).
135. Articles 26-47 A and 102 of the Constitution of the People's Republic of Bangladesh, 1972.
136. Articles 10-17 of the Constitution of Democratic Socialist Republic of Sri Lanka, 1978.
All issues relating to fundamental rights in the context of India, Pakistan, Sri Lanka and Bangladesh will be discussed in the authors forthcoming work entitled *Human Rights in South Asia* which is under Preparation under the sponsorship of the University Grants Commission, Bangladesh.

The Indian venture ran parallel with the European venture which was also influenced by the same Declaration. In the fundamental rights provisions of the Constitutions of Malaya, Pakistan, Sri Lanka and Bangladesh the mixed—influences of the Indian Constitution, European Convention and the Declaration are evident.

Another point may be noted in this connection. In Pakistan, Sri Lanka and Bangladesh though fundamental rights had/have been guaranteed by their Constitutions, but due to political instability there were/are violations of human rights therein and the constitutional courts became/become powerless to enforce the constitutionally guaranteed rights. In India, in spite of political calamities, the Constitution and constitutionally guaranteed rights remain intact and the Supreme Court as well as High Courts are empowered to enforce the rights guaranteed by the Constitution. So, it can be said that the Indian model in relation to human rights, was theoretically followed in Pakistan, Sri Lanka and Bangladesh, but in practice there were/are violations of human rights in these countries to such extent which never have been contemplated by the people of this regions.

From the above discussion and observation on the Nigerian model, Canadian model and Indian model one thing is clear that the framers of the Constitutions of the newly emerged States (except India) were motivated by the adoption of the European Convention on Human Rights, 1950, and they incorporated the main provisions of the Convention into the relevant constitutions. But with a short period their 'will' and 'means' became futile exercise because of the existence of political instability prevalent therein. Only in India, Canada, New Zealand ete. a substantial improvement is evident. So, it can be said that though Parliament of the United Kingdom had exported human rights and fundamental freedoms to the new Commonwealth countries on a scale without parallel in the rest of the world, but that noble intention failed to succed in the majority cases due to political instability prevalent therein. Accordingly, the alternative arrangements made against the cessation of extension of colonial clause by the United Kingdom on independence of a territory for whose international relations the United Kingdom was responsible also failed to succeed in the majority cases.

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UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS (TNCs) IN THE ASPECT OF PRIVATE INTERNATIONAL LAW

DR. MIZANUR RAHMAN*

1. Introduction:

Transnational corporations (TNCs)[1] continue to occupy a significant role in a number of sectors in most countries. The capacity of such corporations to mobilize financial resources, technology and management expertise, together with the impact of their global operations in various production and service sectors, ensures their continuing importance in the overall development programmes of most countries. At the same time, their activities need to be effectively harmonized with the development goals and objectives of the host country in order that any negative effects of their operations in particular countries can be eliminated or minimized.[2] The harmonization of the activities of such corporations with the objectives and development programmes of host countries, particularly developing countries, necessitates a fairly detailed framework of policies regarding the activities of TNCs.

The idea of regulating the activities of TNCs has been inspired by two main perceptions of the role of TNCs in the world economy: on the one hand, it is recognized that TNCs play a positive role as effective instruments of development in developed and developing countries alike and their role should be strengthened; on the other hand, it has also been recognized that the pervasive role of TNCs in the world economy requires the formulation of guidelines for their conduct. The result has been an effort to establish a balanced code that prescribes standards of corporate conduct and principles for the treatment of TNCs.[3]

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1. For a legal definition of TNC see : M. Rahman. Legal definition of transnational corporations (TNCs) : A suggestive study.-*Law and International Affairs*, Vol. 12, No. 1, 1989. pp. 1-20
2. UN. CTC. National Legislation and Regulation Relating to Transnational Corporations. ST/CTC/26, New York, 1983, p. 1.
3. UN. CTC. The Uniied Nations Code of Conduct on Transnational Corporations. E. 86. 11. A. 15, New York, 1986, p. 1.

The global code of conduct has several antecedents[4], varying in scope according to geographical application, substantive coverage, and successfulness. These include the International Convention on the Treatment of Foreigners (1920)[5] the Havana Charter of the International Trade Organization (1948)[6], the International Code of Fair Treatment for Foreign Investments (1949)[7], the Abs/Shawcross Convention on Investment Abroad (1959)[8], the International Association for the Promotion and Protection of Private Foreign Investment (1959)[9], the Harvard Conventions on the International Responsibility of States for injuries to alien (1929 & 1961)[10], the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977)[11], the UNCTAD International Code of Conduct on Transfer of Technolgy (1980)[12], and the UNCTAD Principles and Rules for the Control of Restrictive Business Practices 1980)[13]. The latest code to join the long list of international codes of conduct is the Draft United Nations Code of Conduct on transnational corporations (UN Code).[14]: This article is an attempt to review the substantive issues addressed in the

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4. For details see : T.M. Ocran. Interregional Codes of Conduct for Transnational Corporations.-*Connecticut Journal of International Law*, Vol. 2, No. 1, 1986.
5. League of Nations. Doc. C. 174 M. 53, 1928 II 14 (1929).
6. For the text of the Havana Charter, see : UN Conferences on Trade & Employment. Final Act & Related Documents. U.N. Doc. E/CONF. 2/78, U.N. Sales No. 1948. II. D. 4 (1948)
7. I.C.C. Pub. No. 129 (1949)
8. The text is reprinted in : The Proposed Convention to Protect Private Foreign Investment : A Round Table.- *Journal of Public Law*, Vol. 9, pp. 115-124 (1959).
9. A.P.P.I. Res. No. 1 (1959)
10. For a discussion of the conventions see : Sohn & Baxter. Responsibility of States for Injuries to the Economic Interests of Aliens.- *American Journal of International Law*, Vol. 55, 1961, pp. 545-584.
11. ILO. Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977.
12. Roffe. UNCTAD : Code of Conduct or Tannsfer of Technology.-*Journal of World Trade Law*, Vol. 19, 1985, pp. 669.
13. U.N. Doc. TD/RBP/CONF/10, (1980)
14. 1983 U.N. ESCOR Supp. (No. 7) at 12-27, U.N. Doc. E/1983/17/Rev. 1 (1983). The Draft is reproduced in *International Legal Materials*, Vol. 23, 1984, p. 624.

UN code in the aspect of private international law and to determine the problems which might hinder its implementation, taking into special consideration the demand of the developing countries to effectively control the TNCs.

2. Developing Countries and TNCs : Conflicting Interests

Diverse legal problems emerging out of TNC operations in developing countries precipitate the corresponding necessity of their regulation. Two contradictory factors influence the process of formulation of regulatory measures: the ever increasing demand of the developing countries to regulate and control the TNCs on the one hand, and the inconsistency of existing legal means with complex international economic relations in the sense of their regulation[15]. As a matter of fact, legal means adopted by national legal systems and by international law are directed toward defining the legal status of foreign legal persons in general, and they, of course do not take into account the problems created by the emergence of TNCs. Complex organizational structure of TNCs allows them to manoeuvre in different municipal legal systems and consequently, in some cases, bypass the regulatory measures of the host country. But individual cases of the ineffectiveness of national regulatory measures do not necessarily establish the impossibility of regulating the TNCs in the national level. In our opinion, it seems unfounded to contend that "international character of functioning of TNCs should be accompanied by internationally agreed system of regulation."[16] Such contention accords undue attention to economic aspects of TNCs. It is true that in relation to economic activities TNC is always international, but in its legal essence a TNC is a formation of municipal law and hence, national in character.

3. UN Code of Conduct on TNCs

The call for a comprehensive code of conduct on TNCs was first made during the early 1970s, partly as a consequence of efforts to improve the functioning of the international economic system,

15. W.C. Jenks. A new world of Law ? A Study of the creative imagination in international law. London, 1969, p. 72.
16. V.V. Natalukha. Regulation of Transnational corporations : National and International aspects. Moscow, 1981, p. 2 (in russian)

parly to build on efforts of the international business community to prescribe norms for foreign direct investment It is held that "in relation to TNCs, the 70-s is characterized by efforts to formulate and adopt international codes of conduct."[17] The formulation of the code was made a priority objective of the United Nations Commission on TNCs established under Economic and Social Council resolution 1913 (LVII) of 5 December 1974, which is assisted in its work by the United Nations Centre on TNCs.

The preparation of a draft text of the code was entrusted to an intergovernmental Working Group of the Commission, which began its work in January, 1977. The task of preparing the draft text of the code took longer than had been anticipated, but the intergovernmental Working Group finally submitted its report to the Commission at its eighth session in 1982.[18] Although the Inter-Governmental Working Group had reached tentative agreement on most of the provisions of the code, it was unable to resolve a number of key outstanding issues. The next stage of the negotiations was thus entrusted to a special session of the Commission on TNCs, which began its deliberations in 1983 and is open to the participation of all states. Although the Commission has since then made considerable progress, a number of key issues still remain outstanding.[19]

The provisions of the Draft Code are structured around six main areas or chapters, namely, preamble and objectives; definitions and scope of application; activities and conduct of TNCs; treatment of TNCs; intergovernmental cooperation; and implementation.

Most of the chapters are sub-divided into several sections, each of which deals with particular sets of issues. For instance, the chapter on activities and conduct of TNCs contain three section dealing respectively with general and political issues, economic, financial and social issues, and disclosure of information. The chapter on treatment is also divided into three sections dealing with general treatment of TNCs by the host countries, nationalization and compensation and jurisdiction.

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17. The UN Code of Conduct on Transnational Corporations.- *The CTC Reporter*, No. 12, 1982, p. 2.
18. See. U.N. Doc. E/C. 10/1982/6.
19. For views of the most recent rounds of negotiations see : S.K.B. Asante. The Code : the January 1986 reconvened special session.- *The CTC Reporter*, No. 21, 1986, pp. 14-19.

By 1986, most of the provisions of the code have been agreed *ad-referendum,* leaving a few-albeit difficult-issues to be resolved by the Commission. Subsequent sessions of the Commission testify that a sharp difference exists in the opinion of developed western countries on one side and developing countries and socialist countries on the other on such issues as nationalization and compensation, jurisdiction, treatment of the TNCs by the host countries etc, in other words, issues which constitute the core of TNC operations in developing countries.

In view of the fact that however transnational their operations may be, the TNCs operate within the borders of specific countries with individual legal systems which are theoretically able to prescribe and enforce standards of behavior for all business enterprises within their territories, the chapter of the Code on Activities and conduct of transnational corporations offers special interest in the light of private international law. The basic principle underlying this chapter-that of *national sovereignty* with regard to the prescription of laws and policies on foreign investments is now generally accepted and is, in fact, re-stated positively in paragraph 47 of the Draft Code in the part dealing with the treatment of TNCs. This principle is stated implicitly in this part of the Code, particularly in para. 7, which reads :

> "An entity of transnational corporation is subject to the laws, regulations and established administrative practices of the country in which it operates."

