ISSN 1813-5099

UNIVERSITY OF DHAKA

The Dhaka University Studies Part-F

JOURNAL OF THE FACULTY OF LAW

Volume 16 Number 2 December 2005

THE DHAKA UNIVERSITY STUDIES
PART-F
VOLUME 16 NUMBER 2
DECEMBER 2005

THE DHAKA UNIVERSITY STUDIES PART-F

Volume 16 | Number 2 | December 2005

Manuscripts and editorial correspondence should be addressed to :

The Editor
The Dhaka University Studies, Part-F
Room No. 110, Kazi Motahar Hossain Bhaban
Faculty of Law
University of Dhaka
Dhaka-1000, Bangladesh.
Tel : 8613724, 9661920-73/4348
e-mail : lawfac@bangla.net

Two copies of the manuscript, typed 1.5 spaced on one side of A4 paper, must be submitted for publication in the Journal of the Faculty of Law, the Dhaka University Studies Part-F. The length of the paper shall be between 15 to 30 pages. The text must contain appropriate headings, subheadings and authoritative footnotes. The footnotes should be numbered consecutively and typed single spaced at the bottom of each relevant page. Citations conform generally to a Uniform System of citation. Thus the style should be as follows:

1. Baxi, Upendra, "Access, Development and Distributive Justice : Access Problems of Rural Population", Journal of the Indian Law Institute, Vol. 18, No. 3, p. 176.
2. Baxi, Upendra, Access, Development and Distributive Justice : Access Problems of Rural Population, Sage Publications, New Delhi, 1999, p. 120.
3. Baxi, Upendra, "Access, Development and Distributive Justice : Access Problems of Rural Population" in Wright, Robert (ed.), Alternative Ways to Justice, Sage Publications, New Delhi, 1999, pp. 100-125, at p. 120.

Published by the Registrar, University of Dhaka and printed by Chhoyan Advertising & Printing, Office : 47, (G. Floor), Aziz Market, Shahbag, Dhaka-1000, Phone : 8624327

Subscription Rates

For Individuals :	**Tk. 75**	**US$** 15 (without postage)
For Organisation :	**Tk. 100**	**US$** 20 (without postage)

Journal of the Faculty of Law

Volume 16 Number 2 December 2005

Contents

CONTRIBUTORS

Dr. Sumaiya Khair
Professor, Department of Law, D.U.

Dr. Borhan Uddin Khan
Professor, Department of Law, D.U.

Dr. Shahnaz Huda
Professor, Department of Law, D.U.

Dr. Naima Huq
Professor, Department of Law, D.U.

Dr. Md. Nazrul Islam
Professor, Department of Law, D.U.

Dr. Nusrat Ameen
Associate Professor, Department of Law, D.U.

Muhammad Ekramul Haque
Lecturer, Department of Law, D.U.

Dalia Pervin
Lecturer, Department of Law, D.U.

Mohammad Towhidul Islam
Lecturer, Department of Law, D.U.

The Dhaka University Studies, Part-F Vol. XVI (2) : 1—28, December 2005

JUVENILE JUSTICE ADMINISTRATION AND CORRECTIONAL SERVICES IN BANGLADESH: A CRITICAL REVIEW

Dr. Sumaiya Khair

1. Introduction

It is accepted that children who are criminally culpable under the State's penal codes are in conflict with the law. Historically, in matters of criminal justice, the violation of law was of greater significance than the age or the immaturity of the offender. This stemmed from the ideology that children, who were regarded as miniature adults at that time, did not merit special treatment. However, over the past century and a half changing perceptions and sustained efforts by specific groups within the civil society, have led to the development of a criminal justice system with a more child-friendly orientation. The rationale was that since children are not fully aware of the implications of their acts they are required to be treated with sensitivity and care.[1]

The administration of justice for minors who are accused of, or alleged as having breached the penal laws of the country essentially constitutes the juvenile justice system. Juvenile justice, in the strict sense of the term, denotes the right of children to have the support at all levels, i.e., the State, the family and the community, in realising their rights of survival, protection, development and participation. The present exercise is an attempt at reviewing the administration of juvenile justice in Bangladesh and assessing the impact of correctional services on juveniles and children.

2. Administration of Juvenile Justice: International Perspectives

The international approach to administration of juvenile justice recognises the necessity to have the rights of children redefined and developed in concrete ways simply because they are a special category of human beings. Accordingly, the United Nations have taken significant steps that have contributed to the development of standards for treatment of children who come into conflict with the law. The initiatives are described below in brief for an understanding and appreciation of the standard setting role of the United Nations:

---

1. Khair, Sumaiya, "Street Children in Conflict with the Law: The Bangladesh Experience", *Asia-Pacific Journal on Human Rights and the Law*, Vol.2, No. 1, 2001, Kluwer Law International, pp.55-76, p.56.

2.1 Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985

The Beijing Rules provide minimum conditions for the treatment of juveniles who come into conflict with law. The Rules explicitly provide for a separate and specialised system of juvenile justice and underscore that detention of children should be used as a last resort and that too, for the shortest possible time. The Rules discourage capital and corporal punishment for children. Under the Rules children should be allowed to participate in the legal proceedings. Moreover, care and education of children must be ensured during the period of detention. At all stages of the proceedings discretion should be exercised in the best interests of the child.

In terms of treatment the Rules require that children should be treated fairly and humanely. Measures adopted should be proportionate to the nature of the offender and the offence. The Beijing Rules however, refrain from prescribing approaches beyond setting forth the basic principles of proportionality and the limited use of deprivation of liberty, a shortcoming that has been resolved substantially by the Convention on the Rights of the Child.

2.2 The Convention on the Rights of the Child 1989

The Convention on the Rights of the Child (CRC) 1989 in Articles 37 and 40 spell out the rights of children in conflict with the law and ensure basic guarantees and legal and other assistance for their defence. Article 37 of the CRC ensures that no child shall be subjected to arbitrary arrest detention, torture or other cruel, inhuman and degrading treatment including capital punishment and life sentence. The arrest or detention of a child must be in conformity with law during which the child shall be treated with humanity and dignity.

Many of the essential principles of the 1985 Beijing Rules find expression in Article 40 of the CRC and lend them a binding effect. Article 40 of the CRC provides that every child alleged as, accused of, or recognised as having violated the penal law must be treated in a manner consistent with the child's human rights, fundamental freedoms, sense of worth and dignity. Regard must be had to the age of the child and the need to promote its reintegration into society. Accordingly, a child must be presumed innocent until proven guilty, be informed of charges promptly and cannot be compelled to give testimony or confess to guilt and must have access to legal representation. Articles 37 and 40 are qualified by Article 3 of the CRC which states that in all actions, whether undertaken by public or private social welfare institutions, courts of law,

administrative authorities or legislative bodies, the *best interests of the child shall be a primary consideration.*

The Convention on the Rights of the Child is complemented by two other major documents, which set standards and guidelines for the protection of children in conflict with the law:

2.3 UN Guidelines for the Protection of Juveniles Deprived of their Liberty 1990

These Guidelines apply to all institutions, which detain any person under the age of 18 years. These include institutions for health, welfare or juvenile justice. The Guidelines advocate the least possible use of deprivation of liberty and discourages detention in prisons and other closed institutions. Moreover, the Guidelines advise that children, when detained, should be kept separate from adults in order to protect them from negative influences. Rather, facilities must promote health of juveniles and instil in them self respect and a sense of responsibility to enable them to make a smooth return to society. Access to parents during the period of detention is essential.

2.4 UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) 1990

The Riyadh Guidelines emphasise on the need for integrated and comprehensive plans for preventing crimes by children and young people. They advocate for formal mechanisms of crime control as a last resort. The Guidelines also underline the need for having due regard to the human rights and fundamental freedoms of children, particularly of those who are at 'social risk', such as children who are homeless, destitute, abused and so on. Accordingly, laws and procedures should promote, protect and uphold children's rights. The Guidelines further recommend that children should be encouraged to participate in policy formulation and implementation of prevention programmes as active and equal partners.

An examination of the international standards on the administration of juvenile justice reveals two broad principles that are of particular significance to children in conflict with the law. *Firstly*, that the well being of children who come in conflict with the law must be ensured and *secondly*, the children who come in conflict with the law must be treated in a manner commensurate to their circumstances and nature of the offence. In other words, the rights of children in conflict with the law must be protected in ways that will facilitate their reintegration into their societies and assumption of responsibilities therein. Therefore, it is essential to weigh the considerations adequately before committing

children to formal institutions. In this context, diversion from formal legal procedures is always an acceptable alternative.

Endorsement of international standards, however, does not automatically guarantee their practical enforcement in domestic context of states. While international standards are meant to apply objectively, they essentially lack binding force. Therefore, while international Conventions may engender certain responsibilities for ratifying states, they carry no formal obligations in terms of practical implementation.[2] In the circumstances, it is crucial to develop enabling mechanisms within the domestic legal system for utilisation of international standards in realistic ways.

3. Administration of Juvenile Justice in Bangladesh

The legal provisions relating to the administration of juvenile justice in Bangladesh have their roots in colonial laws. *The Bengal Code and Prisons Act of 1894* required separate trials for children and adults. Guidelines for reformation were contained in the *Reformatory Schools Act 1897*. *The Code of Criminal Procedure of 1898* provides for the trial of children in juvenile courts, which was also later recommended by *The Bengal Children's Act 1922*. These various laws and provisions relating to custody, protection, trial and treatment of children were eventually consolidated to produce *The Children Act 1974*, to be read together with *The Children Rules 1976*, a mechanism conceived to protect the child's best interest during all kinds of legal processes.

The Children Act 1974 contains both procedural as well as substantive components. The procedural component, supplemented by *The Code of Criminal Procedure 1898*, sets out special procedures for juvenile courts and for committing children to the protection and care of state facilities. The substantive part, on the other hand, describes offences done to children and prescribes penalties for them.

The Children Act 1974 lays down protections for children in conflict with the law as well as those who are at social risks. The Act requires that Courts must have regard to the age and character of the child and other related factors before passing any order. It provides for separate juvenile courts and forbids the joint trial of child offenders with adults, even where the offence has been committed jointly. The Act also lays down measures for the care and protection of destitute and neglected children including children whose parents/guardians are either alcoholic or who habitually neglect, abuse or ill-treat children by engaging them in begging or other purposes.

---

2. *Ibid.*, p.64.

3.1 Delineating the Age of Criminal Responsibility

There is often no uniform standard regarding the age at which a person is necessarily considered a child. This is primarily because the age premise is likely to vary across cultures, values and social systems. Article 1 of *The Convention on the Rights of the Child* denotes that a child is a person under the age of 18 years unless, under the law applicable to the child, majority is attained earlier. In other words, the Convention permits member states to set the age of majority in conformity with national laws. This creates problems when, as is the case in Bangladesh, states have domestic legislations that define a child varyingly to suit specific contexts.

Having said that, it is difficult to find a clear-cut definition of a child in international standards as well. Whereas *The Convention on the Rights of the Child* regards all persons under the age of 18 years as children, none of the Rules and Guidelines relating to administration of juvenile justice, i.e., *The Beijing Rules, the UN Rules for the Protection of Juveniles Deprived of their Liberty* or *The Riyadh Guidelines* (as discussed later) contains any explicit indication as to who is a child. Rather, the Guidelines often use the terms `child' and `young person' in tandem and apply the term `juvenile' to signify the form of justice system or the type of delinquency.[3] It appears therefore, that in the context of juvenile justice `it is the manner in which a child is treated for an offence which dictates whether a child is also a juvenile'.[4]

Just as the age of a child is a controversial issue, the age of criminal responsibility, though seemingly straightforward and elementary as a concept, presents concrete problems in the administration of juvenile justice. While there is no distinct international standard on the subject, the *CRC* and the *Beijing Rules* enjoin State Parties to establish a minimum age below which children will be presumed as not having the capacity to infringe the penal law. In so doing, the beginning of the age should not be set too low, having due regard to the child's emotional, mental and intellectual maturity.

The penal law in Bangladesh reflects these considerations to a certain extent. *The Penal Code of 1860*, which sets the age of criminal responsibility states that nothing is an offence, which is done by person under the age of 9 years (Section 82) [5] and that full criminal responsibility commences

---

3. *Juvenile Justice*, UNICEF Innocenti Digest No.3, 1997, p.4.
4. Van Beuren, Geraldine, *The International Law on the Rights of the Child*, Save the Children, Martinus Nijhoff Publishers, Dordrecht et al., 1995, p.171.
5. The age of criminal responsibility has been increased from 7 years to 9 years on the 8th of November 2005 by The Penal Code (Amendment) Act, 2004.

only after the age of 12 years. Section 83 of *The Penal Code* provide that an act of a child above 9 years and below 12 years, who has not attained sufficient maturity of understanding to judge the nature and the consequences of his conduct, is no offence. It follows therefore, that children under 9 years lack the capacity for crime and incur liability after the age of 12 years; in between these two ages, criminal responsibility depends on the state of mind. It is to be noted that apart from *The Penal Code*, immunity of children below 9 years of age from criminal responsibility also extends to offences under any other special or local law of Bangladesh.

The Children Act 1974 which is the principal law relating to the administration of juvenile justice states that a child means a person under the age of 16 years, and a youthful offender means a child who has been found to have committed an offence.[6] When used with reference to a child sent to a certified home or committed by Court to the custody of a relative or other fit person means that child during the whole period of his detention notwithstanding that he may have attained the age of 16 years during this period.[7] In other words, a child who is below 16 years at the time of his committal will still be considered a child until the end of his detention period even if he reaches the age of 16 years during this period.