Agreement on this basic principle, as a matter of fact, simplified to a great extent the elimination of differences in opinion on the *review and renegotiation of contracts.* It is now stated in para. 11 of the Draft that contracts between Governments and TNCs should be negotiated and implemented in good faith. The provision goes on to state further that such contracts, especially long-term ones, should normally inculde renegotiation clauses. In the absence of such clauses, however, where there has been a fundamental change in the circumstances on which such a contract or agreement was based, TNCs are urged to co-operate, in good faith, with Governments in the review and renegotiation of such contracts.

Of pertinent interest is the section containing standards relating to the economic, financial and social aspects of the activities of

TNCs. The provisions on *ownership and control* (paras. 21-25) are designed to strike a balance between the competing interests of the TNCs and the host country, by requiring the parent entity to give its affiliates sufficient autonomy to enable them to pay due attention to the development needs of the host country.

The basic provisions on *balance of payments and financing* require TNCs to carry out their operations in conformity with the relevant laws, regulations and policy objectives of their host countries, particularly developing countries, and to respond positively to requests for consultations on their activities "with a view to contributing to the alleviation of problems of balance of payments and finance of such countries". (para. 27).

The general thrust of the provision on *transfer pricing*, which is yet to be negotiated, calls for the avoidance of pricing policies that are not based on market prices or on the arm's length principle, in transactions between entities of TNCs. This is in order to prevent the evasion of taxes or exchange control measures of Governments of host countries, through transfer of funds across national boundaries that are disguised as payment for goods and services, but they may not be an accurate reflection of the actual price of such goods or services. That objective is reflected in para.34 on *taxation.*

The proviston on *restrictive business practices* (para. 35) embodies principles and rules designed to minimize the use of practices that limit competition in national and international markets, and to facilitate the effective regulation or control of such practices by Governments of host countries. This provision has incorporated the UNCTAD Code on Restrictive Business Practices to bring it under the umbrella of the Code of conduct.

In tune with para. 36, TNCs have been bestowed with the responsibility of *transfer of proper technology* to the host countries to accelerate the economic and social development of the latter. The same objectives underline the provisions on *consumer protection* (paras. 37-40) and *environmental protection* (paras. 41-43).

It is true that in the light of the sharp differences between representative governments it is difficult to predict the final provision. For these reasons, an evaluation or critique of the draft code would be

futile. Nevertheless, formulation of uniform attitude of developing countries on these questions would greatly facilitate the process of introducing necessary changes in the provisions and thereby ensure smooth functioning of the code in the future. In consideration of this fact, we will now concentrate on some of the important provisions of the code which call for drastic changes to safeguard the interests of host developing countries. The backdrop for this analysis is the dire necessity of legal regulation of TNCs by the host countries.

4. Main Areas of Difference

A. *Nationalization and Compensation*:

The question of nationalization and compensation is probably the most controversial part of the code. The host states' attachment to the principle of permanent sovereignty over natural resources stands in sharp conflict with the reluctance and even the refusal of TNCs to accept controls by host states over corporate operations. In fact, developing countries generally regard nationalization as a legitimate means of recovering natural resources, transferring ownership of foreign-owned property and redistributing the world wealth.

Although international law recognizes the right of expropriation, traditionalists such as the western capital exporting nations try to limit severely that power. Under the prevailing western view, for example, expropriation is proper under international law only if consummated for a public purpose,[20] nondiscriminatory with respect to aliens, and accompanied by just compensation.[21]

In direct contradiction to the traditionalist stance, the developing countries, supported by the socialist states, assert that national law of the expropriating state determines the conditions relative to nationalization and that only municipal courts have jurisdiction to adjudicate any related claim. Invoking the concept of equal treatment, these states maintain that no alien is entitled to better treatment than a national of a host state and that any preferential

20. The requirement of "public purpose" was first recognized by the Permanent Court of International Justice in 1926 in *German Interests in Polish Upper Silesia* (*Germany V. Poland*), 1926 P.C.I.J (Ser. A) No. 7, pp. 21-22.

21. Under this view just compensation is defined as "prompt, adequate, and effective" compensation.

treatment under the rubric of minimum standards of international justice amounts to assigning aliens to a special regime in the state.[22]

The draft code follows a compromise formula keeping aside those fundamental issues in which position of states sharply differs.[23] This problem is not also uniformly resolved in international practice (international law) till today, and lawyers are justified in their doubt that uniform decision on this issue can at all be achieved within the scope of the code.[24]

B. *General treatment of TNCs by host states* :

The problem of general treatment of TNCs by host states has been another point of controversy. Seven articles in the Draft deal with this question but on only one of them (para. 47) consensus could be achieved. Thus, it is now generally accepted that "states have the right to regulate the entry and establishment of transnational corporations including determining the role that such corporations may play in economic and social development and prohibiting or limiting the extent of their presence in specific sectors."[25] But difference of opinion exists as to the concrete standard of treatment of TNCs by the host states. Western states demand "fair, equitable and non-discriminatory treatment in accordance with international law (obligation)".[26] This, however, contradicts the very essence of para. 47 of the code on which consensus already exists. Moreover, nondiscrimination of TNCs by the developing states actually tant-amounts to discrimination in favour of TNCs themselves. Such treatment also contradicts municipal laws of many host states which establish different levels of differentiation between alien and national enterprises.[27]

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22. see. Dolzer. New Foundations of the Law of Expropriation of Alien Property.-*American Journal of International Law*, Vol. 75, 1981, p. 553.
23. Para. 54 of the Draft Code. E/C. 10/1982/6.
24. M. M. Rodriguez. The Negotiations on the United Nations' Code of Conduct on Transnational Corporations : Some Issues.-*The CTC Reporter*, No. 12, 1982, p. 9.
25. Para. 47 of the Draft Code. E/C. 10/1982/6.
26. Ibid, para. 48
27. M.M. Rodriguez. op. cit. p. 9

C. *Jurisdiction* :

Mutually opposing opinion is also prevalent on questions relating to how the disputes involving a TNC would be settled. In this context, the developing countries maintain that "entities of transnational corporations are subject to the jurisdiction of the countries in which they operate."[28] Possibility of recourse to arbitration or other means of settlement of disputes is also determined by domestic law of individual host states. In contradiction to this attitude, the developed countries of the west contend that "in contracts in which at least one party is an entity of a transnational corporation the parties should be free to choose the applicable law and the form for settlement of disputes, including arbitration....."[29]- It is not difficult to detect the inherent motive in such assertions which *stricto sensu* amounts to withdrawl of such disputes from the jurisdiction of developing host countries in favour of international arbitration or other means of settlement. Such an approach underestimates the role and authority of laws and organs of judiciary of developing countries, and hence has been aptly rejected by them. It is noteworthy that western states demand national treatment of TNCs by developing host countries, whereas for purposes of settlement of disputes reject application of domestic laws of the host states and bend toward international means. This fact alone is sufficient to prove the inconsistency in the western attitude.

The above mentioned differences between the developed and the developing countries bear principle character, and even if some broad compromise formula can be invented, it would render the code voluntary character, at least in the initial stage.[30] Voluntary character of the code, however, can not reduce its importance in its ultimate goal of regulation of TNCs.[31]

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28. Para. 55 of the Draft Code. E/C. 10/1982/6. Alternative version of this paragraph also exists.

29. Ibid, para. 57.

30. P. Sanders. Implementing international codes of conduct for multinational enterprises.-*American Journal of Comparative Law*, Vol. 30, No. 2, 1982, p. 253.

31. See in detail : K. C. Stephan. Codes of Conduct for Multinational Corporations.-*Business Lawyer*, Vol. 33, No. 3, April, 1978.

5. Inherent weaknesses of the code :

The Draft code in its present form, in our opinion, contains some serious drawbacks, mere presence of which might belate its adoption and hinder its significance. Let us focus on some of them:

Firstly, a very special defect of the code is the part addressed to sovereign states, namely, treatment of TNCs by host states. The sole aim of the code should be restricted to regulation of the activities of TNCs. Whatever concerns individual states, it is well known that their rights and obligations in respect of foreign investment have been formulated in various resolutions of the United Nations.[32] In accordance with contemporary international practice, entry of foreign investment is preceded, as a general rule, by signing of two seperate documents: investment agreement, concluded between the foreign investor and the host state, and investment guarantee agreement, signed by the host state with the home state. Rights and obligations of host states vis-a-vis foreign investor are, as a matter of practice, formulated in this latter agreement.[33] The code, on its part, is supposed to create norms regulating the behavior solely of TNCs in general.

Application of the code both to sovereign states and TNCs might be interpreted as placing them on an equal footing which in turn raises questions concerning international legal subjectivity of TNCs, although the code itself avoids answering this problem.

Secondly, development of international economic relations show that regulation of TNCs by the host states serves the process of realization of full and permanent sovereignty of the developing countries over their natural resources. Regulatory powers of a state include measures like nationalization, and the lawfulness of such steps, the amount and type of compensation etc. are determined in accordance with municipal laws of the concerned host state. This is now recognized to constitute a principle *jus cogens* of international law. By undermining the right of developing host states to nationalize the property of TNCs, the code, as a matter of fact,

32. see for example General Assembly Resolutions 1314 (XIII), 12 December, 1958, 1515 (XV), 15 December 1960, 1803 ((XVII), 14 December 1962.

33. I. Delupis·Finance and Protection of investments in developing countries. London, 1973, pp. 35-36.

questions the validity of these generally accepted principles of international law and thereby adversely affecting the process of unification of investment laws of different states which constitutes one of the fundamental aims of the code.

Thirdly, the question of jurisdiction of host governments in respect of resolution of disputes in which TNC is a party is not satisfactorily decided in the code. The fact that national law of the host state determines the legal status of TNCs is the condition *sine qua non* for the very entry of TNCs into that state. Possibility of recourse to international means of settlement of disputes also depends on the municipal law of the host state since application of *lex voluntatis* is dependent on whether it is permissible under the national law of of the host state. There is also no general rule in international law requiring parties to address to international means of settlement of disputes without first taking shelter of the local means. On the contrary, resort to international means is permitted only after the local means offered by the host state law have been exhausted.[34] But here we might come across a problem of a different category: the TNC has the right and is obliged to resort to local means, which, say for example, do not bring the TNC expected results, e.g the amount of compensation determined by the local court and payable to the TNC is unacceptable to the latter. Can the TNC in such cases look for international means? Aswer to this question can only be negative because in the contrary situation it would tantamount to disrespect and distrust to national courts. It needs not to be stressed that "recognition of developing states as sovereign entities necesserily signifies trust to their legislation and administration of justice."[35]

This now constitutes the generally accepted position of the international community. The developing host states may, however, offer particular concessions by dividing the transactions of a TNC into two categories: national and a-national or international transactions. The effect of national transactions is restricted within the

34. Robert B. Von Mehren & Martin E. Gold. Multinational Corporations : Conflicts and controls.- *Stranford Journal of International Studies*, Vol. 11, 1976, p. 9.

35. P.J.I.M. de Waart. Permanent sovereignty over natural resources as a cornerstone for international economic rights and duties.- *Netherlands International Law Review*, Vol. XXIV, sp-issue, 1/2, 1977, p. 319.

national market and hence do not influence foreign trade or the balance of payment of the host state. The picture is totally different in case of a-national transactions, and *lex valuntatis* can well be applied to determine their proper law.[36] But again, which transactions constitute a-national or international has to be defined in accordance with the host state law.

Fourthly, one of the significant loopholes of the draft code is the absence of provisions establishing obligation of home states (whose nationality a particular TNC possesses) in relation to their TNCs. The code, on the one hand, declares that bilateral agreement between the host state and the home state is one of the ways of achieving the goals of the code, but, on the other hand, absence of provisions concerning home state obligations to a great extent reduces the practical value of the code. This fact has negative impact on the legal nature of the code. The developing countries would like the code to be obligatory in nature, if firstly, it would deal solely with regulation of TNCs, and/or secondly, obligation of the host states would be accompanied by corresponding obligations of the home governments. Under the present circumstances, when the code establishes unilateral obligations of the host states at par with with TNCs. attitude of the developing countries to make the code legally binding cannot remain unaffected and unchanged, not to speak of the code to be "effective, comprehensive, generally accepted and universally adopted."[37]

It seems that the process of formulation of the code followed a wrong path. For more effective regulation of TNCs and meaningfull implementation of the code, provisions concerning host state obligations *vis-a-vis* TNCs should be deleted. By doing so, the code would correspond to the original goals of the code. This would, moreover, underline the subordinate character of TNCs in relation to sovereign states. This of course does not mean that states, both

36. This is the recent practice of some national legal systems. For example, the French Decree of 1981 on International Commercial Arbitration introduces the concept of "truely international contracts". Some lawyers opine that only the so called "technical disputes" could be exempted from the national jurisdiction of the host state. See : Joya Govind. An international legal regime for transnational corporate investment.- *International Studies*, Vol. 19, No. 2, New Delhi, 1980, p. 153.

37. ECOSOC. Res. 1980/60, para. 6 (a).

the host and the home, do not possess certain rights and obligations in relation to TNCs. This type of relations, however, could be formulated and regulated by concluding another international legal document concerning TNCs or foreign private investment in general. This document in turn could serve as the basis of possible bilateral agreements (e.g Investment Guarantee Agreement) between the host and the home state, and also of regional agreements. Only thus, in our opinion, uniformity of measures for regulation of TNCs could be attained.[38]

The idea of such type of international agreements is not new in legal literature. Some specialists opine that such an agreement may be signed in the form of General Agreement on International Corporations-GAIC, like GATT in the sphere of international trade.[39] But of late, the initiators have stepped back from their initial proposition, and international practice developed in the direction of formulation of codes of conduct. However, the UN Code of Conduct on TNCs in its present form contains, as we have discussed above, a number of serious defects which must be removed in order to enable the code to effectively regulate the TNCs.

In our opinion, normative regulation of TNCs should be accompanied by institutional regulation. One UN research accorded the UN Centre on TNCs the role of institutional mechanism.[40] Some theoreticians advocate for establishment of Special International Organ for regulation of TNCs,[41] while others consider this view to be unrealistic.[42] It appears that this problem has been quite satisfactorily decided in the code. It is stipulated that "The United Nations Commission on transnational corporations shall

38. C. Robert O. Kohane et al. The Multinational firm and International Regulation.- *International Organizations*, Vol. 29, No. 1, 1985, p. 1960.
39. P. Goldberg & Ch. Kindleberg. Toward a GATT for Investment : A proposal for supervision of the International Corporation.-*Law and Policy in International Business*, No. 2, 1970, pp. 295-323.
40. U.N. Multinational Corporations in World Development. New York, 1973, p. 93.
41. G. Ball. Cosmocorp : The importance of being stateless.- *Columbia Journal of World Business*, Nov-Dec, 1977, pp. 29-30.
42. G. Ball (ed). The Global Companies. The Political economy of World Business. Englewood, 1975, p. 160.

assume the functions of the international institutional machinery for the implementation of the code..."[43]

6. Conclusion

The prolonged process of formulation of the code testifies to the fact that interests of different groups of states are not only divergent, but also often opposing. Even one and the same principle of law is understood and consequently implemented differently in different legal systems.[44] This accounts for significant difficulty in regulating the TNCs on international level under the aegis of the UN. The draft code in its present form is not only unacceptable to developing countries, but is also without any real perspective. Adoption of the code in its present form, it is concluded, would create additional threat to economic and polittical interests of the developing host countries. For better protection of interests of the developing host countries, it would be expedient to formulate two seperate documents concerning regulation of TNCs: firstly, Code of Conduct establishing legal regime of TNCs in host states, and secondly, Investment Guarantee Agreement establishing rights and obligations of both the host and the home states in relation to TNCs. These two documents taken together could form the basis of a "qualititavely new *lex mercatoria* based on universal consensus".[45] In this case, the principles formulated in the code although voluntary in character, would subsequently attain their legal *status nascendi*.[46]

In accordance with the foregoing analysis, it is submitted that a hierarchy of legal sources regulating TNCs should be constituted which would definitely contribute to the establishment of a uniform regulatory regime. Apparently, the structure of the sources of law regulating TNCs should be constituted on two levels-national and international, wherein they are mutually related not vertically but

43. para. 67 of the Draft Code. op. cit.
44. J.N. Behrman. Conflicting constraints on the Multinational Enterprise. Potentials for resolution. New York, 1974, p. 77.
45. N. Horn, Legal problems of Codes of Conduct for Multinational Enterprises. Kluwer, 1980, p.81.
46. see. W. Wellens. Recent development toward a United Nations Code of Conduct for Transnational Corporations.- *Studia Diplomatica*, Vol. XXXIV, No. 6, Bruxeles, 1981, p. 708.

horizontally. The national level represents the actual regime, whereas the international level is complementary and perspective in the sense that it would help in the long run to unify the national laws in this aspect. Consequently, the structure of the sources of law regulating TNCs may be viewed as follows:

A. National regulation, consisting of
   i. legislation of host countries, and
   ii. legislation of home states.

B. International regulation, mainly for the purpose of
   i. unification of laws concerning TNCs, which might take place in the following main forms:
   a. international treaties (multilateral),
   b. resolution of international organizations,
   c. joint declarations of states adopted in international conferences which are not internalional treaties, etc.

Intermediate place in this structure would be occupied by bilateral agreements signed between host and home states, e.g Investment Guarantee Agreements.

It should also be remembered that regulation of TNCs should proceed in two directions simultaneously-normative and institutional. If the normative direction means creation of norms of behavior which the TNCs are obliged to obey, institutional direction signifies the establishment of certain institutions dealing mainly with questios of violation of law and liability of TNCs, resolution of disputes and conflict situations between host states and TNCs, etc.

It needs mentioning that within this structure international regulation operates on the basis of general norms expressing fundamental principles of functioning of TNCs, whereas national regulation gives concrete expression to these principles i.e it proceeds from individual incidents. This signifies that national regulation realizes the main techno-juridical, controlling function in relation to TNCs. This structure also corresponds to and is consistent with the correlation of international law and municipal law.

Controversy over the Code of Conduct's form and its substantive provisions continues to inhibit the formulation of a final product, despite over a decade of time and energy expended by the Working

Group and other bodies within the United Nations system. The world community has expressed great interest in a code of conduct for TNCs, particularly the developing countries which seek an equilibrium between the promises and the realities of foreign investment on the one hand and a new, just, and non-exploitive economic order on the other. But if the inherent weaknesses of the code, as has been detected in this article, are not set aside, the code will remain a paper-tiger and the expectation of the developing countries of a new international economic order would continue to remain a far cry.

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LIFE INTEREST UNDER MUSLIM LAW OF GIFT

NAIMA HUQ

Introduction:

Life interest denotes holding of right in land limited in duration to the life of the holder or of some third person. Life interest is a term of art in English law and holder of life interest is spoken of as owning property for life. The concept of life interest under English law falls under the general head of the creation and transfer of rights short of full ownership. Under Muslim law, the terms 'life interest' or 'life estate' is being used by the jurists, text book writers, judges and lawyers to denote right in property conveyed by way of gift or family *wakf*, family settlement or will which fall short of full or absolute ownership. But the nature and incidents of these limited right for life under Muslim Law are different from the nature and incidents of limited interest under English law because the concept of property under these two systems of law are different. Failure to keep in view this difference has led to confusion in appreciating the nature and incidents of limited interest conveyed by way of gift or other means of transfer under Muslim Law. As Tyabji has stated that much difficulty in the appreciation of the Hanafi law governing limited interest in property or rights in property not amounting to its full ownership has arisen from a failure to attend to the classification and terminology of the Hanafi texts and from a forced identification of terms used in those texts with terms prevalent in English law though there is no real equivalence between the two.[1] It is submitted that much of this confusion can be avoided if the nature and incidents of the limited rights for life conveyed by gift or other modes of transfer are grasped fully and an appropriate terms is used to designate such limited interest.

This paper seeks to identify the nature and incidents of limited right to property conveyed by way of gift for the life time of the donee to facilitate the proper understanding of the right. Our concern here is only with one type of limited right, namely, right for the duration of life of the donee.

1. F.B. Tyabji *Muslim Law*, (Bombay, 4th Edition, 1968) pp. 446-447

Concept of Gift and *Hiba*.

According to the orthodox Muslim jurisprudence the term gift or *hiba* is identified with absolute and unconditional transfer of ownership of any property without any return for indefinite period, and anything less than absolute and unconditional transfer is not acceptable. This requirement obviously limits the ambit of gift or *hiba*, and limits the number of beneficiaries who can have the onwership at a given time. But this orthodox view of gift has been consistently maintained, one reason being that the Prophet never liked the idea of imposition of condition to a gift. The Prophet approved of *amrees* (life grant) but held the condltion annexed to them by the grantor to be void. In spite of the orthodox notion of gift, transfer of right or interest other than absolute ownership has fallen for consideration as owners of property in all ages have been purporting to convey right or interest in property which is not intended to be absolute right or ownership. The term 'gift' is used to designate such transactions. According to Fyzee, the term gift is generic and is applied to a large group of transfers. The word *hiba*, however is a narrow well-defined concept.[2] *Hiba* is the immediate and unqualified transfer of the corpus of the property without any return.

Concept of Ownership :

Under Muslim Law no distinction is drawn between movable and immovable property in respect of ownership. The expression "Ownership of Property" is restricted under Muslim Law to denote full and absolute ownership. Rights or interests not amounting to full ownership are not spoken of as "Ownership for a limited period of time." Rights or interests that fall short of full ownership, that is, rights limited in point of duration are equated with the right of enjoying the possession or benefit of the property for life or for a fixed period of time although such right can justifiably be spoken of as limited ownership. Ownership is absolute and indivisible.