Unless the age of a child is ascertained properly there is every possibility of misapplication of laws and misadministration of justice. The virtual absence of birth registration in Bangladesh raises serious difficulties in computing the correct age of a child in Bangladesh. This problem is of particular significance where children are brought before the courts and the magistrates have to rely on information furnished by the police who, in the majority of cases, misrepresent the age of the apprehended child. Although there are provisions in the law that require a medical examination to ascertain the age of the child this is hardly conducted in routine time. Consequently, the child remains in custody like an adult until the conclusion of the medical verification.[8]

3.2 Setting the Law into Motion: Procedural Aspects

Although *The Children Act 1974* and *The Children Rules 1976* are premised on the best interests of children who come in conflict with the law and who are destitute, their enforcement in practical terms is rather ineffective

6. Section 2(f)(n), *The Children Act 1974.*
7. Section 2(f), *ibid.*
8. Khair, Sumaiya, 2001, *op.cit.*,p. 61.

and often detrimental to the children. Children traverse through different stages in the criminal justice system from the moment they come into contact with the law. This section attempts to examine the procedural aspects of the juvenile justice system and explore the implications they have for children who come under its jurisdiction.

3.2.1 Arrest and Remand

Generally, a child may be arrested for breaching the penal laws of the land or under suspicion of committing an offence. However, there are other laws, such as *The Bengal Vagrancy Act 1943, Section 54 of The Criminal Procedure Code, The Special Powers Act 1974, The Arms Act 1878*, that are often utilised to arrest children. Children also fall prey to police raids in the wake of political unrest or criminal hunts.

Policemen on the beat identify vagrant children and pick them up from the streets, railway and bus stations, shopping centres, parks and so on. The recognition of status offences, as where a child runs away from home or is deemed disobedient or destitute, also presents a paradox. The practice of taking vagrant and street children into custody essentially criminalises acts which are otherwise not offences in the strict sense of the term. Consequently, a neglected and homeless child becomes the victim of a legal system, which, under the best of conditions, tends to be unjust. Although the right to be heard is fundamental in the human rights discourse the child arrested under *The Vagrancy Act 1943* is devoid of this right, either directly or through appropriate representation in judicial proceedings. The child's right to privacy is virtually non-existent during the process. The right not to be deprived of liberty and only to be detained in conformity with law is also not ensured under *The Vagrancy Act 1943*. This is evident from the fact that children arrested under this Act are often detained for unspecified periods in prisons. Thus, while *The Vagrancy Act 1943* concentrates on maintaining public order, it overlooks children's interests by ignoring their special needs.

Section 54 of *The Criminal Procedure Code 1896* is yet another device that serves to oppress, amongst others, children. The police are empowered under this section to arrest any person on mere suspicion without a warrant of arrest. It is common for law enforcing agencies to indiscriminately arrest and incarcerate street children under the cover of this law on the slightest of pretexts. Apart from Section 54 of *The Criminal Procedure Code*, children's rights and freedom are also compromised by *The Special Powers Act 1974*, which empowers the police to arrest people on suspicion of anti-state activities. *The Special Powers Act 1974* is frequently used to pick up children who, either happen to be loitering on the streets, or are engaged in political agitation by political parties during political

demonstrations and *hartals* (strikes). Street children in such situations, become victims of circumstances and have their rights seriously jeopardised. Children arrested under *The Arms Act 1878* for possessing and carrying illegal arms is another instance of victimisation of children by adults and an insensitive legal system.

When it comes to arresting girls the scenario is even more perplexing. Girl children reportedly make up a much less percentage of juvenile offenders. It is not be so much that girls breach the law less but more, that, the specificities of their contact with the law are not adequately addressed. Classic examples are prostitution and rape where it is more common for girls to be arrested rather than the perpetrators. In other words, girls come into conflict with the law more as victims of prostitution and sexual offences, even if they have actually breached other penal laws. Since there are no separate provisions for housing girl offenders, they are customarily branded as prostitutes and victims of rape in order to acquire for them a place in shelter homes.

Normally, a child may be arrested without a warrant for a cognizable offence[9] under *The Criminal Procedure Code 1896* but s/he cannot be detained in custody for more than 24 hours. Moreover, if a child under 16 has been charged with a non-bailable offence, the officer in charge of the police station may release her/him on bail and arrange for the child to be placed in a remand home or a safe place until s/he is brought before the court.[10]

There is virtually no separation between inmates who are here for correction and those who live here in remand. The resultant is a free mixing between boys with perpetrating and non-perpetrating nature. The consequence is pernicious as children with less or occasional criminal

---

9. 'Cognizable offence' means an offence for which a police officer may in accordance with the second schedule or under any law for the time being in force, arrest without a warrant. See Section 4(f) of *The Code of Criminal Procedure, 1898.*

10. Sections 48 and 49, *The Children Act 1974.*

are compelled to mix with the more hardened types.[11] The current situation raises serious questions about the places of safety ordained by law.

Immediately after the arrest of a child, it shall be the duty of the police officer effecting the arrest to inform the Probation Officer of such arrest in order to enable the Probation Officer to proceed to obtain necessary information about the child's family and other material circumstances likely to assist the Court in making its order.[12] At the same time the officer in charge of the police station to which the arrested child is brought shall inform the parents/guardian of the arrest, if found, and specifying the date, direct them to attend the court before which the child will appear.[13]

The situation on the ground is, however, quite different. Charge sheets are virtually non-existent and children arrested and detained are not shown the grounds for arrest nor are their parents duly informed. The police allege that it is frequently difficult to trace parents and in the absence of adequate facilities they are compelled to detain children in jails until they are brought before the Magistrate. Consequently, children are interned with adult criminals who collude with the police officials to abuse and mistreat the children. Although *The Bengal Jail Code* under Section 499 expressly provides that none shall be admitted into any jail without a writ, warrant or order signed by a competent authority, the reality is quite different as children are frequently locked up with adult criminals without proper authorisation.

It is during arrest and interrogation that children are more likely to suffer police brutality as is evident from a number of studies in the area. Children are allegedly subjected to various forms of maltreatment ranging from transportation to the police stations and jails in handcuffs to detention over 24 hours. Physical abuse and torture are also reported. The practice of placing girl children who are victims of rape or trafficking in the so-called safe custody increases their vulnerability to victimisation and abuse by the police and other inmates.

---

11. See Rahman, Mizanur, *Tracing the Missing Cord: A Study on the Children Act,1974*, pp.35-36.
12. Section 50, *ibid.*
13. Section 13(1), *ibid.*

3.2.2 *Trial*

The Children Act 1974 provides that child offenders may only be tried by juvenile courts or other courts duly empowered.[14] Under the *Children Act 1974* the powers conferred on a juvenile court can be exercised by:

— the High Court Division of the Supreme Court;

— a court of Session;

— a court of an Additional Sessions Judge and of an Assistant Sessions Judge;

— a Sub-Divisional Magistrate; and

— a Magistrate of the First Class;[15]

It is evident from the above that although the establishment of separate courts for juveniles is prescribed by law, the above-mentioned courts are permitted by law to try child offenders provided that they apply the same rules and procedures as followed by a juvenile court. These courts sit as juvenile courts only when the offender is under 16 years of age. When a Juvenile Court has been set up for any local area such court shall try all cases in which a child is charged with the commission of an offence.[16] The concurrent jurisdiction of the Magistrate and Sessions Court is to a large extent responsible for the failure to establish an independent juvenile justice system. The inability of providing a separate trial system for juveniles stems from the criminal justice system that is largely traditional in its approach and jurisdiction that is limited in terms of subject matter.[17]

Although the law requires the establishment of separate courts for juvenile offenders to date there are only two juvenile courts in Bangladesh, one in Tongi and the other in Jessore. Moreover, despite existing concessions in the exercise of jurisdiction by other courts it is found that very few of them in fact sit as juvenile courts. Most Magistrates, being unaware of the procedures under *The Children Act, 1974* choose instead to try children in accordance with *The Code of Criminal Procedure.*

---

14. Section 3, *ibid.*
15. Section 4, *ibid.*
16. Section 5, *ibid.*
17. Rahman, Mizanur, *Tracing the Missing Cord: A Study on the Children Act, 1974*, SCF(UK), 2003, p.34.

According to Section 7 of *The Children Act 1974* and Rule 3 of *The Children Rules 1976*, the Juvenile Court should sit at least once a week or as often as may be necessary. Moreover, the Court should, as far as practicable, sit in a place separate from that where ordinary sittings of the Court are held. If need be a different date or time should be chosen for the court to sit. Where a child and adult are charged together, a separate trial must be conducted for the child.[18] Thus, it is provided in Section 8 of *The Children Act* that when a child is a co-accused with an adult in any offence and it appears to the Court that the case is fit for committal to the Court of Session, such Court shall, after separating the case in respect of the child from that of the adult, direct that the adult may be committed to the Court of Session alone. This measure is prescribed strictly in the best interests of the child. In practice, however, the child is often tried together with the adult in the same court without any regard for the law in this context or the child's right to privacy.

The Children Act 1974 also provides for confidentiality in respect of court proceedings against a juvenile offender. To this end Section 9 of *The Children Act* lays down that no person shall be present at any sitting of a Juvenile Court, except

- The members and officers of the Court;
- The parties to the case or proceeding and other persons directly concerned with the case/proceeding including police officers;
- The parents or guardians of the child; and
- Such other person as the Court specially authorises to be present;

Confidentiality often entails the withdrawal of certain people from the hearing of the case. If at any stage during the hearing of a case or proceeding the Court considers it necessary in the interest of the child to direct any person, including the parent/guardian or the spouse of the child or even the child himself/herself to withdraw, the Court may make such order whereupon the person concerned shall withdraw.[19] In the same fashion if at any stage of the hearing of the case or proceeding the Court is satisfied that the presence of the child is not essential, the Court may dispense with the attendance of the child.[20]

---

18. Section 6, *The Children Act,1974.*
19. Section 10, *ibid.*
20. Section 11, *ibid.*

The provision on confidentiality must also be invoked during examination of a child witness. Section 12 of *The Children Act* provides that if at any stage of the hearing of a case or proceeding in relation to an offence against or any conduct contrary to morality or decency, a child is summoned as a witness, the Court may direct such persons as it thinks fit, not being parties to the case/proceeding and their legal advisers and court officials, to withdraw. In any event no report in any newspaper, magazine or any news agency shall be permitted to disclose any details of the Court proceedings in which a child is involved. Similarly, no photograph of the child shall be published which directly or indirectly leads to the identification of such a child unless the Court deems it essential in the interest of the child.[21] The requirement of confidentiality also extends to reports of Probation Officers and other reports impinging on a child offender.[22]

During trial of a juvenile there are certain salient aspects that require special consideration. Section 15 of *The Children Act 1974* states that for the purpose of any order, which the Court has to pass, the following factors shall be taken into consideration:

- The age and character of the child;
- The circumstances in which the child is living;
- The reports made by the Probation Officer;
- Such other matters as may be required to be taken into consideration in the interest of the child;

In practice however, there is evidence that reports by Probation Officers are not sought, the Magistrates preferring to rely on charge sheets or the final reports in police cases. Whatever little merit is attached to reports of Probation Officers is evident only in guardian-referred cases.

Whenever a person whether charged with an offence or not, is brought before any criminal court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, that court shall make an enquiry as to the age of that person and for that purpose, shall take such evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age as nearly as may be.[23] In reality, however, the police and jail authorities make no mention of children's age when they send them to the correctional centers.

---

21. Section 17, *ibid.*
22. Section 16, *ibid.*
23. Section 66, *ibid.*

Consequently, there are instances when children over the acceptable age are also detained with younger children.

Although it is essential that at every phase of criminal proceedings the child's age, identity and other necessary information be treated as classified in order that the child is protected from the effects of labelling, the reality is quite different. Although a medical examination is legally required to specify a child's age, the usual practice is to put down an age on pure guesswork. The special treatment of children during trial includes the expeditious disposal of the case by a competent and impartial authority in a congenial and a child friendly environment. However, children are frequently denied this privilege, as our courtrooms are chaotic, daunting and far from child-friendly.

Rule 4 of *The Children Rules 1976* states that the hearing of all cases and proceedings shall be conducted in a simple manner without formality. In other words, the proceedings must be conducted in a congenial and homely environment so as to put the child at ease. As such, the Court shall ensure that a child brought before it is not kept under police guard; rather, it must be ensured that the child is in the company of a close relative, friend or the Probation Officer. This is hardly the case on the ground. To begin with the children arrive in the court premises in prison vans along with adult offenders. They are often shackled. As they are ushered into the courtroom they are pushed on to the dock with the other adults. In the circumstances, proximity is more in terms with other adult criminals rather than their relatives, friends of even their Probation Officers.

Rule 4 further lays down that in examining a child and recording his statement the Court shall freely interact with the child during which the Court can elicit information about the offence the child is accused of, as well as other attending factors, like his family, home, physical and mental conditions and so on. Where a child offender pleads guilt or is found guilty the Court shall not forthwith make an order upon such finding. Rather, it shall direct the Probation Officer or such other person as may be deemed fit by the Court to furnish it with a report containing *inter alia* information on family background of the child, his character and antecedents, his physical and mental conditions and the circumstances in which the offence was committed or any such information considered significant in the interest of the child.

In reality however, the attitude and demeanour of judges demonstrate a general apathy towards children's well-being. While the accused are rarely segregated in terms of age, the fact that a large number of accused are brought before the court at the same time makes it difficult for the

judge to single out the child offenders from amongst the teeming adults. Contrary to legal requirements the entire courtroom atmosphere is such as to generate fear in children and intimidate them into silence and submission. This seriously compromises the spirit of the juvenile justice laws.