Concepts of Corpus and Usufruct :

Muslim Law distinguishes between corpus and usufruct of any property. In the case of land corpus means the very plot of Land,

2. A.A.A. Fyzee, *Outlines of Muhammadan Law* (Delhi, 4th edn. 1974), pp. 217-218.

whereas usufruct means the use or produce of the land. According to *Fyzee*,[3] the main distinction between the two terms is this : with the right to take the produce is intimately connected the notion of time or duration ; so that one may transfer the *manafi*, usufruct for a specified time, but not the corpus. If the corpus is transferred, in Islamic jurisprudence, there can be no question of a time limit ; it is the absolute transfer of ownership and is therefore for an indeterminate duration or in ordinary parlance, for ever. The Prophet is understood to have said this : "When you have made an absolute gift of a house, you cannot cut it down by conditions repugnant to it ; you cannot restrict the use of the property to the lifetime of a man in such a case."[4]

According to the textbook writers gift or *hiba* of corpus connotes and comprehends the entire bundle of rights in the property but conveyance of use or usufruct of any property can be subject to condition or limitation. Although usufruct can be transferred for a well defined period according to Tyabji transfer of usufruct for life does not amount to creation of life estate as understood under English law, notwith/standing some essential identity between a usufruct for life and a life estate.[5]

Case Law :

The distinction between the corpus and the usufruct was not evident in the earlier cases, for example, *Mst. Hameeda & others V. Mst. Badlun and Government*[6], *Abdul Gafur and others v. Nizamuddin*,[7] nor did these earlier cases consider the creation of rights in the use and enjoyment of any property. In those earlier cases it was held that life interest for limited duration could not be transferred or conveyed under Muslim Law. In *Anamalay Chetty V. Shaikh Mohmomed Ismail and others*,[8] it was held that creation of life estate was inconsistent with the Mohammadan law and where a life estate was attempted to be created the donee took an absolute interest. This exnposed the confusion surrounding the conception or property under Muslim Law and a failure to attend to the classi

3. Ibid, pp. 245-247.
4. Ibid, p. 246.
5. Tyabji, Supra p. 450.
6. (1872) 17 WR 525
7. (1872) 19IA 170
8. AIR 1914 Lah 152

fication in text-books of corpus and usufruct. The interpretation as to the enlargement of life estate into an absolute ownership resulting from the failure to construe gift was given a decent burial in the Privy council decision in *Amjad Khan V. Ashraf Khan.*[9]

In *Amjad Khan V. Ashraf Khan*[10] the question of enlargement of limited interest into absolute interest was raised. The Privy Council decided against the view that when life interest was purported to be created by gift the donee took entire interest of donor without pronouncing any opinion on the question of the validity of life-interest. In this case, the donor gave to his wife his entire property as to one-third with power to alienate by mortgage, sale or gift and as to two-third she did not possess any power of alienation but remained in possession thereof in her life time. After the death of the donee the entire property gifted away by the document were to revert to the donor's collaterals. On her death her heirs claimed (as against the donor's collaterals) the whole property. On the question whether the interest given in the one-third was an absolute interest or was only a life interest with a power to alienate, their Lordships held that wife's heir could not succeed as either (a) that she acquired only life interest and in that case that interest came to an end on her death and her heir had no title or (b) that if under Hanafi Law, such could not be transferred to the wife by way of gift inter-vivos then she acquired no interest in property. The alternative plea of wife acquiring full interest by expansion of life interest into a heritable interest or a life interest resolving itself into an absolute estate was altogether excluded in respect of those cases in which after ascertaining the intention of donor by reading terms of deed as a whole and giving them natural meaning of language used it was found as a matter of construction that life estate was intended to be granted.

In *Bai Saroobai V. Hussain Somji and others*[11] the majority verdict was that under Sunni law a gift of a life interest was valid but it did not become automatically enlarged into a gift of the corpus of the property absolutely.

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9. (1929) 56IA. 213, AIR 1929 PC 149 affirming AIR 1925 Oudh. 568.
10. Ibid.
11. AIR 1936 Bom. 330

In *Nazimuddin and others V. Khairat Ali*,[12] it was held that a bequest for a limited period or a bequest of the life estate or the usufruct of the property for a fixed period is valid and such a bequest does not operate as absolute interest. The basis of these decisions must be that the gift of the life-tenant is of the usufruct and not of corpus of the property.

The validity of life interest by way of gift was in issue before the Privy Council in *Sardar Nawazish Ali Khan V. Ali Reza Khan.*[13] In that case a Shia Muslim by his will purported to give an estate for life to A and thereafter to B for life, with a power to nominate his successor. It was held that A and B took life interest and the power of appointment was invalid under Muslim Law. A and B had life interest in the usufruct and the testator's heirs were the owner of the property. Their Lordships further stated as under:

"In general, Muslim Law draws no distinction between real and personal property, and it does not recognize the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates or in point of duration like estates in fee simple, in tail, for life or in remainder. What Muslim law does recognize and insist upon, is the distinction between the corpus of the property itself (*ayn*) and the usufruct in the property (*manafi*). Over the corpus of property the law recognizes only absolute dominion, heritable and unrestricted in point of time and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property and the dominion over the corpus takes effect subject to any such limited interests. But though the same terms may be used in English and Muslim Law, to describe much the same things the two systems of law are based on quite different conceptions of ownership. English law recognizes ownership of land limited in duration. Muslim law admits only ownership of unlimited duration in the the use of property. There is no difference between the several schools of Muslim Law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the Schools".

12. AIR 1938 Oudh. 51.
13. (1948) 75 I.A. 62

"In dealing with a gift under Muslim Law, the first duty of the Court is to construe the gift. If it is a gift of the corpus, then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant, but if upon construction, the gift is held to be one of limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected to the extent to which its enjoyment is postponed for the duration of the limited interest".

The decision highlighted the fundamental difference in the concept of property in English law and Muslim Law and serves as a caution against using technical term out of context. The incidents of limited interest under Muslim Law are not identical with the incidents of interest or estates under the English Law. Under Muslim law these limited interests are only usufructuary in nature and not rights of ownership of any kind.

Under English law a person having interest in immovable property for limited period of time is said to be the owner of the property during that period exercising all rights of property including alienation and enjoying all proprietary remedies as against the third party. Under Muslim Law, a person can be said to be an "owner" only if he has full and absolute ownership. Ownership for a limited period is not contemplated at all. In the case where enjoyment of property is granted to a person for life or other limited period such person cannot be said to be an owner for that period.

The principles laid down in *Amjad Khan's case* and *Nawazish Ali Khan's case* have been consistently followed in cases involving both Sunni and Shia Muslims, and the Sunni and Shia Law on the validity of limtied interest are now assimilated. The decisions in *Mst. Inayet Begum V. Mst. Maryum Bibi and another,*[14] *Anjuman Ara V. Nawab Asif Kader,*[15] *Samir Shaikh V. Aijan Bewa and others,*[16] *Syed Duresh Mohidden V. Madras State*[17] *Sheikh Mastan Bi V. Sheikh Bikar Saheb*[18] *Wali Mohammed V. Most. Anowara Sultan,*[19] *Mst. Bibi Alan Taj V. Most. Inayet Begum*[20] *Khan Bibi V.*

14. PLD 1953 Pesh. 1.
15. (1953) 2 Cal. 109.
16. PLD 1956 Dac. 143
17. AIR 1957 Mad. 577
18. AIR 1958 A.P. 751
19. PLD 1958 Lah. 198
20. PLD 1963 Pesh. 199

Safira Begum[21] *Fateh Mohammed V. Nathu*,[22] *Abdur Razzak V. Rabeya Khatan*,[23] *Ghulam Iqbal Khan V. Abdul Jalil*,[24] to cite a few, have followed the decisions in the two above mentioned Privy Council cases. Some of these decisions in upholding interest for the duration of life have thrown some light on the nature and incidents of these limited interest, and a discussion of the same would be illuminating.

In Mst. Inayet Begum V. Mst. Maryam Ribi and another[25] where it was observed that if a person granted a lease of certain property in favour of his four daughters and that lease was to subsist till the lifetime of these four girls, it could not be said that the lease was against any law much less the Hanafi Law, even though the consideration was natural love and affection which was permissible under Section 25 of the Contract Act. The creation of life interest was nothing more than a lease of certain property which were to subsist for the life-time of the lessee. In such a case the owner does not part with the corpus of the property, but he only grants to another its use and occupation for a specific period, which cannot on any ground be made subject to any legal objection and the owner's absolute right is not affected in any way.

A Division Bench of Madras High Court in *Syed Duriesh Mohideen V. Madras State*[26] held that where a donor made a condition that the donee should pay an annuity to one of his heirs in perpetuity and gave effect to the dominion by transferring the subject thereof to the dominion of the donee, as the condition in no way interfered with the completeness of the gift, both the gift and the condition became operative in law. There is no real basis for the contention that the only exception to the general rule that any condition that derogated from the full rights of ownership in property, the corpus, gifted by a Muslim, is a reservation of the usufruct or a portion thereof in favour of the donor, A direction to pay a portion of the usufruct to some one other than the donor and direction to pay it in perpetuity are valid and enforceable obligations. So the arrangement was valid so long as the rule against

21. PLD 1969 Lah. 338
22. 1982 CLC 2082
23. 34 DLR 309
24. PLD. 1958 Pesh 43.
25. PLD. 1953 Pesh 1.
26. AIR 1967 Mad. 577

perpetuity was not violated and the enjoyment of the property was not postponed for an indefinite period. The court also recognised the limited extent of remedies available, namely, the enforcement of right and obligation under tbe gift by one party to rhe gift against another.

In Shaikh Mastan Bi and others V. Shaikh Bikari Shaheb and others,[27] the court observed that a Sunni under Hanafi Law could not without consideration convey ownership of the property with limitation for the life of the donee. But where the ownership is vested is somebody and only the enjoyment of the property was conveyed or received the rule did not apply. Therefore limitation on the enjoyment of property is permissable, though it is aot allowed on ownership. This separate enjoyment is know as "ARIAT"[28] A hiba has become associated with transfer of ownership and the several conditions necessary for making valid gifts would not be essential for creating *ariat*. Thus in *ariat*, it is not necessary for the donor to be of age nor that the thing given should not be undivided. It equally follows that the prohibitions concerning what cannot be done by gift would not extend to the rules governing *ariat*, for the ownership is not conveyed by the latter transaction. Where only *ariat* rights are being conveyed to a person, they can be limited by time.

In *Abdur Razzak V. Rabiya Khatun*[29] it was observed, that reservation of usufruct by the deed of gift itself would not invalidate the gift under the Muslim Law and that the possession of the donee can be effected either by actual possession or constructive possession which constructive possession could be evidenced by the mutation of the record of right in the name of the donee.

The decisions following *Nawazish Ali Khan's* case have thrown light on the nature of usufructuary or limited interest conveyed by the owner of property. This is not a proprietory right conferring any semblance of ownership but at best it is a personal right or

27. AIR 1958 A.P. 751
28. '*Ariat*' does not mean a transfer of ownership but a temporary licence to enjoy the profit or usufruct of a thing. It has been defined by the author of *Durul Mukhtar* as "making another owner of the usufruct without consideration."
29. 34 DLR 309

privilege conferred by the donor upon the donee. As against the donor, the donee can invoke the law of contract or trust to vindicate his right. The donee does not have any title to the property and his possession is deemed to be the constructive possession of the donor or the donee of the corpus of the property in question. By invoking the doctrine of constructive possession the donee of the corpus of the property can obtain mutation of his name in the record of right and therefore create his evidence of title. The donee of the usufruct cannot maintain any suit against a third party who threatens to or really dispossess him unless he seeks the assistance of the donee of the corpus. The donee of the limited interest does not have the security of his interest against the donor as the interest by its nature is revocable. All these incidents serve to distinguish limited interest under Muslim law from the limited interest under English law. Although the nature of the usufructuary or limited interest under Muslim law is clear to many text-book writers and lawyers but for many others the use of the technical terms 'life interest' or 'life estate' to designate such limited interest for life causes a lot of confusion and it is better that these terms be avoided.

Conclusion

The conclusion that can be reached is that the very difinition of gift or hiba as the absolute and unconditional transfer of ownership renders it impossible to conceive that any right or interest of ownership for the duration of one's life can ever be created or conveyed by hiba or gift. To be precise, it would be a contradiction in terms if the concept of gift or hiba could be applied to the transfer of right less than full ownership, for example, use and enjoyment for the duration of the life of the donee or any other person. The term 'gift' is used to designate the transfer without cinsideration of limited right. When one uses the words 'gift of life interest' or 'gift of usufruct' the term 'gift' is loosely used in a much wider sense than '*hiba*'.

There is no doubt that use and enjoyment of property for one's life time can be arranged through family settlement, can be endowed by will to a limited extent and can be conferred by family *Wakf* and contract, but these mode of transfer are not the same as gift or *hiba*.

In the context of Muslim Law, gift of life interest is used to designate transfer without consideration of the use and enjoyment of property for one's life time and this bears no resemblance with the concept of life interest in English Law. Under Muslim Law such interest has got very limited scope and can be equated with bare right, privilege or indulgence. It does not create any transferable right and the legal protection for such right is very restricted. Nevertheless the reason for creation of such right is possibly to keep control over the beneficiary of such right. In the light of the above analysis the use of the terminology 'gift of life interest' or 'gift of life estate' to designate creation of rights in the usufruct, rights which fall short of absolute ownership do not convey the right meaning and should be avoided and instead phrases like 'gift of usufructuary or user right for life or for a fixed period' should be used to denote transfer or creation of right to the use or enjoyment of produce of lend.

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PROBATION IN BANGLADESH : PROBLEMS AND PROSPECTS

ABDUL HAKIM SARKER

Introduction

It is a recognized fact that an offender faces certain ready problems in his readjustment to the community after release. It is mainly due to the 'stigma' he earns through official punishment. In view of the socio-legal implication of the matter, final disposition of the criminal, it could be said, should neither lie in imprisonment nor in freedom, but in the conditions under which he may seek readjustment with the community after having been free.

In recognition of these facts some alternative methods of releasing offenders have arisen. These are suspended sentence, probation, unconditional release of offender after a short jail term, payment of a fine etc. All these methods have, however, not been developed on sound logic or are effective. But two of these methods – probation and parole are guided by legal philosophy with a noble purpose of saving the offenders who are not essentially criminal in attitude or in life organization. The relatively inexperienced or whose habits are still in a formative stage are considered to remain unstigmatized in the greater interest of the society.

Of the two methods probation is more appreciated and accepted means of correctional treatment all over the world. It means "a process of treatment, prescribed by the court for persons convicted of offences against the law, during which the individual on probation lives in the community and regulates his own life under conditions imposed by the court (or other constituted authority) and is subject to supervision by a probation officer"[1] It is a type of suspended sentence, buttressed with legal restrictions, and implying study of the offender's personality and background mainly through a guiding supervision by an officially assigned person.[2] The principal

1. Friedlander, walter A (1968) Introduction to Social Welfare (3rd ed.) Englewood Cliffs, New Jersy P. 450.
2. Cavan, Ruth Shonle (1962) Criminology (3rd ed.) Thomas Y. Crowell Company, Illinois P. 519

characteristic of probation is, therefore, the postponment of either the final judgements or the postponment of the execution of the sentence combined with certain conditions imposed by the court under the guidance and supervision of a probation officer. Having been imbibed with the ideals "attitudes are not changed merely by platitude," "human conducts are improved through guided human contacts" the underaged deviants preferably the first offenders (may be adult also) are, within legal framework, granted probation by the court allowing them to live freely in the community with family members, relatives, friends or foster parents under the supervision of probation officers.

The analysis of above facts would give us the following social elements of probation conducing possible adjustent for the offender in the society : (1) probation permits the probationer to live a normal life in the community and to readjust to socially acceptable attitudes without being cofined to a penal or correctional institution; (2) it is granted, on the basis of a social investigation by the court, assuming that the probationer has the potential ability to live a lawful life and (3) it provides a process of adjustment with the society under the supervision of a probation offecer.[3]

Origin and Development of Probation

As a modern innovation of justice, probation has deep roots in its evolution from earlier methods of dealing with the offender. The punitive reaction was at one time mitigated by the methods such as securing sanctuary, right of clergy, judicial reprieve, and technical circumvention of statutes.[4] Under the common law of crimes the court could suspend sentences temporarily for various reasons of above nature. In the early days, the court, at times, suspended sentences by permitting convicted offenders to live freely on 'good behaviour' or on "keeping the peace." Sometimes, the offenders were compelled to furnish financial guarantee in favour of their pledge taken to project good behaviour during the suspended period. In such situations, persons came forward as volunteers to assist the offender fulfil the objective of the suspension which might be called a counterpart method of probation. John Augustus,

3. Friedlander, Op. cit. P. 450
4. Sutherland E H & Cressey D.R (1955) Principles of Criminology, (Fifth ed.) J.B. Lippincot Co. New York, P. 423

a shoe-maker of Boston, as one of the earliest volunteers (in 1841) secured the release of a confirmed drunkard from a Boston Court by acting as surety for him. He was, however, successful in his attempt to rectify the drunkard fully. He, then extended his service to a large number of offenders[5] during next seventeen years and thus he inspired a lot of volunteers otherwise called probation officers before probation was authorized by the statutes.

The first statutory provision for probation was the Massachusetts Law of 1878. The law authorized the Mayor of Boston to appoint and pay a probation officer by empowering the municipal court to place offenders on probation.

The term 'probation' is derived from the Latin word 'probo,' 'I prove' which gives an idea of the original intent of the device i. e., it is a measure by which an individual may be given a second chance to prove his worth as law abiding citizen. However, in order to check the outgrowth of the problem of crime particularly delinquency in the modern world first time non-serious offenders—adult or underaged are helped by applying probation among some other methods to readjust by turning them out into sober, industrious and law-abiding persons. Probation is, by now, a popular and well-practised method of judicial treatment in the developed as well as developing countries in the world.

Probation in Bangladesh

Probation as a correctional programme, in Bangladesh, came into existence through the promulgation of the probation of Offenders Ordinance in 1960. During Second 5-Year Plan period, two projects: Probation of Offenders project and After Care Service Project were initiated (in 1962). At the beginning, these programmes were started separately in ten places in the country. Later in 1965, these two projects were merged into an integrated one and since then 21 units have been in operation in 21 district headquarters (mainly old) under the management of Social Service Department, Government of Bangladesh. It may be mentioned that the Probation of Offenders Ordinance 1960 primarily indicated, by definition, that there would remain a 'Probation Department' responsible for the administration

5. The number was: male - 1152 and Female - 794

of the Ordinance.[6] The probation officer who would be working for the purpose, was to be appointed by the said probation department and whose qualifications would also be prescribed by the rules under the ordinance.[7]

After an amendment by the erstwhile East Pakistan Assembly in 1964 the Ordinance was turned into an Act, called Probation of Offenders Act, 1964. By this amendment, the responsibilty of administering probation service rests with the Directorate of Social Welfare (now Social Service Deptt). Accordingly, the Social Service Departmet has been administering the programme of probation along with its manyfold services related to case work, group work, community development and general welfare.

Existing Plight of Probation Service

The probation, though important from legal, human and social viewpoints, is a relatively sick programme compared to other programmes of the Department. The reason, as it may readily be identified, is linked somewhere with the autonomy of overall adminisitration of the programme. Probation is explicitly an extended court function. We know that the Probation Act has empowered, aside from juvenile court, court of sessions and magistrate (of the first class) courts to exercise power in deciding cases for probation. So, granting probation to an offender is basically a function of the court. Contrawise, the Social Service Department is to entertain the client placed on probation for helping him restore, acquire personal quality for social adjustment through certain processes of case work.[8] Now, it becomes clear that the efficacy of probation service greatly depends on the nature and degree of relationship between the judiciary and the Social Service Departement in charge of administering probation service.

Ours is an oriental society and we are being oriented to many new ideas and concepts through inconsistent and differential processes. As a natural consequence, there remain variations in our attitude

6. See Probation of Offenders Ordinance, 1960 under the preliminary elaboration of the concepts, Clause [1(2) (6)]
7. Ibid, see also Appointment of Probation Officers, Clause [12 (1) (2) (3)]
8. Case work is a method of social work which intervenes in the Psychosocial aspects of a person's life to improve, restore, maintain his social functioning by improving his role-play and relationship in the social environments

towards certain things and so also prevail in the treatment process. Incidentally probation is one of such things which claims to be measured first in terms of the attitude held by the departments involved in the process. As has been indicated, probation is a regular service of particular interest of the Department of Social Service whereas it seems to be an added function of the court. As if, it is an egg, the lay of which depends on the voluntary will of the court.

In addition, the need for sincere and unequivocal support of the the police (including prison authority) and of private efforts for correction cannot be ignored. After all, all concerned departments must come to an agreement both in attitude and in commitment to making the probation drive a success.

However, based on common observation and on informal interview with the probation officers, some problems related to the execution of probation programme are listed below in a bit descriptive form :

(a) It is an admitted fact that for proper implementation of any Act there should be 'rules' spelling out the whole work process and functions to be carried out. In case of Probation Act no such rules are made by the Government for the purpose of of carrying into effect the provisions involved in it. As a consequence, the court has no clear guidance about the referral of cases to the probation officer.

(b) Since the functions of a probation officer encompass court, prison and the client (probationer) the office of the probation should have been somewhere in the court premises. Because, a close and regular contact with the court is a must for picking up the suitable cases likely to be placed by the court on probation calling for pre-sentence investigation.

(c) For the purpose of granting probation interview with the under trial prisoners is a vital part of the probation–function. The officer has to face, in this connection, certain difficulties relating to physical facility and in respect of cooperation expected to be available from the prison authority.

(d) A Probation officer has been posted to a grater (old) district headquarter and the jurisdiction of his work is the whole of

the district. The staffing pattern of the probation office is very inadequate both in size and quality. The probation officer has no field workers to assist him, not even an office assistant. It is, however, understood from a source that the probation and after care service have been added to Rural Social Service Programme (RSS) in 258 upazilas. The concerned upazila officers are to take care of this programme.[9]

(e) The probation is a relatively uncared programme of the Social Service Department than other programmes. Administration of this programme is in many ways weak and haphazard due to lack of proper guidelines and plan of action. The administrators of this programme at the headquarter are or were never well oriented, trained or keenly interested to work out proper strategy for implementing the programme. The supervision work is also highly irregular and unsystematic. It is evident from the poor volume of statistics of cases under a probation officer.