During the trial stage, the accused reserves the right to cross-examine witnesses and to produce his/her own witnesses thereby placing the burden of proof on the prosecution. Children are never able to exercise this option, as Magistrates summarily decide their cases. Children, like adults, have the right to benefit from the principle of equality before the law and equal protection of law. If any of these rights are infringed the trial itself cannot be deemed 'fair'.[24] There is a general lack of due process resulting in arbitrary actions. The attitude of courts towards young offenders is often biased and not based on considerations of the gravity of the offence. Individual circumstances and the offence often have no bearing on the sentence, which is frequently disproportionate.

3.2.3 *Sentencing*

Verdict of the Court

The mode of punishment for children is restricted to detention and institutionalisation in a certified home. In fact, Section 71 of *The Children Act 1974* prohibits the use of the words `conviction' and `sentenced' in relation to children. Alternatively, the words may be read `found guilty of an offence'.

After the hearing the Court can exercise three options:

- commit the child to a certified home;
- release him on probation; and
- discharge him after admonition;

Section 51 of *The Children Act 1974* lays down that no child shall be sentenced to death, transportation or imprisonment. However, if the Court is of the opinion that the crime committed is of so serious a nature or the child is so unruly or depraved that he cannot be committed to a certified institute, the child can be sentenced to imprisonment. Nevertheless, a child offender so committed shall not be allowed to associate with adult offenders. However, there is no clear indication of what constitutes `unruly' behaviour. Moreover, once children have been sentenced it is not clear where they should be kept.

---

24. Khair, 2001, *op.cit.*, pp.70-71. See also *Shoshur Bari. Street Children in Conflict with the Law*, SCF(UK), 2000.

Where the Court finds a child guilty of an offence punishable with death, transportation or imprisonment, it may, if it thinks so expedient, order him to be committed to a certified institute for detention. In such cases the period of detention shall not be less than two years and not more than 10 years, and in any case shall not extend beyond the time when the child will attain the age of 18 years.[25] However, during one of the visits to the Tongi Correctional Centre a 15-year old boy who was fined Tk. 10,000 and sentenced to 7 years detention. It is evident that there exists no mechanism for specifying time periods for detention nor any guideline on the course of action once a detainee reaches 18 years. In the absence of birth registration the possibility of children outstaying their time in certified institutes cannot be ruled out. According officials of Correctional Institutes children are sent off to the central jail to complete their unfinished sentences once they attain the age of 18 years. This presents a paradox---if these children are sent to jail then what is the purpose of correctional treatment.

The Court may also, instead of committing him to a certified institute, discharge a young offender after due admonition and advice.[26] Contrarily, the young offender may be released on probation for good behaviour for a period not exceeding three years. In this context, the child may be released into the care of his parent/guardian or any other fit person executing a bond, with or without surety, as the Court may require.

The Court may also order that the child may be placed under the supervision of a Probation Officer.[27] However, if it appears to the Court from reports of the Probation Officer that the youthful offender has not been behaving well during the probation period, it may, after due inquiries, order the young offender to be detained in a certified home for the remaining period of his probation.[28]

Detention Measures

Children may be detained either for having been found guilty (as discussed above) or for reasons of safety.

Section 55 of *The Children Act* provides that any Probation Officer or police officer not below the rank of Assistant Sub-Inspector or any other person authorised by the Government for this purpose may take any child to a place of safety in respect of whom there is reason to believe that

25. Section 52, *The Children Act. 1974.*
26. Section 53(a), *ibid.*
27. Section 53(1)(b), *ibid.*
28. Section 53(2), *ibid.*

an offence has been or is likely to be committed. A child so taken to a place of safety or a child seeking such refuge may be detained until he can appear before the Court. However, this detention shall not, in any event, exceed 24 hours exclusively of the time required to commute from the detention centre to the Court.

According to Section 2(j) of *The Children Act* 'place of safety' includes a remand home or any other suitable place or institution, the occupier or manager of which is willing to receive the child temporarily. Where such suitable places are not available, the Act permits only male children to be kept in police stations or in custody separate from adult offenders. The Act is silent about alternative arrangements for girls. A remand home is a place that is used for the purposes of detention, diagnosis and classification of children committed to custody by any Court or police.[29]

If the Court is convinced that there is reason to believe that an offence has or is likely to be committed against a child who is brought before it, it may make an order for the care and detention of the child until a reasonable time has elapsed for proceedings to be initiated against the person for having committed the offence or such other lawful action as may be expedient.[30]

In case of children who are victims of an offence, the Court trying the perpetrator shall direct such child to be produced before the Juvenile Court for appropriate orders.[31] Upon appearance before it the Court may exercise two options:

- Commit the child to a certified institute or an approved home until he attains the age of 18. In exceptional cases the period may be shorter, in which case the reasons for such shorter period is to be recorded in writing.
- Commit the child to the care of a relative or other fit person on such bond, with or without surety, as the Court may require provided that such relative or person is willing and capable of exercising proper care, control and protection subject to the conditions the Court may impose in the interests of the child for a period not exceeding three years.[32]

Where a child is committed to the care of a relative or any other fit person, the Court may, if it thinks fit, withdraw the child from such care any time

29. Section 20, *ibid.*
30. Section 56, *ibid.*
31. Section 57, *ibid.*
32. Section 58(a)(b), *ibid.*

before the expiry of the period for which he was so committed. In such cases the Court may commit the child to a certified institute or an approved home for the remainder of the time.[33] In this context it is difficult to understand why a victimised child should be kept in remand.

Under Rule 12 of *The Children Rules* a youthful offender or child may be permitted by licence to live with a trustworthy or respectable person provided that

- he shall obey the person to whom he is licenced to live;
- he shall stay away from bad company and refrain from taking intoxicants;
- he shall not leave the place of his residence without permission of the person under whose care he has been placed;

However, if the child has a parent or guardian, who is fit and capable and in the opinion of the Court, capable of exercising proper care, control and protection, the Court may allow the child to remain in his custody or commit the child to his care on bond, with or without surety as the Court may require, subject to the conditions the Court may impose in the interests of the child.[34] A child committed to a parent, guardian or any other fit person may, in addition, be placed under supervision of a Probation Officer.[35] Similar provisions are available for children who are homeless, destitute, neglected and ill-treated by parents/guardians, in bad company and involved in immoral activities.[36]

The Children Act 1974 makes special provisions for uncontrollable children. Section 33 of the Act provides that where the parent / guardian of a child complains to a Juvenile Court or a Court duly empowered that he is unable to control the child, the Court may, if satisfied upon inquiry, order the child to be committed to a certified institute or an approved home for a period not exceeding three years. However, if the Court is of the opinion that home conditions are satisfactory and all that the child requires is careful supervision, it may, instead of committing the child to a certified institute or an approved home, place him under the supervision of a Probation Officer for a period not exceeding three years.

It is found that guardians often send addicted children to correctional institutes labelling them as `uncontrollable' as seen in the National

---

33. Rule 7(3), *The Children Rules 1976.*
34. Section 58 (proviso), *The Children Act 1974*, Rule 7(1), *The Children Rules, 1976.*
35. Section 59, *ibid.*, Rule 7(4), *ibid.*
36. Sections 32 and 33, *The Children Act, 1974.*

Correctional Institute at Jessore. This is possible because although it is required by law to conduct a medical examination of children on admission this is not done in practice. Consequently, one may question the validity of labelling children as `uncontrollable' without first assessing them in practical terms. Mechanisms for such assessment and allocation of detention periods in the circumstances are absent.

The Probation Officer shall operate the supervision and guidance of the Juvenile Court. The Probation Officer shall, in the exercise of his duty under *The Children Act*,

- Visit or receive visits from the child at regular intervals;
- Ensure that that the relative or any other person to whose care such child is committed observes the conditions of the bond;
- Report to the Court about the behaviour of the child;
- Advise, assist and befriend the child and where necessary, try to find some kind of employment for him;
- Perform any other duty that may be prescribed.[37]

Thus the overall functions of the Probation Officer include maintaining a close liaison with the child and the family/guardian in whose care to which he has been committed, issuing cautionary warnings in case of breach of conditions, seeing that the child is free from unsavoury or corrupt influence and so on.[38] An ideal Probation Officer essentially adopts a combination of material aid techniques, executive techniques, guidance techniques and counselling techniques in discharging his responsibilities.

The government may, at any time, order a child or youthful offender to be discharged from a certified institute or approved home, either absolutely or on such conditions as the government may specify.[39] While it is not clear what is meant by `any time' there is also no mention of specific procedures for releasing children. Moreover, no specific government agency has been earmarked for this purpose. Similar confusion arises when Section 68 of The Children Act 1974 provides that the government and the Chief Inspector may order any child or youthful offender to be transferred from one certified institute or approved home to another. The circumstances and the procedure of such transfer are not discussed.

---

37. Section 31, *ibid.*
38. Rule 21, *The Children Rules, 1974.*
39. Section 67, *The Children Act, 1974.*

4. Certified Institutes

The Children Act 1974 and *The Children Rules 1978* provide concrete guidelines for the setting up and running of certified institutes or approved homes.

4.1 Establishment and Certification

Section 19 of *The Children Act 1974* empowers the Government to establish and maintain training institutes for the reception of children and youthful offenders. In this context, the Government may prescribe conditions subject to which any training institute, industrial school, educational institution or approved home shall be so certified or recognised.[40] No such place shall be certified or recognised unless the Government is satisfied that

- the object of such institute, school, institution or home is the welfare of the children;
- there is suitable accommodation for establishing dormitories and conducting training programmes for children and youthful offenders;
- the management of such institute, school, institution or home is efficient and has adequate funds to conduct the programmes;
- it has adequate number of trained personnel for running its programmes;[41]

4.2 Control and Management

The control and management of certified institutes rests on the Superintendent and a Committee of Visitors who are appointed by the Government. Every institute, school or institution certified under this Act shall be under the management of its governing body.[42] The Superintendent is the principal officer in charge of the certified institute or approved home.[43] He shall maintain separate case file for each inmate containing detailed information about the family background, character, aptitude, performance in education, training and such other matters as may be deemed necessary. In every case, the Court shall consult the managers of a certified institute before committing a child to their care.[44]

---

40. Section 21, *ibid.*
41. Rule 5, *The Children Rules 1976.*
42. Section 22,*The Children Act 1974.*
43. Rule 2(g), *The Children Rules 1976.*
44. Section 23, *The Children Act 1974.*

Although this process is meant to ensure both the well being of children and the efficiency of the institution its is not practiced in reality.

The Governing Board of a certified institute shall exercise such powers and conduct its business in a manner as may be determined by the Director who will approve the decisions of the Governing Board.[45]

The Committee of Visitors for a certified institute shall comprise six members to be appointed by the Government. They shall be selected from amongst the following category of persons:

i. Reputed social workers;

ii. Medical practitioners;

iii. Retired police or prison officers;[46]

The Committee of Visitors shall be responsible for the management of the training institute and shall discharge such duties and perform such functions as specified in writing by the Director.[47] Every certified institute or approved home shall maintain registers indicating *inter alia* admission, discharge, attendance, sickness, punishment and leave of inmates.[48]

4.3 Treatment of Inmates

Salient aspects of the treatment of inmates are clearly spelt out in *The Children Rules 1976*. These may be broadly grouped into the following categories:

Health

Immediately after the admission of a child into a certified institute or approved home, he shall be medically examined. An inmate suffering from a contagious disease shall be kept segregated from other inmates and the Superintendent or managers of the certified institute shall make arrangements for his treatment. Apart from this, medical check ups shall be conducted at regular intervals.[49] Children suffering from dangerous diseases or ailments requiring prolonged treatment shall ordinarily be sent to government hospitals. Where the requisite treatment is not available in Government hospitals, arrangements shall be made for

45. Rule 9, *The Children Rules, 1976.*
46. Rule 10, *ibid.*
47. Rule 11, *ibid.*
48. Rule 13, *ibid.*
49. Rule 15, *ibid.*

treating the child in a private clinic or hospital duly selected for the purpose.[50]

The inmates of a certified institute shall be supplied with diet and clothing as prescribed in the *Schedule* to *The Children Rules 1976*. Special diets shall be supplied to inmates during illness in accordance with the instructions of the attending physician. On festivals and special occasions inmates shall be provided with improved diets. Inmates in the star grade shall be allowed such extra food as the Director may decide. Apart from food and clothing the inmates shall be provided with necessary toilet articles.[51]

Grading

After a child is admitted into a certified institute he shall remain under observation for at least two weeks. During this time his mental disposition, conduct, aptitude and other behavioural aspects shall be studied in order to formulate an effective treatment plan. On the basis of the findings of the assessment the child shall be assigned to one or more tasks or vocation. Contrarily, he may be recommended for general education, religious instruction or moral guidance.[52]

The inmates of a certified institute are normally divided into three grades, namely, the *penal grade*, the *general grade* and the *star grade*. Upon admission inmates are usually placed in the general grade. The privileges of each grade in the given order are higher than those of the preceding grade. A close scrutiny and monitoring of the general behaviour, amenability to discipline and performance in educational, vocational and other activities forms the basis for promotion to the star grade. Special incentives/rewards are given to inmates of the star grade that range from a distinctive dress and badge money to assisting the administration and communicating with families more frequently.[53]

Inmates in the penal grade receive a different brand of treatment Where an inmate is believed to be exercising a bad influence over others, he shall be placed in the penal grade for such time as may be considered necessary for his reform. During this period he shall be employed in hard and laborious work and shall have all privileges forfeited. Inmates of the penal grade shall be kept separate at nights from other inmates.[54]