(f) There remains a status conflict between the magistrate and the probation officer. The probation officer officially does not possess the status as the magistrate does. The question of the status consciousness becomes prominent because of the fact that they represent two different agencies but one intervens in other's function. As has been indicated above, due to lack of general awareness about the matter and for want of spelled out legal bindings the nature of this relationship continues to exist as such. As a result, the probation officer has to take interest unilaterally and most often go for motivating the magistrate about probation without an unjust cause.

(g) For supervision of the female probationer there should be the provision for female probation officer. A male officer has to face some practical difficulties in rapport building, guidance and supervision of female probationer. In a tradition bound society like ours we can easily concieve of the difficulties.

(h) It is reported that most of the probationers come from poverty stricken families. Any rehabilitation programme for them

9. Huq, Shamsul *et al.* (ed) Probation Act O Punarbashan Karzabali, Social Service Deptt. Govt. Bangladesh P. 2

immediately necessitates some sort of economic support. But, in view of this immediate need, there is no provision for giving monetary assistance in the Departmental Programme. Besides, there is no such institutional arrangement by means of which the probationers could be helped to ractify themseves through some occupational therapy.

(i) The probation officer has to run simulteneously 'after care service'[10] alongwith probation. It is, according to them, difficult in practice to organize and manage both the programme, at a time effectively. As a consequence, neither probation nor the after care service has attained any satisfactory standard.

(j) Social Service Department being an agency of multipurpose and multilateral programmes often engages the probation officer in other types of activities on the plea and contention that the said officer is relatively free in his own domain of work.

(k) Probation is highly a professionally skilled service. Therefore, the personnel who would remain associated with this service must have adequate knowledge, skills and expertise about probation. But, the Social Service Department has no definite policy to recruit personnel for this specialized job. Persons of diverse academic background are now in charge of probation yielding an inconsistent contribution to it.

Present Imperatives

It is an undenying fact that probation is a consistantly coordinated effort. As probation originated in the suspended sentence and is an extension of the judicial function the major control of of the matter lies in the hands of the court. On the contrary, the the supervision of the client (probationer) is essentially an administrative work, cannot be judicial because the judge is not able to handle any work outside court. Moreover, the police particularly the prison authority is also entangled with the probation system. So, in view of the above circumstances and genuine importance of the service a separate organization with the particular aim of corrections and after care may evolve in the social-legal perspective of

10. After Care is an organized service for rehabilitation of the released prisoners. It is also a programme of the Department of Social Service initiated in 1962.

the vast issue of criminal justice and crime-control. The proposed organization may be named as 'Board of Correctional nad After Care Service' under which the entire programmes for correction of the deviants and rehabilitation of the released prisoners may be administered. It may also be suggested, in this connection, that by a Government Order, the proposed Board may be an autonomous organizution.

It is gratifying to note that some laws like the Bangladesh Children Act, 1974 and the Probation of Offenders Act, 1964 entail some significant services for greater benefit of the society which require to be administered within a socio-legal framework of thinking. With the overall Increase of criminal incidents particularly among the juvenile and the youth, it may be predicted that the Government shall have to emphasize such programmes in near future by extending the number of projects and discovering new ones like the parole.

However, to make the probation service, under discussion, effective it is immediately essential to formulate probation rules which were supposed to follow the Probation Act for better understanding of the pros and cons and the overall implication of the Act as a whole by all concerned persons and agencies.

In the existing structure, a deliberate attempt should be taken to develop a working relationship among the departments e.g. judiciary, administrative, law-enforcement and social service by mutually recognising one another's role in probation. Without mutual coherent effort, a service like probation can hardly attaln a success. It is, therefore, necessary to arrange interdepartmental meetings at policy-maker's level and orzanize training programmes, workshops for better orientation of the relevant personnels in the field.

Since crime prevention and control is one of the most vital national programme, along with the traditional legal measures, it is an ardent necessity to discover and underscore all possible socio-legal, extra-legal and social measures which may initiate, organize and order for our purpose. In the context of the aggravated crime situation of today we need to attempt to make the existing socio-legal institutional and non-institutional programmes more viable and strongly invite voluntary NGO efforts to initiate therapeutic rehabilitation programmes for helping the deviant persons adjust and

secure honourable resettlement in the society. In this connection the foreign NGOs may particularly be asked to direct their attention to such programmes in addition to or in lieu of their so-called welfare services.

Recruitment of the probation officer may be based on certain policies and principles. As correctional work involves professional service, it goes without saying that the persons dealing with probation work should be educated in professional discipline. Social work is such a discipline having close relations with probation. In the advanced world professional social workers are generally involved in probation service. So, in the context of the above, it is necessary to recruit persons having the educational background of social work/welfare. The status of the probation officer should also be determined in equivalance with other working partners.

The programme may be extended to upazila levels. A control office for supervising and monitoring the programme activities should be set up in each district headquarter. Staffing pattern at all levels should be so that can ensure better service.

For professional development of probation there should be an adequate provision for advanced training for the probation officer in and outside the country.

Finally, it may be sugested that there should be a Training and Research-cum-Evaluation Unit in the structural design of the proposed Board so that training may be offered to the relevant personnels of the concerned departments on a regular basis. Data obtained from the fields and periodical studies concerning the status of the programme may substantially contribute to the development of indigenous training materials for the profession.

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PATENT RIGHTS AND PUBLIC INTEREST

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What is a Patent ?

In its simplest term a patent is an agreement between an inventor and the public, represented by the government : in return for a full public disclosure of the invention the inventor is granted the right for a fixed period of time to exclude others from making, using, or selling the defined invention in the country. It is a limited monopoly designed not primarily to reward the inventor, but to encourage a public disclosure of inventions so that after the monopoly expires, the public is free to take unrestricted advantage of the invention. Because there exists no duty to disclose inventions, an incentive to disclose is embodied in the patent laws of almost all the countries of the world. These laws, in effect, say to the inventor :

> "You have made an invention, but nobody can use it unless you reveal it. It is thought the public will benefit from knowing about it. If you will disclose your secret in such a thorough and orderly manner that anyone skilled in the art can put it into practice, we will give you in return a contract, called a patent, giving you exclusive rights to stop others form making, using, or selling the invention, for a limited period of time.
>
> During this time you may exploit the invention as you please, or sell or lease your rights, and if you die the rights shall pass to your heirs. But at the end of the limited period of time, the invention shall become public property"[1]

Originally, the term "patent" had a broader meaning than that it is now assigned to it. A grant from a sovereign of any special license or privilege, in the form of an open letter addressed to the public at large, was called a letters patent, from the latine *literae patentes*—literally open letters. The term is commonly shortened to "patent[2]. The Letters Patent were addressed by the sovereign

1. Alf K. Berle and L. Sragne De Camp, *Inventions, Patents, and their Management*, D. Van Nostrand Company, Inc., Princeton, New Jersey, 1959 pp. 5-6.
2. J. K. Wise, *Patent Law in the Research Laboratory*. Reinhold Publishing Corporation, New York, 1955, pp. 1-2.

"to all to whom these presents shall come". These grants, or patents included charters, land, titles, offices and many other subjects in addition to monopolies for inventions.

In a document, written by the Director General of WIPO, for the preparatory work on the revision of the Paris Convention for the Protection of Industrial Property, the notion of patent is described as follows : "a patent is a document, issued, upon application, by a government office, which describes an invention and creates a legal situation in which the patented invention can normally only be exploited with the authorization of the owner of the patent[3]. The patent contains a grant to the patentee and a printed copy of the specification and drawings of the invention is annexed to the patent and forms a part of it.

Thus, a patent for an invention is a grant of a property right by the Government to the inventor (or his heirs or assigns), acting through the patent office. The right conferred by the patent grant is "the right to exclude others from making, using, or selling" the invention.

Nature of Rights Conferred by the Patent

The exact nature of the rights conferred by the patent grant must be carefully distinguished, and the key is in the words "right to exclude others from making, using, or selling" the invention. The patent does not grant the right to make, use, or sell the invention but only grants the exclusive nature of the right. Any person is ordinarily free to make, use, or sell anything he pleases, and a grant from the Government is not necessary. The patent only grants the right to exclude others from making, using, or selling the invention. Since the patent does not grant the right to make, use, or sell the invention, the patentee's own right to do so is dependent upon the rights of others and whatever general laws might be applicable. A patentee, merely because he has received a patent for an invention, is not thereby authorized to make, use or sell the invention if doing so would violate any law. An inventor of a new automobile who has obtained a patent thereon would not be entitled to use the patented automobile in violation of the laws of a state requiring a license, nor may a patentee sell an article the sale of

3. WIPO documents PR/GE/II/2 of September 5, 1975

which may be forbidden by a law, merely because a patent has been obtained. Neither may a patentee make, use or sell his/her own invention if doing so would infringe the prior rights of others. A patentee may not violate anti-trust or anti-monopoly laws, such as by resale price agreements of entering into combination in restraints of trade, or the pure food and drug laws, by virtue of having a patent. Ordinarily there is nothing which prohibits a patentee from making, using, or selling his/her own invention, unless he thereby infringes another's patent which is still in force.

Since the essence of the right granted by a patent is the right to exclude others from commercial exploitation of the invention, the patentee is the only one who may make, use, or sell the invention. Others may not do so without authorization from the patentee. The patentee may manufacture and sell the invention, or may license, that is, give authorization to others to do so.

It is to be noted, however, that many patent laws permit under certain circumstances precisely defined in such laws—exploitation of the patented invention without the authorization from the patentee. An example is exploitation under a compulsory license[4], that is, a licenses granted not by the patentee but by a government authority. The word compulsory license is sometimes called "non-voluntary license", which clearly shows that it is granted against the will of the patentee. A compulsory license is a sanction imposed upon the patentee if that patentee fails to fulfil its or his obligation to work the patented invention[5]. "Working" of a patented invention means, where the patent has been granted in respect of a product, the making of the product and where the patent has been granted in respect of a process, the use of the process[6]. Purely commercial acts such as importing or selling do not constitute working : there must be manufacture of the product or use of the process.