---

50. Rule 16, *ibid.*
51. Rule 17, *ibid.*
52. Rule 8, *ibid.*
53. Rule 22, *ibid.*
54. *Ibid.*

Education and Training

Inmates shall be provided with primary standard education. In special cases they may be given the opportunities of pursuing higher education outside of the certified institute. Arrangements shall be made for vocational training of inmates as may be suitable for their rehabilitation.[55]

Work

All inmates, as long as they are medically fit, shall be required to work for eight hours each working day. Each day shall be normally divided along the following line of activities:

Drill and Exercise: 1 hour

Literary Instructions: 3 hours

Manual Work: 4 hours

Recreational Activities: 1 hour

The time slots for literary instructions shall be increased to 5 hours and for manual work shall be decreased to 2 hours respectively for examinees of SSC examinations.[56]

Disciplinary Measures

The Children Rules 1976 provide a comprehensive list of acts the commission of any of which shall render an inmate liable to punishment. Most of the acts are premised upon wilful disregard for the rules and regulations of the institute and overt waywardness.[57] It may be noted that the list specifies certain acts as punishable that appear to be quite ridiculous considering the age of the inmates. For example, it is forbidden to talk loudly in latrines or during bathing. It is also forbidden to sing or talk after 9.00 pm at night. An inmate committing any of the specified acts shall be liable to any or a combination of the following punishments: formal warning; waiving privileges; reducing the grade; separate confinement; caning not exceeding ten stripes.[58]

4.4 Monitoring and Withdrawal of Certified Institutes

Every certified institute and approved home shall be liable to inspection at all times and in all departments by the Chief Inspector or Assistant Inspector of certified institutes. This exercise shall be conducted at least

---

55. Rule 18, *ibid.*
56. Rule 25, *ibid.*
57. Rule 23, *ibid.*
58. Rule 24, *ibid.*

once in six months every year. Where the certified institute is for the reception of girls only a woman authorised by the Chief Inspector shall carry out the inspection.[59]

The Chief Inspector of certified institutes may be appointed by the Government along with such number of Inspectors and Assistant Inspectors as the Government may deem fit.[60] The Chief Inspector shall be responsible for the control and supervision of the certified institutes or approved homes. He may, if he thinks fit in the interest of any child, order him to be transferred from one certified institute to another. Besides, the Chief Inspector shall supervise and control the work of Inspectors, Assistant Inspectors, Superintendents and other officials and staff of the certified institutes or approved homes. He shall visit the certified institutes at least once in two months and perform such other duties as may be assigned by the Director from time to time.[61]

When an institute ceases to be certified institute, the children or youthful offenders detained therein shall be either discharged absolutely or on such conditions as the Government may impose or may be transferred by order of the Chief Inspector to some other certified institute.[62]

5. Analysis and Concluding Observations

The formal law of Bangladesh attempts to protect its citizens against all forms of discrimination. Children are not the exception but the rule. This is evident not only from the juvenile justice laws but also from the *Constitution of Bangladesh* which ensures under Articles 15, 17, 27, 28 and 31 that children and others shall be entitled to protection against all forms of discrimination. The Constitution also guarantees everyone the right to life, liberty and freedom from arbitrary detention. While the right to bail and a fair and speedy trial is embodied in the Constitution, it also gives every citizen the right to freedom from torture and other cruel, degrading and inhuman treatment.

Children who come in conflict with the law are not unlike other children. It is only the particular situations they find themselves in that set them apart from ordinary children. In the circumstances, designating children in accordance with the offences committed by them essentially have a `labelling' effect, which is hardly compatible with their rights under the law. This is compounded by the fact that many children are

---

59. Section 29, *The Children Act, 1974.*
60. Section 30, *ibid.*
61. Rule 20, *The Children Rules, 1976.*
62. Section 28,*The Children Act, 1974.*

institutionalised for activities that hardly merit as `offences', much less treatment. In the circumstances, the children are very often subjected to double victimisation.

The impact of corrective measures under the existing system appears inscrutable to say the least. Given the diversity of factors that compel children to breach the law, it is necessary for the juvenile justice system to assume a differential approach towards treatment of children who come under its purview. In this regard, distinction must be made between child victims of abuse and those who have broken the law. While non-institutional methods should be applied in helping maladjusted children, attempts must be made for separating status offences from criminal offences. Indeed, sentencing and institutionalisation on false or minor charges harden children to life's realities and provoke them into committing real crimes the next time.

The situation is compounded by parents/guardians who prefer to abdicate their responsibilities by handing over their children to correctional institutes for being wayward and uncontrollable. This is indicative from the preponderance of guardian-referred cases than police referred ones in correctional institutes. Although one may deduce from this scenario that Bangladesh has the trappings of a welfare state this is certainly not the case in actuality. The family is a strong medium through which children develop their attitudes and conduct. It is necessary for families to be mindful of their responsibilities if children's confidence in them as care givers is to sustain. In the circumstances, efforts must be made to strengthen the homes and develop healthy relationships between caregivers and the children.

It would be useful to remember that the welfare model of juvenile justice should in no way be used to subvert the inherent rights of children. Therefore, existing laws need to be applied in a sensitive manner in order to avoid unfair biases against children who come in contact with the criminal justice system. A scrutiny of juvenile justice laws in both the international and national contexts reveals that recourse to deprivation of liberty of children as a sentence should be the last resort and for the shortest possible time. This stems from the understanding that deprivation of liberty must not be imposed unless the judge or the magistrate is convinced of the objectives of the measure. In other words, it is imperative to assess whether such deprivation will necessarily have a positive impact on the child's reform and development. Therefore, in every case, the judge or the magistrate has to weigh all circumstances of the child before committing him/her to imprisonment.

In practice however, recourse to deprivation of liberty is too frequent an occurrence, which is totally inconsistent with the objectives that it may be used only as a `last resort'. It is a common enough practice to sentence children to imprisonment without taking relevant circumstances into consideration. While regard must be had to the situation of each individual child and the nature and circumstances of the crime, there is little evidence of this practice during investigation and trial. This essentially compromises a child's right to a fair hearing and treatment.

Children are frequently institutionalised for quite different reasons; instead of training and protection, child offenders are faced with demands of retribution by the society, irrespective of their age. This effectively draws out hostile and aggressive responses from most children. Despite having reformative or deterrent aspirations, judicial response to delinquency often has the effect of `labelling' a child as delinquent. This may well influence the child's perception about him/herself and how he/she behaves. The experience of being `caught', institutionalised and publicly labelled as `deviant' may have far-reaching consequences on a child's physical and psychological development.

Another difficulty lies in the associational practices in the correctional institution. Keeping a large group of children having different anti-social propensities in close proximity for extended periods of time may have deleterious effects on them. Numerous cases of serious maladjustments in child offenders make it nearly impossible to offset the unhealthy effects that result automatically from the exchanges amongst themselves. Moreover, where the number of cases to be handled is great, individual treatment can be, and often is, exacting. There is also a great dearth of facilities offering separate treatment of divergent types of cases. Institutions do not provide clinical and therapeutic programmes; as a result, individualised diagnosis and treatment of child offenders are virtually non-existent.[63]

Under the juvenile justice laws in Bangladesh the Court has the power to discharge youthful offenders or commit them to `suitable' custody. Therefore, on the basis of adjudication young offenders may either be sent to some correctional institution or placed under the supervision of

---

63. Khair, Sumaiya, *Exploring Root Causes of Juvenile Crime in Bangladesh: A Study*, UNICEF, 1998, p.40.

a Probation Officer, the latter being an attempt at a non-institutional approach. In practice the absence of adequate probationary services results in increasing institutionalisation of children who come into contact with the law. The fact that the certified institutions operate both as centers for remand and correction presents a paradox. There is an urgent need to separate these two streams of services by developing necessary capacity and infrastructure. The other serious lacking of the system is the absence of correctional facilities for girls. Consequently, when girls come into contact with the law they are either despatched to jails or to some shelter home that accommodates prostitutes and rape victims. There are reportedly a good number of derelict and unutilized structures across the country that the Government may renovate and use for these purposes.

While existing legal standards generally discourage institutionalisation, minimum parameters for the care of institutionalised juveniles do exist to offset the deleterious effects of detention and to foster the reintegration of juveniles into society. Nevertheless, although institutions for juveniles are supposed to operate as care, education and rehabilitation centres rather than penitentiaries, treatment in institutions gives rise to serious concern. This is evident from the gaps between the views of children who have been to the correctional institution and those of the institutional authorities. While children generally voice their dissatisfaction at the way they are treated in the certified institutes or approved homes, Social Welfare authorities take a more favourable view about the existing scenario in correctional homes. The gaps between these views speak volumes.

It is admittedly difficult to reconcile the actual scenario in the administration of juvenile justice with policy recommendations, particularly when there are differing ideologies supporting the welfare model on the one hand, and the justice model on the other. In the former instance, deviance is viewed as a manifestation of intense maladjustment resulting from an unfavourable environment; in the circumstances, treatment of the child is considered a proper intervention where the child's welfare needs to be pre-eminent. In the latter, deviance is viewed as a matter of choice; therefore, sanctions and controls serve as legitimate responses to validate and sustain the norms endorsed by society. Dissent surrounds both the above-mentioned models. It has been argued that

> the 'need for treatment' has sometimes been used as a justification for very considerable restrictions on the liberty of the child which seem out of proportion to the seriousness of the offence. Equally however, it is evident that an exclusively

> 'crime control' or 'justice' approach, in which serious crimes result in strong punishments, ignores the extensive evidence that severe and persistent delinquency is often accompanied by widespread personal difficulties and disturbance which give rise to distress and social impairment for the individual as well as `trouble' for the community.[64]

Thus, in the absence of foster homes, problem children are usually institutionalised. Institutions in Bangladesh hardly have the home-like quality that is essential for rehabilitation of young offenders. Although it is difficult to measure the impact of institutionalisation with any certainty, as children generally go through different ordeals before being actually sent to institutions, a safe assertion would be that more ought to be achieved through institutionalisation in the given circumstances.

Treatment of children in welfare institutions should be toned down to the extent where children do not feel over-controlled and over-protected. The general feeling among children is that `they are more likely to be responded to as a problem than to have their problems responded to'.[65] It is obvious that concrete interventions that would raise the general level of the psycho-social development of children are yet to materialise.

Institutions should avoid harsh treatment, corporal punishment and excessively stringent discipline of child inmates. While the handling of a child through formal methods may be justifiable up to a certain extent, institutional measures beyond a point is likely to become counterproductive for children. Thus, there is a need for diversion from institutional mechanisms into more non-institutional alternatives. The Government must create conditions and opportunities conducive to child development and mobilise human and material resources in that regard. Improved social services, specialised assistance, child-centred initiatives and committed personnel with requisite skills, knowledge and experience are fundamental to a sound juvenile justice system.

---

64. Rutter, Michael and Giller, Henri, *Juvenile Delinquency. Trends and Perspectives*, The Guilford Press, New York et al., 1983, p.322.

65. Newburn, Tim, "Youth, Crime and Justice" in Maguire, Mike et al.,(eds.), *The Oxford Handbook of Criminology*, Clarendon Press, Oxford, 1997, pp.613-660, at p.635.

Informal initiatives within the community may be an effective strategy for monitoring children's activities and diverting them from coming into conflict with the law. Community policing may include counseling and support services for parents to equip them with techniques on planned parenthood, child rearing and strengthening family relationships. Similar services to children and juveniles would ensure that they do not feel alienated and uncared for. When communities demonstrate their willingness to share the responsibility of their children, it instills in young people a sense of belonging and a confidence that there is someone to fall back on in times of crises. Wholesome activities and recreations within the community may offer children with viable outlets for their energies, emotions and anxieties. Community involvement in counseling juveniles on salient aspects of their conduct will ensure that they utilise their time in constructive ways.

The Dhaka University Studies, Part-F Vol. XVI (2) : 29—40, December 2005

NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW IN BANGLADESH

Dr. Borhan Uddin Khan

1. Introduction

The mechanisms for implementing International Law at the domestic level in general become increasingly abstruse and sophisticated to the point that it is sometimes difficult to ascertain who, in the final analysis, has the responsibility for applying it. However, in the case of implementation of International Humanitarian Law, the International Committee of Red Cross (ICRC) does not assume principal function in this matter. It is the parties to the Geneva Conventions, which have the obligation to respect and ensure respect for the rules of International Humanitarian Law contained in the Conventions.[1] Thus, implementation and enforcement of International Humanitarian Law is the primary responsibility of the states concerned. The role of international bodies, such as the ICRC, has been to undertake activities designed to encourage and induce national governments to fulfill their responsibilities in accordance with the relevant international standards; to engage governments in cooperative procedures aimed at assisting them in the implementation of internationally recognized standards and in overcoming difficulties that they may be experiencing in that regard; and to respond to, or attempt to deal with, violations of the internationally recognized rules.[2]

2. State of Ratification by Bangladesh of Conventions Concerning International Humanitarian Law

Since its emergence as an independent state, Bangladesh has become the 132nd High Contracting Party[3] to the four Geneva Conventions[4] of 1949

---

1. By virtue of Article 1 common to the four Conventions and Article I, paragraph 1 of Additional Protocol I, the High Contracting Parties promise "to respect and to ensure respect for" these instruments in all circumstances.
2. See, Ramcharan, B.G., "The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights in Non-International Armed Conflicts", in *The American University Law Review*, Vol. 33, No. 1, 1983, p.99.
3. See, *International Review of Red Cross*, No, 135, Geneva, 1972, p.333.
4. *First Convention*: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949; *Second Convention*: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949; *Third Convention*: Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949; *Fourth Convention*: Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949.

and has declared itself bound by virtue of the previous ratification of those Conventions by the state of Pakistan.[5] Moreover, on 21 December, 1971 the United Nations Security Council had also called upon "all those concerned to take all measures necessary to preserve human life and for the observance of the Geneva Conventions of 1949 and to apply in full their provisions as regards the protection of wounded and sick, prisoners and civilian population".[6] There has been no objection to the assumption of such responsibilities by the state of Bangladesh. The government has ratified 1977 Protocols[7] Additional to the Geneva Conventions.[8]

The other Conventions concerning Humanitarian Law ratified by Bangladesh are: the 1972 Biological Weapons Convention, the 1976 Environmental Modification Convention, the 1980 Conventional Weapons and its four Protocols (including the amended Protocol II), the 1993 Chemical Weapons Convention, and the 1997 Ottawa Anti-personnel Landmines Convention and the 2000 Optional Protocol to the Convention on Rights of the Child. The government, however, has not ratified the 1954 Cultural Property Convention and its Protocol.

3. Status and Implications of International Humanitarian Law in the Domestic Legal Regime

The Constitution of Bangladesh was adopted on 4 November 1972 and came into force on 16 December 1972. Human rights agenda had been in the fore-front of the country's liberation struggle. The country's respect for human rights and fundamental freedom dates back from the Proclamation of Independence of 10 April 1971. The Proclamation, *inter alia* reads "... we undertake to observe... and to abide by the Charter of the United Nations".[9] The Constitution in its Preamble provides "... it shall

---

5. See, *International Review of Red Cross*, No, 135, Geneva, 1972, p.333. The formal letter was received by the Swiss Federal Council on April 4, 1972.
6. See, Res. 307, 26 U.N. SCOR (1621st mtg.) 2, U.N. Doc. S/RES/307, 1971 (vote 13-0-2).
7. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol) I), of 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.
8. For the text of the Conventions and the Protocols see, ICRC, *Hand book of the International Red Cross and Red Crescent Movement*, Geneva, 1994, pp. 23-280.
9. See, 24 DLR, 1972.

be a fundamental aim of the state to realise ...a society in which the rule of law, fundamental human rights and freedom,... will be secured for all citizens". Article 11 envisages that the republic shall be a democracy and in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed.[10] Article 25 delineates that the "state shall base its international relations on the principles of... respect for international Law and the principles enunciated in the United Nations Charter...".[11] Article 145A specifies that "all treaties[12] with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament".

From the above provisions, it is evident that the Constitution is silent on the status of International law upon the domestic legal regime, even though it does make reference to human rights and respect for international law. Accordingly, under the general principles of international law and the municipal legal regime, international treaties can become part of the domestic law in Bangladesh only if they are specifically incorporated in the law of the land. In other words, they are not self-operating in Bangladesh i.e. treaty obligations concluded by Bangladesh cannot *ipso facto* be put into effect unless an enabling legislation is passed or enacted.[13] Further, the Constitution does not contain any specific provision, which obliges the State to enforce or implement international treaties and Conventions including implementation and enforcement of International Humanitarian Law.

4. Obligations of Bangladesh as Regards National Implementation under the Geneva Conventions of 1949 and the Protocols of 1977.

The primary responsibility for the application of humanitarian law lies with the States themselves. In accordance with the Geneva Conventions of 1949 and their Additional Protocols, States have an obligation to

---

10. For details see, *Constitution of the People's Republic of Bangladesh 1972.*
11. For details see, Ibid, Article 25.
12. The author is of opinion that here the expression 'treaty' shall not mean to include a treaty within the meaning of the Vienna Convention on the Law of the Treaties but 'treaties' concluded by the government of Bangladesh with another foreign state or states. Thus, the term 'treaty' here essentially refers to 'international agreements' between states within the meaning of Article 3 of the Vienna Convention. It may be recalled that Article 5 of the Vienna Convention states that the Convention applies to any treaty, which is the constituent instrument of an international organisarion while Article 1(i) states 'international organisation' means an intergovernmental organisation.
13. See, Rashid, H., *International Law*, Dhaka, 1998, p.23.

ensure implementation of and respect for humanitarian law, and to that end to adopt, in peacetime, a set of legislative, regulatory and administrative measures at the national level.[14] Thus, as a state party to the various Geneva Conventions and its Protocols, the government of Bangladesh has some obligations including the followings:

(a) Repression of Breaches of Humanitarian Law at the National Level through Legislative Enactment providing Effective Penal Sanctions

Humanitarian law lays down the principle of individual penal responsibility. But penal proceedings can only be instituted if the acts in question are punishable under national law. In the event of an allegation of a serious violation of humanitarian law, Bangladesh as a State Party is obliged to bring criminal charges against the suspect, regardless of his or her nationality or the place where the act was committed, or to extradite the suspect to another State. Furthermore, Bangladesh as a State Party has the responsibility to enact legislation necessary to provide penal sanctions and measures necessary to prevent breaches of Humanitarian Law.[15] The government of Bangladesh is yet to enact specific legislation to this effect. The only law that has some bearing is the *International Crimes Tribunal Act, 1973*.[16]

(b) Communication of Translations of the Conventions and Protocols and Laws of Application during Hostilities

As a High Contracting Party to the Conventions and the Protocols, Bangladesh has an obligation to communicate to other state parties during hostilities, the official translations of the Conventions, as well as the laws and regulations it enacts to ensure application of the Conventions. Such laws and regulations of application refer mainly to the legislative, regulatory or administrative measures which must be adopted in peacetime in order to allow the application of the rules of Humanitarian Law in times of armed conflict.[17] Since independence the state of Bangladesh has not experienced any hostilities and as such has remained outside the purview of compliance with these provisions.

---

14. For obligation of states generally, see, ICRC, *National Mechanisms for the Implementation of International Humanitarian Law*, Geneva, 1996, pp.4-5.
15. See, Articles 49, 50, 129 and 146 respectively of the four Geneva Conventions and Articles 11 and 85 of Protocol I.
16. For details see, discussion under the heading 'International Humanitarian Law having Bearing on Domestic Legislative Measures" of this paper.
17. See, Articles 48, 49, 128 and 145 respectively of the four Geneva Conventions and Articles 80 and 84 of the Protocol I.

(c) Protection of the Red cross/Red Crescent Emblem

The Red Cross and the Red Crescent are signs protected by humanitarian law. Their use and the use of other protected distinctive signs, must be regulated by the Government of Bangladesh in accordance with the provisions of law as envisaged by the Geneva Conventions and the Protocols. Unauthorised use of these signs must be prohibited and sanctioned by appropriate national legislation.[18] The prevalent legislation on this aspect is the Geneva Conventions Implementing Act 1936. This law which predates the Geneva Conventions of 1949 falls far short of the compliance requirement under the Conventions.[19] Following recommendations of a symposium on emblem protection held in 1999, organised by the ICRC and the Bangladesh Red Crescent Society, the ICRC Advisory Services Department has prepared and submitted an updated draft on emblem legislation in the same year. The government of Bangladesh is yet to take any measure.

(d) Dissemination of Knowledge of the Rules of Humanitarian Law

With the sole exception of the 1954 Hague Convention for the Protection of Cultural Property, the four Geneva Convention of 1949 and their two additional Protocols are virtually the only instruments in International Law, that expressly impose obligation on state parties to take all necessary measures, to make the treaty provisions adequately known to the categories of people, likely to be in situations in which they must be applied. Humanitarian Law is an integral part of teaching and training programmes for the armed forces in Bangladesh. However, the obligation of the government that the knowledge of the principles and rules of Humanitarian Law should be disseminated as extensively as possible among the population during peace time[20] requires practical measures of implementation on the part of the government.

(e) Undertaking Material Preparations to Ensure Respect for and Compliance of International Humanitarian Law

There is a series of provisions laying down practical measures to ensure

---

18. See, in particular, Articles 38 of the First Geneva Convention; Articles 41 of the Second Convention; Articles 8, 18, 38 and 85, para. 3(f), of Protocol I, Annex 1 to Protocol I; and Article 12 of Protocol II.
19. For details see, discussion under the heading 'International Humanitarian Law having Bearing on Domestic Legislative Measures" of this paper.
20. See, Articles 47, 48, 127 and 144 respectively of the four Geneva Conventions; Article 83 of Protocol I; and Article 19 of Protocol II; see also, Protocol I, Article 6, "Qualified persons", Article 82, "Legal advisers in armed forces"; and Article 87, "Duty of commanders".

respect for and the protection of persons and property protected by the law in the event of armed conflict. For example, the protective Red Cross/Red Crescent emblem must be used to identify medical personnel and to mark hospitals, medical units and transports; hospital ships must be equipped with the prescribed radio signal; military targets must be kept away from densely populated areas and located in such a way that they may be easily distinguished from civilian objects at all times.[21]

(f) Recognising the Competence of the International Fact-Finding Commission

This refers in particular to measures that must be taken to enable international implementation mechanisms to operate properly in the event of hostilities. One example is acceptance of the competence of the international Fact-Finding Commission, which is dependent upon a declaration to be made by the government. Though the declaration may be made at any time, it should preferably be made before the need arises for an inquiry into a breach of Humanitarian Law.[22] The government of Bangladesh has not yet made any declaration pursuant to Article 90 of Protocol I, recognising the competence of the International Humanitarian Fact-Finding Commission.

5. Constitutional Provisions Reflective of the Principles of International Humanitarian Law

The Constitution of the People's Republic of Bangladesh guarantees certain fundamental human rights to citizens as well as non-citizens. Such as right to life and personal liberty, safeguard as to arrest and detention, prohibition against forced labour, protection in respect of trial and punishment etc., but not 'war crimes' or 'grave breaches'[23] of the Geneva Conventions, in the strict sense of the term.

---

21. See, for example, Article 23 and 26 of the First Convention, Article 39 of the Second Convention and Articles 12 to 31 of Protocol I.

22. See, Article 90 of Protocol I.

23. 'Grave breaches' are defined under each of the Conventions and they include generally willful killing, torture or to inhumane treatment including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. They also include compelling a prisoner of war to serve in the forces of the hostile power or willfully depriving a prisoner of war of the rights of fair trial and regular trial prescribed in the Convention, unlawful deportation or transfer or unlawful confinement of a protected person and taking them as hostages. See, Article 50 of the First Convention; Article 51 of the Second Convention; Article 130 of the Third Convention and Article 147 of the Fourth Convention.

It is, however, interesting to note that there are a few provisions in the Constitution, which have some bearing on International Humanitarian Law principles. The Preamble to the Constitution, which declares the general purposes for which the several provisions in the Constitution have been made, "...assures international peace and cooperation..." which is the basic objective of the International Humanitarian Law. Similarly, the right to life and personal liberty are guaranteed under the Constitution to 'any person'–which expression includes citizens as well as non-citizens–have close resemblance to the International Humanitarian Law principles. Thus, Article 32 of the Constitution which proclaims, "no person shall be deprived of his life or personal liberty save in accordance with law", is a guarantee against 'grave breaches' of the Conventions.

The principles of equality, non-discrimination and absence of arbitrariness in Articles 27 and 28 of the Constitution, are a clear replica of the principles of International Humanitarian Law incorporated in the various Geneva Conventions and the Additional Protocols. Yet another constitutional provision which has some relevance to International Humanitarian Law principles is the one contained in Article 35 which deals with certain safeguards and protection to persons accused of crimes. This Article prohibits against retrospective criminal law, double jeopardy and self-incrimination. Some of these principles can be found in the Geneva Conventions also. Similarly, the principles as specified in Article 33 of the Constitution dealing with protection against arrest and detention in certain cases are also found in some of the provisions of the Geneva Convention.

Thus, even though the Constitution does not directly provide for the implementation of International Humanitarian Law principles, the constitutional obligation of the judiciary to enforce these fundamental human rights may indirectly uphold the principles of International Humanitarian Law as enshrined in the Geneva Conventions.

6. International Humanitarian Law having Bearing on Domestic Legislative Measures

The first effort to implement humanitarian law, albeit partially, was the passing of, in 1936, the *Geneva Convention Implementing Act, 1936*.[24] Since

---

24. Act No. XIV of 1936; See, *The Bangladesh Code*, Vol. No. XI, Dhaka, 1988, pp. 367-368.

then it has been amended several times[25] the last being in 1974. It was initially enacted to implement article 28 of the Geneva Convention of 1929, which dealt with protection of the emblem of the Red Crescent and Red Cross etc. It was subsequently amended[26] with a view to implementing article 53 of the First Geneva Convention of 1949, which replaced the 1929 Convention. Section 2 of the Act deals with the protection of the use of emblems. It reads as follows:

> No person other than a person entitled thereto under the Geneva Convention shall use, or in any manner exhibit, whether for the purpose of trade or business or for any other purpose or object whatsoever, the emblem or the designation "Red Cross", "Red Crescent", "Red Lion and Sun" or "Sun" or any sign of designation constituting an imitation thereof, irrespective of the date of the adoption of any such emblems or designation by such person.

Section 4 of the Act prescribes punishment for violation of the above provision, which is Taka 50 only.[27] No Criminal Court can take cognizance of any offence punishable under this law except with the pervious sanction of the government.[28] The law further does not indicate who is responsible for authorising the use of the emblem. The Act is silent regarding 'grave breaches' of the Geneva Conventions and trial procedures. The law, thus, is inadequate and unsatisfactory in itself.

---

25. *Chronological list of amendment:* The Government of India (Adaptation of Indian Laws) Order, 1937; the Adaptation of Central Acts and Ordinances 1949 (G.G.O. IV of 1949); the Federal Laws (Revision and Declaration) Act, 1951 (Act No. XXVI of 1951); the Central Laws (Statute Reform) Ordinance, 1960, (Ordinance. No. XXI of 1960); the Geneva Convention Implementation (Amendment) Act, 1963 (Act No. XXI of 1963); the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973) as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974, (Act No. LIII of 1974).
26. The Bangladesh Laws (Revision and Declaration) Act, 1973, as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974.
27. It is of interest to note that since the enactment of the law, it has been amended seven times but the amount of penalty Taka 50, has remained unchanged. For list of amendment, see above, note 25.
28. Section 5 of the Geneva Convention Implementing Act, 1936.