The patent law of Bangladesh provides that if, by reason of the default of the patentee to manufacture to an adequate extent and to

4. *Background Reading Material on Intellectual Property*, WIPO, Geneva, 1988, p, 92
5. *Ibid*, p. 108
6. WIPO model law for developing countries on inventions, volume 1, Patents, WIPO, Geneva, 1979, p. 27

supply on reasonable terms, the patented article, or any parts necessary for its efficient working, or to carry on the patented process to an adequate extent, any existing trade or industry or the establishment of any new trade or industry in Bangladesh is unfairly prejudiced, any person interested may present a petition to the Government requesting the grant of a compulsory license or revocation of the patent. If the parties do not come to an arrangement among themselves, the Government decides upon the petition or refers it to the High Court. A compulsory license may be granted on such terms as the Government or the High Court may think just.[7]

A number of countries provide for the grant of compulsory licenses on the public interest grounds.[8] Generally national defence, public health and the development of other vital sectors of the national economy constitute public interest grounds. For instance, if the protected product is not available in the country but is urgently needed, and if the time required for its manufacture or production in sufficient quantity is too long, the concerned government authority may decide that the product should be imported despite the patent. If, on the other hand, the protected product is available on the market in the country as a result of importation, but its manufacture locally would enable a vital sector of the national economy to be developed, the concerned government authority may decide that it should be manufactured in the country notwithstanding the patent. The patent law of Bangladesh provides that if the patented article or process is manufactured or carried on exclusively or mainly outside Bangladesh, the Government, on the basis of a petition from any interested person, on being satisfied that the allegations contained in the petition are correct and that the applicant is prepared, and is in a position, to manufacture or carry on the patented article or process in Bangladesh and that the patentee refuses to grant a license on reasonable terms, may revoke the patent forthwith or after such reasonable interval as may be specified in the order, or order the patentee to grant a license.[9]

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7. Patents and Designs Act, 1911, Section 22
8. *Background Reading Material on Intellectual Property*, WIPO, Geneva, 1988 p. 109
9. *Ibid*, Section 23

Limitations of patent Rights

Even when a patent is prefectly sound, valid, and legally granted, the patentee is subject to certain limitations in exploiting it. The main limitations are as follows :

(a) A patentee may sell a sample of his invention as he pleases, or refuse to sell it at all. But once he has sold it, he loses all control over it. This important limitation applies to those products which have been put on the market in the country by the patentee or with its or his authorization. "Putting on the market" typically means sale. Other ways of putting on the market include renting and transfer by way of gift; for example, an entity gives away a certain number of articles that contain the patented product for publicity purposes.

Putting on the market of any given article incorporating the patented product can occur only once. For example, the article containing the patented product may be sold by the entity that manufactured the article and which is the owner of the patent for inventeon. By this sale, the product has been put on the market and its use by the buyer or its possible further sale by the buyer to another person are acts done in respect of an article which is already on the market because the owner of the patent for invention has sold it. And as already stated, acts done with products which have been put on the market are not prohibited acts.

(b) The manufacture, sale, and use of specimens of an invention are subject to the police powers of the government, which may regulate, limit, or forbid such acts on the gorund that the invention is dangerous or may be used for illegal purposes. Drugs, gambling devices, fuels, and explosives are often regulated thus.

(c) The anti-trust or anti-monopoly laws forbid certain methods of exploiting patents; for instance, the use of a patent to restrict or monopolize trade in any article other than the thing patented, or trying to fix prices on resale of a patented article.

(d) Patents as such are not taxed, but the income from exploiting them is subject to income taxes like most other income.

(e) Another common rule of substantive importance, containing a limitation of the rights of the patent owner under special circumstances is contained in the Paris Convention. It deals with the transit

of devices on ships, aircraft or land vehicles through a member country of the Paris Union in which such device is patented.[10]

The effect of this provision is essentially the following: where ships, aircraft or land vehicles of other member countries enter temporarily or accidentally a given member country and have on board devices patented in that country, the owner of the means of transportation is not required to obtain prior approval or a license from the patent owner. Temporary or accidental entry of the patented device into the country in such cases constitutes no infringement of the patent for invention.

(f) The protection conferred by the patent grant is also limited in time. For instance, the term of a United States patent is 17 years and is non-renewable.[11] At the expiration of the term, the invention automatically is dedicated to the Public and everyone then has the right to make, use, or sell the invention. The term of a Bangladesh patent is 16 years[12] and is renewable. This term may be extended, on a petition to the Governnent, for a further term not exceeding five years or, in exceptional cases, ten years, on the ground that the patent has not been sufficiently remunerative.[13]

(g) Another limitation of patent rights is a geographical limitaation. A patent is granted by a particular Government and only covers those actions that take place within that Government's jurisdiction. For instance, a owner of a patent in Bangladesh for for a given invention can not prevent anyone else outside of Bangladesh from making, using or selling the said invention[14]. The reason behind this is that the grant of a patent for invention in one country for a given invention does not have any effect in other countries; in order to obtain protection in other countries, the grant of patent needs to be obtained in each country.

Anti-Trust or Anti-Monopoly Laws and Patents

A patent is a grant of a monopoly to the inventor based on the public interest in promoting the growth and diffusion of techno-

10. The *Paris Convention* for the Protection of Industrial Property of 1883, Article 5 ter.
11. 35 United States Code, S 154
12. Patents and Designs Act, 1911, Section 14.
13. *Ibid.*, Section 15.
14. *Ibid.*, Section 12.

logy. It is the monopoly grant that makes tangible the inventor's reward and converts a formal into a realistic property right. However, the monoply grant has a *prima facie* adverse impact on trade, because the monopoly conferred by the patent is the right to exclude others from making, using or selleng the patented product, or from practicing the patented process.

Society's aversion to monopolies, price fixing, and the allocation of business among competitors found an early expression predating the common law of England. In A D 483, the Emperor Zeno reportedly issued to the Practorian Prefect of Constantinople an edict, which provided in pertinent part:

> "We command that no one may presume to exercise a monopoly of any kind of clothing or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be, either of his own authority or under a rescript of an emperor already procured, or that may hereafter be procured, or under an Imperial decree, or under a rescript signed by our Majesty; nor may any persons combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they may have agreed upon among themselves. Workmen and contractors for building, and all who pracrice other professions, and contractors for baths are entirely prohibited from agreeding together that no one may complete a work contracted for by another, or that a person may prevent one who has contracted for a work from finishing it, full liberty is given to anyone to finish a work begun and abandoned by another, without apprehension of loss, and to denounce all acts of this kind without fear and without costs. And if any one shall presume to Practice a monopoly, let his property be forfeited and himself condemned to perpetual exile."[15]

The concept that monoplies violated the principles of common law was first perceived by Sir Edward Coke who argued in the 1600s that monopolies violated the civil law, the Megna Carta, and certain statutes of Edward III's reign.[16]

Coke (1552-1634) was a brilliant English courtroom lawyer who rose to prominence as speaker of Parliament in 1593 and in 1594

15. Code IV, p. 59. Translation of A. H. Marsh, Q. C., reprinted in 23 *American Law Review*, p. 261 (1889).
16. Wagner, "Coke and the Rise of Economic Liberalism", *Econ. Hist. Rev.* VI, p. 30 (1935)

was selected over Sir Francis Bacon as Queen Elizabeth's attoney-general. In 1606 he became chief justice under King James I, at which time he insisted that even the King was subject to the law.

One of the most important case of significance in the common law concerning monopolies, is *Darcy* V. *Allein*, or The case of Monopolies, decided in 1603.[17] *Darcy* v. *Allein* established the principle that a royal grant by patent was invalid if it created a monopoly. In that case Queen Elizabeth granted Darcy, her groom, a patent for a monopoly on the manufacture and importing of playing cards. Shortly thereafter, in 1601, Allein, a London haberdasher, made and sold some playing cards and was subsequently sued by Darcy for infringement of his patent. The court held the patent void as a "dengerous" and "unprecedented" innovation and in order not to offend the Queen, adopted the fiction that "the Queen was deceived in her grant; for the Queen, as by the preamble appears, intended it to be for the real public."[18] The court further held that the grant prejudiced the public good by raising prices and lowering the quality of the cards. More importantly, by depriving various workmen of their livelihood the patent was void because it violated the right of others to carry on the trade.[19]

The British Statute of Monopolies, passed in 1624 declared that all monoplies, combinations, grants, licenses, charters, patents etc., for the sole buying, making, using and selling of any commodity or article within the Kingdom were contrary to law. The historic importance of the Statute is that it did recognize the exception of patents for invention, stating in Section 6:

> "Provided also, and be it declared and enacted, that any declaration before mentoned shall not extend to any letters patents and grants of privilleges for the term of fourteen years or under, hereafter to be made of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use, so as also they be not contrary to the law nor mischievous to the state, by raising prices of commodities

17. 11. Co. Rep. 84b,77 Eng. Rep. 1260 (k. B. 1602).
18. *Ibid.*, at 87a, 77 Eng. Rep. at 1264.
19. Gordon, *Monopolies by Patent*, p. 226
20. J. K. Wise, *Pntent Law in the Research Laboratory*, Reinhold Publishing corp., New York, 1955, p. 8.

> at home, or hurt of trade, or generally inconvenient, the said fourteen years to be accounted from the date of the first letters patents or grants to such privilege hereafter to be made, but that the same shall be of such force as they should be if this Act had never been made and of none other."[20]

The evils of monopolies in England were clearly in the minds of the early American colonists and these evils found expression in such laws as a 1641 Massachusetts statute:

> "There shall be no monopolies granted or allowed among us, but of such new inventions as are profitable to the country, and that for a short time."[21]

It should be recognised that the term "inventions" was not restricted to the rather narrow present-day meaning but that it included establishment of new industries and enterpises.

The principal monopoly activity was in the colonies of Massachusetts and Connecticut and to a lesser extent in New York. Owing to the necessity for new industries, the grant of monopolies persisted in the colonies long after the practice had died out in England. Under the Articles of Confederation, Patents continued to be granted to inventors.

In the years preceding 1890, a strong feeling arose against certain large business combinations whose practices were thought to be against the public welfare. Hence, in 1890, the Sherman Anti-trust Act was passed. Section 1 of this Act provided that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" between the states or with foreign nations, was illegal. Section 2 provided that every person "who shall monopolize, or attempt to monopolize or conspire with any other person or persons, to monopolize any part of" interstate or foreign commerce was guilty of a misdemeanor, the punishment of which was the same as provided in Section 1.

The next important anti-trust legislation of singnificance was the Clayton Act, passed by the United States Congress in 1914. Whereas the Sherman Act prohibitions are expressed in general terms, the Clayton Act prohibits specified trade practices. Furthermore, the Clayton Act, unlike the Sherman Act, condemns

20. J.K. Wise, *Patent Law in the Research Laboratory*, Reinhold Publishing Corp., New York, 1955, p. 8.
21. *Ibid.*, p. 10.

practices the effect of which may be substantially to lessen competition, rather than only those restraints which in fact unreasonably restrain trade.

Some of the pertinent provisions of the Act provide as follows: As enacted, Section 2 of the Clayton Act made it unlawful for any person to discriminate in prices, services, or facilities where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. Section 3 makes illegal (1) tying (or tie-in) agreements, that is, agreements to sell a desired product only on the condition that the buyer purchases a second unwanted or less disirable product, (2) exclusive dealing contracts, that is, agreements that the buyer will purchase only from the seller and no other supplier, and (3) requirements contracts, that is, agreements that the buyer will purchase all his requirements of a certain product from the the seller.

The Sherman Act, the Clayton Act, and the court decisions under them forbid not only monopolies but also any acts that might bring about monopolies, such as conspiracy to monopolize and combinations or mergers that might monopolize.

The patent laws give the owner of a patent a temporary monopoly on the invention claimed in the patent. A patent is, in fact, a legal monopoly with the same purpose as other monopolies : to enable the monopolists to make more money in trading in a certain commodity than he could under conditions of free competition. The distinction between patents and other monopolies is that the extra profit made by a patent owner is a reward for making the invention available to the public, whereas a monoplist whose position is based merely on his skill at the manipulation of securities and corporate intrigue has performed no such service.

Thus, patents constitute an exception to the basic rule of competition embodied in the anti-trust laws, since, within the scope of the patent claims, the patentee has a recognized legal monopoly. And a patentee that uses the lawfully procured patent merely to exclude others from making, using or selling the patented invention will not incur anti-trust difficulties. And when the patentee manufactures and sells the patented product or uses the

patented process in his business, based on these facts alone he should not run afoul of the anti--trust laws, even though the patent permits him to exclude competing products and processes from the market. On the other hand, because the patent monopoly is a limited exception to the prohibitions of the anti-trust laws, use of the patent to secure a competitive advantage outside the scope of the patent grant is likely to create anti-trust issues. These issues usually arise during the course of the patentee's dealings with others — sales of the patented products, cooperation in patent pools, granting licenses, and the like.

Tie-In Arrangements under the U. S. Anti-trust laws

Where a contract expressly requires the purchaser of certain products to purchase other, less-desired products of the supplier as a condition for buying the preferred product, there is an arrangment known as a tie-in. Tie-in contracts are ususlly violations of the anti-trust laws and many cases illustrating this violation have involved patented products or processes.

The test for a finding of *per se* illegality in tying cases under Section 1 of the Sherman Act is that the supplier has sufficient econmic power in the tying product appreciably to restrain competition in the tied product and a "not insubstantial" amount of interstate commerce is affected. *Per se* violations of section 3 of the Clayton Act result when the supplier has a monopoly position in the tying product or if a substantial volume of commerce in the tied product is restrained. It is significant that the economic power required for a Section 1 violation is presumed when the tying product is patented.

In the patent field, tie-ins often involve conditioning the sale or lease of certain desired patented goods on the requirement that the dealer or user also purchase certain unpatented goods. Often the unpatented goods are not wanted for price reasons or are inferior to other similar unpatented goods available on the open market.

In *International Business Machines Corporation* v. *United States*[22], a case brought under section 3 of the Clayton Act[23], IBM leased its

22. 298 U. S. 131 (1936)
23. The same action could have been brought under Section 1 of the Sherman Act.

tabulating and computer machines upon the condition that the tabulating cards used in the machines would be purchased only from IBM. The reason given for this requirement was to ensure satisfactory performance of the machines, which could use only cards conforming to precise specifications as to size and thickness, and which were free from defects due to slime or carbon spots that cause unintended electrical contacts and consequent inaccurate results. The cards manufactured by IBM were electrically tested against for such defects. A provision in the lease agreement provided that the lease whould terminate if the lessee used a card not manufactured by IBM. The Court noted that approximately one third of IBM's annual income was derived from the sale of these cards.

The court found the tie-in to be illegal on the ground that others were quite capable of manufacturing cards suitable for use in IBM's machines. The court stated that IBM.

> "...is not prevented from proclaiming the virtues of its own cards or warning against the danger of using, in its machines, cards which do not conform to the necessary specifications, or even from making its leases conditional upon the use of cards which conform to them. For aught that appears such measures would protect its good will, without the creation of monopoly or resort to the suppression of campetition[24].

International Salt Co. entered into a similar lease arrangement with customers. International Salt was, at the time, the nation's largest producer of salt for industrial uses and in this connection owned patents on two machines used in the commercial utilization of salt. Under its lease agreements International Salt required lessees to purchase from it all unpatented salt and salt tablets consumed in the leased machines. The agreements also provided that if a competitor should offer salt at a lower price, the lessee could purchase such salt unless International Salt furnished the salt at an equal price.

A suit was brought by the government, *Internationol Salt Co., Incorporated* V. *United States*[25], and the U.S. Supreme Court ruled that the tie-in arragument was *per se* illegal as violative of Section 1 of the Sherman Act. The Court noted that the patents in question conferred only the right to restrain others from making, vending, or

24. 298 U. S. at pp. 139-40
25. 332 U.S. 392 (1947)

using the patented machines, but it did not confer the right to restrain use of, or trade in. unpatened salt. The court also noted that the pricing provision, which permitted International Salt Co. to match a lower competitive price, did not cure the illegality of the tie-in because a competitor would have to undercut its price to have any hope of capturing the market, while International Salt could hold that market by merely meeting competition.

International Salt argued that since it remained under an obligation to repair and maintain the machines, it was reasonable to confine their use to its own salt beause its high quality assured satisfactory functioning and lower maintenance costs. The court answered this argument, stating that "a lessor may impose on a lessee reasonable restrictions designed in good faith to minimize maintenance burdens and to assure satisfactory operation—(and) the lessee might be required to use only salt meeting such a specification of quality"[26]. However, there was no showing by International Salt that others could not produce an equivalent salt or that its machines were "allergic to salt of equal quality produced by anyone except International"[27].

Absence of Specific Anti-Trust or Anti-Monopoly Statute in Bangladesh

Bangladesh has not yet adopted a statute similar to the anti-monopoly statute in England or anti-trust Laws in the United States of America. However, the contract law of Bangldesh contains some provisions that have a bearing on monopolistic practices.

Bangladesh contract law provides that an agreement is unlawful if the court regards it as opposed to public policy[28]. The doctrine of "public policy" covers political, social, economic or moral grounds of objection. Public policy is, in its nature, so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce, and usages of trade, that it is difficult to determine its limits with any degree of exactness. This rule may, however, be safely laid down that wherever any contract conflicts with the morals of the time and contravenes any extablished interest of society, it is void as being against public policy. An agreement

26. *Ibid.*, at p. 397-98
27. *Ibid.*, at p. 398.
28 The Contract Act (Act IX of 1872), Section 23.

may also offend against public policy by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in their liberty to exercise any lawful trade or calling.

To put it in another way, certain classes of contracts are said to be against public policy or against the policy of the law, when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency so as to be injurious to the interest of the state or the public. Among such classes of contracts are contracts tending to create monopolies.[29]

Bangladesh contract law also provides that "every agreement by which any one is restrained from excercising a lawful profession, trade or business of any kind, is to that extent void".[30] Freedom of trade and commerce is the fundamental right protected by the Constitution of Bangladesh.[31] Every agreement which interferes with this freedom is called an agreement in restraint of trade. Whether such restraint is general or partial, qualified, or unqualified, it is void. So, as a general rule, all agreements in restraint of trade, being void are not binding except in the case of a sale of the goodwill of a business. Other exceptions to the general rule are to be found in the Partnership Act, 1932, Ss. 11(2), 54 and 55(3).

Trade Combinations or Pool agreements.—Trade combinations or pool agreements are price-maintenance agreements. They can be divided into two groups :—

(i) where a number of persons engaged in the same trade or industry agree to maintain the price of their product by co-operating to regulate the output and distribution of that product; and

(ii) where a manufacturer or distributor of a particular article claims from those buying from him a contract not to retail the goods at less than specified prices.

Such agreements are for mutual benefit, the purpose being to avoid unhealthy competition. The parties to such agreements meet on terms of equality and are the best judges of their own

29. The principle that contracts tending to create monopolies are void or illegal has been established in *D. B. Jhelm* v. *Hari Chand.* 1934 Lah. 474, and *Devi Dayal* v. *Narain Singh*, 1928 Lah, 33

30. The Contract Act of 1872, Section 27.

31. *The Constitution of the People's Republic of Bangladesh*, Article 4o.

interest. Therefore, the restraint on trade imposed by such agreements is bound to be reasonable as between the parties *inter se*. And unless it is proved that the intention of such agreement was to raise the price to an unreasonable extent, the agreement is not contrary to Section 27 of Bangladesh Contract Act, and is perfectly valid.[32]

These provisions impose no restrictions on the property right of an inventor granted to him under the Bangladesh Patent and Desingns Act, 1911. The exculusive rights granted to inventors for a limited period are governed by that Act.

Scientists and inventors made significant contributions toward the industrial revolution and economic and social advancement that occured in the West. Continuing advancement in technology fuelled the phenomenal economic and industrial growth in the West. To reward the inventors and to provide them with incentive to develop newer technology, products and processes and thereby contribute toward industrial and economic growth, advanced industrial countries adopted patent laws and periodically updated those laws.

In these countries, in the midst of industrial and economic activities and competitions, some traders and speculators tried to curve a monopoly market for themselves in certain products and industrial processes through various manipulations and practices including combinations, restrictive trade practices, price fixing, mergers, take-overs, etc.. In order to curb such activities and keep the competitions in the market unimpaired, anti-monopoly and anti-trust laws are adopted in advanced industrial countries. These laws play a significant role in countries like the United States of America where some big corporations try to become bigger through merger with or take-over of other corporations or enterprises and thereby try to monopolize the markets in particular products, processes or services.

Bangladesh is still very far from reaching the stage of technological, industrial and economic development that occured in advanced countries. Becaused of the low level of commercial and

32. *Fraser and Co.* v. *Bombay Ice Co.*, 1 Ch. D. 292 (1915).—In this case, certain ice manufacturers entered into agreement not to sell ice below *a certain* minimum price, The agreement was held to be valid.

industrial activities in Bangladesh and because of absence of very large Bangladeshi corporations and enterprises trying to monopolize the market in particular products or processes, the need for adopting a specific anti-monopoly statute has not yet been keenly felt in Bangladesh.

Conclusion

Stimulating the invention and development of new products and processes is without doubt the most important benefit expected of the patent system. For it society pays a price; the monopoly power conferred by the patent grants.

Inventions and innovations bestow benefits upon society. How beneficial inventions are depends upon how fully they are utilized. Under the patent system inventors are given the right to control and restrict utilization of their inventions, so that output may be lower and prices higher than they would be if the inventions were utilized under purely competitive conditions.

Normally, a patent holder can choose between alternative methods of controlling utilization. He can reserve exploitation of the invention exclusively to himself, calling upon the courts to enjoin anyone who attempts to infringe upon that right. In this way, the profit-maximizing price can be set directly. Or he can license as few or as many firms as he pleases to exploit the invention, charging royalties for the privilege.

That patent owners exercise their power to set prices exploiting whatever monopoly power their patents confer does not mean that society is denied all benefits which might otherwise come from inventions and innovations. On the coutrary, the society as a whole and the consumers in particular benefit directly from them in two ways.

First, after the patent has expired, the patent holder should in principle have no further power to restrict output; competitive pricing will prevail and consumers will reap the full benefits of the invention.

Second, consumers may also realize inmediate gains even when innovations are exploited monopolistically. The gains come in the

form of new products, processes or services generated by the inventions and innovations.

The patent law grants monopoly privileges. However, these privileges are for a limited period and for a useful purpose. The purpose is to encourage inventions of newer technology, products and processes which benefit the society. The anti-trust law will check attempts to continue the monopoly privileges beyond the period allowed by the patent law.

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