Another piece of legislation, which has direct nexus to Humanitarian Law, is the *Bangladesh Red Cross Society Order, 1973*[29] by which the Bangladesh Red Crescent Society was established. Article 4 of the Order envisages that the Society shall in all its activities observe neutrality, impartiality, independence, universality, humanity and all other basic principles and shall adhere to the Statute of the of the International Committee of Red Cross and the Geneva Conventions. Article 5 of the Order, read with the First Schedule of the Order lays down the objectives of the Society, which as it appears are drawn from the Geneva Conventions and its Protocols. The objectives *inter alia* include: (a) aid to sick and wounded members of the Armed forces of Bangladesh in accordance with the terms and sprit of the Geneva Conventions and discharge of other obligations devolving upon the Society under the Conventions as the recognised auxiliary of the Armed Forces Medical Services; and (b) prevention and alleviation of human suffering with complete impartiality, making no discrimination as to nationality, race, sex, religion, belief, class or political opinions.

The other legislation where the Geneva Conventions have an important bearing, is the *International Crimes Tribunal Act, 1973*.[30] The long title of the Act refers it as "an Act to provide for detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law".[31] According to Section 3 of the Act, the Tribunal has Jurisdiction to try Crimes against Humanity,[32]

---

29. President's Order No. 26 1973. See, *Bangladesh Gazette Extraordinary*, dated March 31, 1973.
30. Act No XIX of 1973. See, *Bangladesh Gazette Extraordinary*, dated 20 July 1973.
31. See, Ibid.
32. Namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated. See, Section 3(2)(a).

Crimes against Peace,[33] Genocide,[34] War Crimes,[35] violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949 and any other crimes under international law.[36] The Tribunal has been vested with the power to try and punish any person irrespective of his nationality who, being a member of any armed, defense or auxiliary forces commits or has committed the above mentioned crimes, in the territory of Bangladesh.[37]

The 1973 Act represents an important recognition and implementation of international due process guarantees for the accused of international crimes. The Act goes beyond the Nuremberg guarantees. Furthermore, it is far more useful evidence of present legal expectation than the 1950 and 1951 United Nations Command Rules of Criminal Procedure.[38] But the Act is not satisfactory in terms of implementing the obligations of Bangladesh under the Geneva Conventions and Additional Protocols. Because, it does not provide for universal jurisdiction in relation to 'grave breaches', that is, jurisdiction regardless of the nationality of the alleged perpetrator and the place where the crime was committed. It should however be borne in mind that the *International Crimes Tribunal Act, 1973* was not enacted to implement the Geneva Conventions and its

---

33. Namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances. See, Section 3(2)(b).

34. Meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent births within the group; (v) forcibly transferring children of the group to another group. See, Section 3(2)(c).

35. Namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detenues, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. See, Section 3(2)(d).

36. See, Section 3 of the International Crimes (Tribunal) Act, 1973.

37. Id.

38. See, Paust, J.J., and Blaustein, A.P., "War Crimes Jurisdiction and Due Process: The Bangladesh Experience", in *Vanderbilt Journal of Transnational Law*, Vol. 11, No.1, 1978, p.38.

Protocols but to try those accused of war crimes during the war of liberation in 1971.

It will not be out of place to indicate that the International Crimes trial never took place, not because of lack of jurisdiction but because of politics. The issue of international crime and criminal jurisdiction had become so intermeshed with post-war regional disputes and global politics that Bangladesh finally agreed[39] in 1974 to allow India to repatriate the 195 alleged violators of Geneva Conventions to Pakistan. Even though, Pakistan did not agree to prosecute grave breaches of the 1949 Geneva Conventions. Thus, it can be said that neither India, Pakistan, nor Bangladesh had lived up to their responsibilities under the Geneva Conventions to search out and prosecute, or extradite for prosecution, those accused of grave breaches of the Geneva Conventions.

7. Conclusion

The adoption by the international community of the various Conventions relating to Humanitarian Law is not an academic exercise. Its object is to bring about effective and harmonised progress in the national law and practice. One of the factors influencing the effectiveness of these international standards is the degree to which they are formally accepted by member states. Thus, adoption of Conventions, strictly speaking, is only a first stage, the intention is that these standards should be embodied in the law of the member countries is the second stage; and the actual implementation and enforcement of these standards at the domestic

---

39. An agreement was concluded on the 9th of April between India, Pakistan and Bangladesh. A news account reported the April 9, agreement as follows: "NEW DELHI, April 9 – India Pakistan and Bangladesh reached a major breakthrough tonight and signed an agreement to repatriate 195 Pakistani prisoners of war... [T]he war-crimes trial planed for Pakistani prisoners by Bangladesh, the former Eastern wing of Pakistan would be dropped...".

    "The trials, tribulations, tensions, and conflicts of the subcontinent will become a thing of the past, something of a bad dream that is best forgotten," said India's Foreign Minister, moments after the signing of the agreement.

    The Bangladesh Foreign Minister, "This is a moment for satisfaction. The efforts for enduring peace in the subcontinent will put an end to conflict and confrontation, and the 700 million people of the subcontinent will be able to live as good neighbors". Quoted from, Paust, J.J., and Blaustein, A.P., "War Crimes Jurisdiction and Due Process: The Bangladesh Experience", in *Vanderbilt Journal of Transnational Law*, Vol. 11, No.1, 1978, p.37. See also, *The N.Y. Times*, April 10, 1974, at page 1 col. 5.

level is the final stage. Hence treaties, which constitute International Humanitarian Law, could well remain a dead letter unless internal legal and practical measures for implementation are taken within State system to guarantee their application.

It is evident from the preceding discussion, that the government of Bangladesh has not yet passed appropriate legislation to give effect to the 1949 Geneva Conventions and its Protocols. It is expected that positive steps would be adopted in near future to promulgate suitable legislation for implementing International Humanitarian Law in its proper perspective to suit and meet the needs of the time. At the same time, it is suggested that the *Geneva Conventions Implementing Act, 1936* which is incomplete and unsatisfactory in terms of fulfilling the obligations of the government of Bangladesh under the Geneva Convention should be repealed by suitable and appropriate legislation.

The implementation of International Humanitarian Law is a continuous process which covers a very wide range of activities i.e., legislative, administrative, practical, educational etc., affecting various government spheres and many sectors of public life. It requires coordination by and cooperation of number of Ministries, administrative authorities, State entities and other national institutions. Hence, for the promotion of implementation of International Humanitarian law at the national level, a National Committee may be formed which would be in a position to evaluate national legislation, judicial decisions and administrative provisions in the light of the obligations steaming from the Geneva Conventions and their additional Protocols. The Committee should submit to the government, and specifically to the authorities concerned and the legislature, advisory opinions on issues relating to the application of humanitarian law and formulate necessary recommendations. The proposed Committee should play a significant role in encouraging dissemination of humanitarian law and, to that end, should have the necessary authority to carry out studies and propose activities and assist in spreading knowledge of humanitarian law at all levels of civil society. The Bangladesh Red Crescent Society should assist and cooperate with the government in fulfilling the obligation of the government. Finally, it must be emphasised that if the humanitarian rules are to be implemented in times of war, the government of Bangaldesh must take action in peace time, by enacting necessary laws, by adopting internal regulations and administrative measures, and by making the Conventions and Protocols as widely known as possible.

The Dhaka University Studies, Part-F Vol. XVI (2) : 41—70, December 2005

THE CONCEPT OF CONSENT IN MUSLIM MARRIAGE CONTRACTS: IMPLICATIONS FOR WOMEN IN BANGLADESH

Dr. Shahnaz Huda

Introduction

The option or freedom of choice which allows a woman to select or reject a spouse demonstrates her status in other aspects of life and her freedom of choice generally. Closely connected with the age of marriage is the concept of consent since a child is not generally construed as capable of giving an informed consent and neither is a person consenting on her behalf, taking into consideration her opinions even if she were capable of expressing any.

The reality of women's consent to marriage is an important indicator of their status. The typical Bangladeshi woman herself is generally unaware that she has any real option other than to agree to a match arranged by her family, which in truth she usually does not have. The socio-cultural and religious norms which demand seclusion of a woman are at odds with the requirement imposed by religious law of obtaining the consent of the woman.

Since the consent of an adult woman is an essential condition of marriage under religious law, it is necessary to discuss the assertion on one hand that there is generally absence of consent on the part of a Bangladeshi girl, and on the other hand that Muslim marriage requires, as an essential condition, the free consent of both parties to the marriage if they are adults.

This article[1] deals in depth with the religious law regarding the consent of the woman and includes various aspects of such law, for example,

---

1. This article is an adapted and updated version of Chapter seven of the author's unpublished Ph.D. dissertation:

   Huda, Shahnaz (1996) 'Born to be Wed'—Bangladeshi Women and the Muslim Marriage Contract; University of East London, UK. It contains the results of the empirical investigation undertaken by the author during her field work in mainly two villages; a) Dhitua village in Muktagacha Upazilla (sub-district), Mymensing District and b) Komolpur village in Shaturia Upazilla, Manikganj District. Both quantitative and qualitative data was obtained in the field work. Secondary evidence to update the article has been utilized throughout.

'agency in marriage, the concept of equality, the procedure for expressing consent and the position of the civil law of the State regarding consent. Another substantial portion of the article deals with the reality of a Bangladeshi woman's right of choice as evidenced by work in the field, which necessarily deals with arranged marriages, the position of law as regards consent, and the perception of women about their right to choose whether or not to consent

Consent under Muslim Law

Under Muslim Law, a marriage is a contract between a man and a woman. This marriage contract must fulfill the necessary conditions in order that it is a valid union. In short, a Muslim marriage consists of an offer or proposal and the acceptance of that offer, both made in the presence of witnesses. Thus, the consent of the parties to the marriage is vital. Consent is expressed by declaration (*ijab or ejab*) and acceptance (*qabul/kabool*).[2] Without the consent of the parties or their guardians (where the parties are minors) there can be no marriage. The two primary sources of Islamic Law, the *Quran* and the *Sunna* are both clear as to the requirement of consent in marriage. Verse 2:232 of the *Quran* is interpreted as saying: "Prevent them not from marrying their husbands when they agree among themselves in a lawful manner."[3]

In the *Quran*, marriage has been referred to as a '*Mithaq*' which means a covenant, between the husband and the wife.[4] The Holy *Quran* is said to lay down expressly that the husband and the wife *both* must agree to the marriage. It is reported from the traditions of the Prophet that "(t) he father or the guardian cannot give a virgin or matron in marriage without her consent".[5] He was also reported to have said that: "a matron should not be given in marriage except after consulting her; and a virgin should not be given in marriage except after her permission."[6] The *Sahih Muslim* records companions of the Prophet reporting that '*Allah*'s Messenger'

---

2. Baillie, Neil B.E. (1875). A Digest of Moohummudan Law, 2nd Edition; Smith, Elder and Co.; London at p. 4.
3. Ali, Maulana Muhammad (1973). The Religion of Islam; The Ahma-diyya Anjum Ishaat Islam, Lahore at p. 511 and Doi, A. Rahman I.(1984). Shahriah-the Islamic Law; Ta Ha Publishers, London at p.123.
4. Op.cit. Ali (1973) at p.511.
5. *Bukhari* (1986). The Translation of Meanings of *Sahih-Al-Bukhari*, Arabic to English, Vol.II, by Dr. Muhammad Muhsin Khan; Kazi Publications, Lahore at p. 51.
6. Ibid at p.52.

(the Prophet) had said: a woman without a husband (or divorced or a widow) must not be married until she is consulted, and a virgin must not be married until her permission is sought.[7] The *Sahih Muslim* in the *Kitab Al-Nikah* (book of marriage) also contains account of various companions of the Prophet to the effect that: "A woman who has been previously married (*Thayyib*) has more right to her person than her guardian. And a virgin should also be consulted..."[8] Although it is unclear from the above reports of the traditions whether 'virgin' includes also minors, it has been well established that minor girls, below the age of puberty, may be married by their guardians. The *Hanafi* School has qualified what has been referred to as a virgin, and has added the qualification of adulthood with regard to the need of consent.[9] This would imply that consent is required only of girls above the age of puberty. The necessity of consent is stressed upon, as we have seen above, in the *Hadith*. So much so, that according to reports, if a man gives his daughter in marriage in spite of her disagreement, such marriage is invalid:[10]

> Narrated Khansa bint Khidam Al-Ansariya that her father gave her in marriage when she was a matron and she disliked that marriage. So she went to Allah's Apostle and he declared that marriage invalid.[11]

The reasoning behind allowing a woman to contract her own marriage, or making her consent one of the essentials to the marriage, is that since a sane adult woman is capable of distinguishing good from evil and is by law capacitated to act for herself in all matters of property, she likewise has the capacity to choose a husband or to decide upon her own marriage which is an act affecting only herself.[12] The *Hanafis'* thus hold that a woman is quite capable of deciding her own marriage and that `it is not

---

7. *Muslim* (*Sahih Muslim*) (1972). Being traditions of the sayings and doings of the Prophet Muhammad as narrated by his companions and compiled under the title Al-Jami-us-Sahih by Imam Muslim; Translated by Abdul Hamid Siddiqui Vol.II; Sh.Muhammad Ashraf, Lahore at p.714.
8. Ibid.
9. See The *Hedaya* (1870). Commentary on the Muslim Laws; Translated by the order of the Governor-General and Council of Bengal by Charles Hamilton; H. Allen & Co., London at p.34.
10. Op. cit. *Bukhari* (1986) at p.52.
11. Ibid.
12. Op. cit. *Hedaya* (1870) at p.34.

lawful for a guardian to force into marriage an adult virgin against her consent'[13]

Unlike the *Hanafi* School, other schools (for instance the *Hanbali* or the *Shafi*) do not agree that a woman is capable of deciding for herself about her own marriage, and are of the opinion that her guardian must decide on her behalf. The crux of the disagreement between the *Hanafis'* and the other schools is that the majority restricts the freedom of choice of the woman and makes her guardian share with her in taking charge of her marriage.[14]

The argument of the *Hanafi* doctors is that an adult virgin is free and subject to all the obligatory observances of the law, (such as fasting, prayer and so forth) and no one has any absolute authority over her like in the case of an infant.[15] An adult virgin that is to say one who has attained discretion `is the same as an adult son; and that all her acts with respect to matrimony are good and valid'.[16] The confusion results from some contradictory reports of the Prophet's traditions, which is shown by the other schools in support of their view. In the *Mishcat-ul-Masabih* it is narrated from Abumusa that the Prophet had said that "there is no marriage without the permission of the father".[17] The Prophet's wife Aayeshah is reported to have narrated that according to him: (e)very woman who marries without the consent of her father, her marriage is null and void, is null and void, is null and void.[18]

Again Abuhurairah reports the Prophet's tradition according to which:

> One woman shall not give another woman in marriage; nor a woman give herself in marriage; because she is a fornicatrix who giveth herself to a man.[19]

---

13. Ibid.
14. Alami, Dawoud S.El (1992). The Marriage Contract in Islamic Law; Graham and Trotman, London at p.57.
15. Op. cit. .*Hedaya* (1870) at p.34.
16. Ibid.
17. Khan, Mahomed Yusoof (1891-92). Tagore Law Lectures 1891-92. Mahomedan Law relating to Marriage, Dower, Divorce, Legitimacy and Guardianship of Minors, according to the Soonnees, Vol.I , reprinted edition of 1984; Law Publishers, Allahabad at p.100.
18. Ibid.
19. Ibid.

Robertson W. Smith,[20] while reiterating that in Muslim law a guardian cannot dispose of his adult ward in marriage, says that the traditions on this head show quite plainly that the necessity of consent on the part of the woman was an innovation and long a matter of dispute amongst scholars of Islamic law.

Consent of a Hanafi female

To summarize therefore, the law regarding the consent of an adult *Sunni Hanafi* woman: although a *Hanafi* girl, who is under the age of puberty may, under the religious law, be contracted into marriage by her guardian, a woman who has become an adult, that is to say has reached the age of puberty, must give her consent to any marriage she is a party to, either personally or through an agent (*wakil*). 'Proposal and consent are essential to a contract of marriage' says Macnaghten.[21]

Although in the case of a minor this consent may be given by her guardian, in the case of an adult woman her own consent either expressed personally or through an agent is a pre-requisite. The adult woman has been granted full freedom in the choice of her husband and she must not be married without her own consent: the consent of her father cannot take the place of her own consent;[22] she may even engage in the contract without his agreement.[23]

In *Asgur Ali Chowdhury vs. Muhubut Ali*,[24] a case on appeal from a decision of a subordinate court of Chittagong, a Mahomedan girl had been given in marriage to a man, on the strength of her father's consent who alleged that the girl was a minor. The husband, suing for establishment of conjugal rights, failed on the ground that the girl was of age and had not consented to the contract.[25]

---

20. Smith W.Robertson (1990). Kinship and Marriage in Early Arabia; Darf Publications, London at p.103.
21. Macnaghten W.H.(1825). Principles and Precedents of Moohummudan Law; Calcutta at p.56.
22. Verma B.R. (1988). Muslim Marriage, Dissolution and Maintenance, 2nd Edition; The Law Book Co., Allahabad at p. 25.
23. Op. cit. *Hedaya* (1870) at p.34.
24. WR 1874 403.
25. Ibid.

Again in the case of *Mst. Atkia Begum vs. Muhammad Ibrahim*,[26] an Allahabad case, it was held that the guardian's consent is unnecessary and a woman would be legally entitled to please herself and to marry the man of her choice, despite family or social opposition. The action, out of which an appeal had arisen before the Privy Council, was instituted by the respondent for the restitution of conjugal rights. It was held that the plaintiff, in order to succeed, had to establish that either the marriage was contracted with the consent of the girl's lawful guardian, or that the girl having reached majority it was contracted with her own consent.[27]

Case law shows that courts of the undivided sub-continent as well as later have from very long ago recognized that a *Hanafi* woman who has reached puberty cannot be forced into marrying against her will. Nor can she be stopped if she marries a Muslim by free choice.[28] As soon as a woman has arrived at puberty, like a man under Muslim law, she has the right to contract herself into marriage.

According to Baillie[29] along with the other conditions required to be fulfilled:

> The consent of the woman is also a condition, when she has arrived at puberty, whether she be a virgin or *suyyib*, that is, one who has had commerce with a man; so that, according to us, a woman cannot be compelled by her guardian to marry.

Legality of the marriage contract

The permission of the woman must be present in order that the contract of marriage has legality. Without her consent there would be no valid marriage. As Baillie[30] reiterates, 'no one, not even a father or the Sultan, can lawfully contract a woman in marriage who is adult and of sound mind, without her own permission...'If anyone does contract such a marriage on behalf of an adult woman `the marriage is suspended on her sanction, if assented to by her it is lawful, if rejected it is null'[31]

---

26. AIR 1916 250.
27. Ibid.
28. Maududi, Abul Ala (1972). Purdah and the Status of Women in Islam; Islamic Publications Ltd., Lahore at p. 155.
29. Op. cit. Baillee (1875) at p. 10.
30. Ibid at p.55.
31. Op.cit. Baillie (1875) at p.55.

How consent is to be expressed

The consent in a Muslim marriage must be given by the parties themselves, i.e. the bride and the groom, or an agent on their behalf; or in the case of a minor by a competent guardian.[32] The consent of a virgin is taken to be implied by her silence,[33] since she may be suffering from shyness; her laughter may also signify assent whereas weeping may be construed as disapproval.[34] As regards a *thyabbib* or *siyaeeba* (woman who is not a virgin), it is necessary that her compliance be particularly expressed by words' since she:

> has not the same pretence to silence or shyness as a virgin, and consequently the silent signs before intimated are not sufficient indications of her assent to the proposed alliance.[35]

In the case of a virgin, if consent is given by a father, uncle or brother, silence is tantamount to consent but a woman who is not a virgin must express her consent in person and silence cannot be taken to signify assent.[36]

Consent by coercion, compulsion, force or fraud

Although the importance of consent on the part of an adult *Hanafi* woman has been clearly established, there remains confusion as to the effect of consent obtained by compulsion, coercion or fraud. There exist contradictory reports as to the legality of marriages in which consent has been obtained by any of the above means. According to Ameer Ali,[37] as under English Law, consent of a woman to a marriage obtained by compulsion or fraud has no effect and the marriage or '*nikah*' is not valid. However:

> Silence on the part of the girl, after learning that a marriage has been contracted for her, amounts to ratification whilst the marriage is subsisting.[38]

---

32. *Sobrati vs. Jungli* 2 CWN 245 1898.
33. Op. cit. *Bukhari* (1986) at 52; Op. cit. *Hedaya* (1870) at p. 35 and Op. cit. Baillie (1875) at p.55.
34. Op. cit. *Hedaya* (1870) at p. 35.
35. Ibid.
36. *Jainan vs. Rulia* IC Punjab 1912 43.
37. Ali, Ameer (1929). Mahommedan Law , Vol.II, 5th Edition; Thacker, Spink and Co., Calcutta at p. 305.
38. Ibid.

The *Hanafi* School however declares that a marriage contract is valid, even though it has been made under compulsion, although if it has been brought about fraudulently it is void.[39] Baillie contends that even when a woman has been forced into a marriage it is only when there is inequality or her dower is less than the proper amount that she has any option; otherwise not.[40] A difference is therefore made between compulsion/force and fraud—the former is not considered as ground for the invalidity of marriage while the latter is. According to Baillie therefore

> When a woman is constrained to enter into a marriage, and does so, the contract is lawful, and no responsibility attaches to the compeller. If the husband be her equal, and the specified dower more than or equal to that of her equals, it remains lawful'.[41]

However if the specified dower is less than that of her equals, and she demands that it be made up to the proper amount, the husband may be required to increase the amount or otherwise to separate.[42]

The above rule is based on the tradition of the Prophet reported in the *Mishcat-ul-Masabih* which says that there are three things which whether done in joke or in earnest shall be considered as serious and effectual; one, marriage; the second divorce and the third, taking back.[43] Whether the forcing of a woman into marriage can be construed as `a joke' seems questionable. The author of the *Radd-ul-Muktar* is of the opinion that if divorce under compulsion or by way of joke is valid, marriage contracted under compulsion should also be.[44]

Contradicting the above are the traditions of the Prophet which report him as giving the right to a virgin, as well as a matron, to repudiate marriages which were contracted against their wishes. This clarifies that marriage under coercion or force is invalid. Since for all purposes a contract of marriage under Muslim law is treated as a civil contract, the same consequences which attaches itself to a contract where consent has

---

39. Tyabji, Faiz, Badruddin (1968). Muslim Law (the personal law of Muslims in India &Pakistan), 4th Edition; N.M.Tripathi Ltd., Bombay at p.52.
40. Op. cit. Baillie (1875) at p.72.
41. Ibid.
42. Ibid.
43. Op. cit. Tyabji (1968) at p.52.
44. Ali, Ameer (1929). Mahommedan Law; Thacker, Spink and Co. Calcutta. At p.360.

been obtained by coercion or force should apply— more so in fact, since one of the characteristics of a Muslim marriage contract is its permanence.

It has been conclusively stated that it is not lawful for a guardian to compel a virgin who has attained majority to marry according to his wishes and against her wishes. There also exist instances where the Prophet annulled the marriages of women who complained to him that they were contracted by their fathers into marriages against their will.[45]

If she is coerced or deceived into granting her consent, her marriage contract would be vitiated and would be deemed to be an irregular marriage unless ratified afterwards. Tanzil-Ur-Rahman[46] states:

> A Muhammadan woman after attaining puberty becomes a sui juris, able to look after her interests herself and if she does not consent to a marriage of her free will and the consent is obtained by coercion or undue influence, such marriage will not bind her.

According to Ameer Ali,[47] free consent on the part of the woman forms the very essence of the contract of marriage and therefore when the consent has been obtained by coercion or fraud the marriage would be invalid unless ratified after the coercion has ceased, or the duress has been removed, or when the consenting party, being undeceived, has continued the assent.

The correct view, from the above, appears to be, that under Muslim law, lack of free consent invalidates the marriage unless it is ratified by the woman. It is certainly the just and equitable view to allow the woman today to have a say in her own marriage.

Concept of equality in marriage (*kafa'at*)

The Prophet is reported as 'commanding':

> Take ye care that none contract women in marriage but their proper guardians, and that they be not so contracted but with their equals... [48]

---

45. Tanzil-ur-Rahman(1978). A Code of Muslim Personal Law; Hamdard Islamicus, Karachi at p.51.
46. Op. cit. Rahman (1978) at p.71.
47. Op. cit. Ali (1929) at p. 358.
48. Op. cit. *Hedaya* (1870) at p. 40.

The logic behind the concept of equality is that the purposes of marriage are 'cohabitation, society, and friendship' and these cannot be enjoyed except when the couple are equal.[49] Tahir Mahmood[50] calls the marriage of unequals "ill-sorted marriages". The *Hedaya*[51] states:

> if a woman should match herself to a man who is her inferior, her guardians have a right to separate them, so as to remove the dishonour they might otherwise sustain by it.

The concept of equality in marriages laid down by Muslim law somewhat vitiates the woman's right to consent. While on one hand declaring in no uncertain terms that the consent of the woman is an essential requirement, this condition or right given to the woman is qualified by giving her guardian the right to dissolve the contract of marriage if the husband is not the wife's equal.

The *Hanafis'* give more importance to the concept of equality than the other schools. According to the *Hanafi* school, in the case of marriage the man should be equal to the woman he is marrying, in the following respects: religion; lineage; freedom; calling or profession; opulence or wealth; piety, virtue, character or integrity.[52] This means that the man and the woman must share the same religion, that is Islam; they must be equal in descent or lineage; the profession of the husband should be of the same status as the wife's family; there should not be disparity in financial status and their moral standards should be similar. The remaining point as to freedom has become superfluous since the institution of slavery no longer exists. Thus Abu Hanifa gives the woman freedom in making the contract of marriage while at the same time protecting the right of the guardian by allowing him to dissolve an unequal union.

The concept of equality requires the husband to be the equal of the wife and not vice versa.[53] This requirement seems to be inconsistent with the idea of Islam being a caste and class-less religion under which all are equal. In the *Quran* (XLIV: 10) it is stated that the Believers are brethren; the Prophet is also said to have declared:

---

49. Ibid.
50. Mahmood, Tahir(1982). The Muslim Law of India; 2nd edition; Law Book Co., Ltd., Allahabad at p. 67.
51. Op. cit. *Hedaya* (1870) at p. 40.
52. For more on the criteria of equality see Op. cit. Rahman (1978); Op. cit. Baillie (1875) and Op. cit. *Hedaya* (1870).
53. Op. cit. Baillie (1875) at p.62.

> that all human beings are equal, regardless of their individual or racial status, and that no one can claim any preference or superiority over others, except by reason of his piety.[54]

Tanzil-Ur-Rahman,[55] is of the opinion that the law about equality seems to have been based upon practical difficulties experienced at the time of marriage and that some of the grounds of inequality have now lost their significance. From a legal standpoint, according to the *Hanafis'*, the marriage between a man and a woman, even where the man is not the equal of the woman, is valid.[56] The guardians have however been given the authority to object on the grounds of inequality, and of getting the marriage cancelled or annulled, if they wish to do so but only through a Court.[57] This right exists only until the birth of a child.[58]

In practice, the conditions of equality are not adhered to strictly in most cases. Ameer Ali,[59]quoting a passage of the *Futawa Alamgiri* declares that '(e) xcept Islam and freedom, equality in any other respect is not invariably observed in a country other than Arabia'. In practice, although according to the Sunni school the guardians may go to court to set aside an unequal marriage it rarely happens. In the case of *Jamait Ali Shah vs. Mir Muhammad* [60] the Court held that inferiority in the social status of the husband does not render the marriage invalid *ab initio*, nor does it justify the court in dissolving the nuptial tie. It is only when equality has been stipulated for and there has been breach of that stipulation that the marriage can be set aside on the grounds of inequality. The Courts have clearly put more emphasis on the reality of the contemporary situation where equality does not have the same significance as it had before. Thus, even though the doctrine of equality in marriage is a part of the substantive law of the Muslims and continues to apply to Muslims,[61] the above is proof that the judiciary in its role as interpreters of law can play a crucial role in bringing about reforms where necessary.

---

54. Op. cit. Rahman (1978) at p.207.
55. Op. cit. Rahman (1978) at p.199-200
56. Op. cit. Baillie (1875) at p.67 and Op. cit. Rahman (1978) at p.215.
57. Ibid.
58. Op. cit. Rahman (1978) at p.215.
59. Op. cit. Ali (1929) at p.367.
60. IC Punjab 1916 10.
61. Op. cit. Rahman (1978) at p.200.

Agency in marriage (*wakiliyat*)

As already stated, the parties to a marriage may personally give their consent or their consent may be given through an agent or representative. According to the *Hedaya*,[62] agents in matrimony are persons employed and authorized by the parties concerned to enter into contracts of marriage on their behalf; and the power so delegated is termed *Wikalit-ba-Nikkah*. An agent on behalf of a party to a marriage is merely a person who negotiates or represents that party. All the rights and duties arising out of the marriage attaches not to him but to the principals that is the bride or the groom, whomever he represents. The agent:

> is no more than a negotiator, and the principal himself must be referred to as the contracting party, and he alone is entitled to the rights and liable to the obligations of the contract.[63]

The agent who contracts into marriage must be sane and adult; he may be agent for either or both the parties to the contract and must be authorised by the parties to act as agent. Although an unauthorised person may contract another person into marriage, such a contract is valid only upon the ratification or approval of the parties.[64]

In Bangladesh the common practice is that the bride is always represented by an agent. A Bangladeshi woman's modesty, coupled with the fact that she may be in seclusion and cannot appear before the witnesses, makes the practice of agency in marriage the norm.

As regards the question as to whether a woman can be a matrimonial agent, there seems to be no clear-cut rule. On one hand we have a reported tradition of the Prophet which relates that 'one woman shall not give another woman in marriage' while in the *Hedaya*[65] we find that there is mention of a man contracting a woman or a woman contracting a man. According to Shama Churun Sircar:[66]

> A woman adult and discreet can not only marry of her own accord and authority, but appoint an agent to contract her in marriage and can herself act as an agent in another's marriage.

---

62. Op. cit. *Hedaya* (1870) at p.42.
63. Op. cit. Baillie (1875) at p.75.
64. Op. cit. Ali (1929) at p. 316 and Op. cit. Baillie 1875 at p.85.
65. Op. cit. *Hedaya* (1870) at p. 42.
66. Shama Churun Sircar (1875). The Muhammadan Law—Tagore Law Lectures 1874; Thacker, Spink and Co., Calcutta at p.369.

Ameer Ali[67] also agrees that a woman may act as an agent. Therefore, it may be construed from the above that, according to the *Hanafi* school, a woman may act as an agent in marriage. However, in Bangladesh a woman rarely becomes a matrimonial agent.

The Bangladesh Situation

As we have seen from the above, an adult girl (i.e. one who has attained puberty) must consent to her own marriage and may do so in a variety of ways.[68] Among the *Hanafis'* there is no disagreement about this necessity. However, in Bangladesh the consent of the woman in the rural, as well as in many cases the urban areas, is not considered as important and is regarded as more of a formality than anything else.

There are several considerations which affect the way in which, and the reasons for which, consent is, or is not, given properly. The practice of arranged marriages is one such practice. Again it is important to note the cases in which the women have formally consented, but in reality there is no real freedom of choice.

Arrangement of marriages

Due to various practices like *purdah*, patriarchy as well as the great degree of control that parents have over their children in Bangladesh, there exists a system whereby the marriage of a couple is arranged by their families, and not by themselves. There is very little opportunity generally, in the conservative social system of Bangladesh, for young people to meet, get to know or interact with each other. As in many other Muslim societies:

> The element of freedom of choice of the mate for either party is very limited, while romantic reasons for entering upon a marriage are almost completely foreign to the participants.[69]

Marriage is the most important event practically in every woman's life, both in the rural and the urban setting. For this most important event, she has to leave her fate almost entirely to the judgment of her family, especially the men. The system of arranged marriages is not unique to Bangladesh. In fact:

---

67. Op. cit. Ali (1929) at p.316.
68. As to how consent may be expressed see above.
69. Korson , Henry J.(1967). "Dower and Social Class in an Urban Muslim Community" in Journal of Marriage and the Family; Vol.29 No. 3, August 1967, pp.527-532 at p.527.

> The traditional system of mate selection in Muslim societies has been a marriage arranged by the families of the principles, usually with the consent of the couple.[70]

It is not unusual for the bride and the groom to see each other for the first time on the day of the marriage, unless he is a relative she played with when she was very young.[71] According to various authors, in rural Bangladesh, marriage:

> ... is always arranged, and the father and the other male relatives play a dominant part in the marriage negotiations. The girl's opinion is never sought. While her consent is necessary in Muslim marriages, it is only a formality.[72]

The male members of the family usually have the greater and the final say in the arrangement of marriages, although the female members may be consulted. The proposal usually comes from the groom's side and the bride's family has to decide on whether or not to accept the proposal. Financial stability, as well as family lineage are matters which are taken into consideration amongst other things. Economic affluence may make up for the absence of a lot of other qualities. Emotional ties are expected to develop between the couple after the marriage 'and it is primarily the wife's responsibility to make the marriage a success'.[73]

Apart from the economic status of both families, the personal qualities of the groom, for instance education, health, character and position and those of the bride such as moral reputation, obedience, manners, piety, complexion, health and her skills to be a good housewife, are taken into consideration by the families.[74] Although sometimes the boy's opinion or acceptance is taken into consideration, a girl's rarely is.[75] Even in the urban areas, in spite of less poverty and more education, arranged

---

70. Korson, Henry J.(1969). "Student Attitudes Towards Mate Selection in a Muslim Society: Pakistan" in Journal of Marriage and the Family;Vol.31 No. 1, February 1969, pp.153-165 at p.153.
71. Abdullah and Zedenstein (1982). Village Women of Bangladesh—prospects for change; Pergamon Press, Oxford et al. at p.74.
72. Chaudhury, Rafiqul Huda and Ahmed, Nilfer Raihan (1980). Female Status In Bangladesh; The Bangladesh Institute of Development Studies, Dhaka at p.14.
73. Papanek, Hanna (1973). "Purdah: Separate Worlds and Symbolic Shelter" in Separate Worlds—Studies of Purdah in South Asia; Papanek, H. et al (eds.), Chankya Publications, Delhi at p.41.
74. USAID (1977). Profile of Bangladeshi Women—selected aspects of women's role and status in Bangladesh at pp.37-38.
75. Ibid.

marriages are still the norm and '(a)n overwhelming majority of urban, educated woman still accept and prefer arranged marriages.'[76]

Nowadays, in the urban areas, usually the boy and the girl get to see each other before the marriage, in the presence of guardians and relatives. However, even if they are allowed to have a glimpse of each other, they rarely get an opportunity to meet and exchange views and ideas. There are still many instances where the urban bride and the groom see each other, for the first time, on the day of the wedding.

With the spread of Western ideas and somewhat more freedom in the urban areas, in infrequent cases, some couples may get an opportunity to get to know each other before the wedding. Parents will usually hesitate to admit that the couple have decided upon their own future and will hide the fact if possible. This is true especially in the case of a girl. Such a marriage, known as a "love marriage", is considered to be 'a gross mis-step' by the couple, almost an immoral act.[77] The parents of the girl are considered to have failed to properly guard and protect their daughter's character.

Most village women consider marriages where the girl and the boy have married by choice faintly indecent, at least immodest. This was confirmed by the empirical investigation conducted for the dissertation on which this article is based. Views of rural women of various ages and status were elicited in order to get a greater understanding of women's choices and their opinions. Jamila was married to Hatem Ali of Dhitua village in 1969. Since Jamila had not reached puberty at the time of her marriage, her consent was not necessary under religious law and was not sought. She had never seen her husband, her in-laws, or come to her husband's village before her marriage. Jamila was embarrassed when she confessed that her daughter married by her own choice.

Batashi is above 50 years old; she was married when she was 13 or 14 to a man she had never set her eyes upon before marriage. Batashi, who was widowed in 1979, had the following to say about rural marriages:

> It is not like the marriages that take place nowadays, where the boy sees the girl and even the girl sees the boy.

About her own wedding she says with pride: "we were not even consulted, neither were the boys".

---

76. Jahan, Rounaq (1975). "Women in Bangladesh" in Women For Women, University Press Limited, Dhaka, pp.1-30 at p.7.

77. Op. cit. Korson (1969) at p.155.

For Batashi as for many other women, the fact that her marriage was arranged and that she did not even see the person she was marrying, is evidence of the fact that she has led a virtuous and chaste life.

Although the majority of arranged marriages take place with the brides implicit, if not explicit consent, there are instances where such consent is obtained under some sort of compulsion. In a good number of cases 'consent of the adult girl is obtained by camouflaged force'.[78] Thus a thin line may often exist between arranged marriage and forced marriage.

A Bangladeshi girl usually consents to the marriage arrangements made for her by her family. In most cases the girl consents willingly since from very early on she has been taught to accept the decision of her elders. Only in rare cases, would a girl protest against her guardian's decision—and there have been instances where girls have been forced into marriages.[79]

Consent of a Bangladeshi girl

There are cases where the girl is married, as mentioned before, without her consent being asked at all, her acquiescence taken for granted. Again, sometimes girls may be forced into consenting to a marriage. The requirement of consent from the girl herself, when she is above the age of puberty, is not strictly followed in practice, and the father or other legal guardian may consent to the marriage, as if she was a minor. Respondent Fawzia's marriage was arranged by her husband's brother-in-law who is from her own village. She saw her husband for the first time after the marriage was solemnized. Fawzia says:

> I just knew I would have to say yes (*qabul*). Nowadays some girls are asked before the wedding is arranged whether they agree to the match; but not all.

Robert and Pauline Whyte,[80] found that the practice of arranged marriages exists throughout Asia where the parents' religious and social obligation:

> ...of seeing ones daughters married as advantageously as possible, as early as possible in the interests of family honor, overshadows considerations of their probable happiness even though it must not be assumed that such considerations are altogether absent.

---

78. BNWLA (2001). Forced Marriages--A Blot in Women's Freedom of Expression; BNWLA (Bangladesh National Women Lawyer's Association), Dhaka at p.26.
79. Op. cit. Chaudhury and Ahmed (1980) at p.28.
80. Whyte, Robert and Pauline (I982). The Women of Rural Asia; Westview Press, Colarado at p.68

One must remember that for a village woman financial and economic stability to a large extent translates into happiness and it would be presumptuous to say that the rural parent does not have his/her offspring's interests in mind when he/she tries to think of a future free from basic needs.

Although education (at least basic education) for girls has become more popular and may postpone a daughter's marriage for a couple of years, there is no change in the general consensus that when it comes to marriage, the parents know best. In all fairness, it should be mentioned that women who have themselves been married very young, or have not been consulted about their own marriages, do not wish their daughters to have any option of choice either. For instance, Wazifa from Dhitua, who was married below the age of puberty, recalls that she was too small to have anything to say about her own marriage or have any opinions, although she remembers being frightened.

Although Wazifa wishes to postpone arranging her own daughter's marriage (depending on her husband's wishes of course) until she is 16, 17 or 18 so that the daughter may continue her education, she is vehement about arranging the marriage. Asked whether she will ask her daughter's opinion before arranging the marriage, Wazifa answers:

> no, she must get married wherever I want her to; I'll murder her otherwise. Of course I shall try to find a suitable husband for her; after that it is in *Allah*'s hands. If her fate is good she will be happy-- we will do our best.

From my field study it was quite obvious that for most rural women, the idea that their consent was required for their marriage seemed incomprehensible. They accepted the idea that their guardians had complete power and authority over their lives. The placidity of their attitude showed that it would not occur to them that they had any say in choosing their husbands.

For example, Shahanaz comes from a village several miles away from her husband's village of Dhitua and had never seen her husband before. She was married the same day her husband's family came to see her. She says she willingly consented at the time of her marriage i.e. when she was asked, although she had never seen the groom before and was scared to go to an unknown house.

Romesa also says she willingly consented, at the time of the marriage ceremony, to the match which her parents arranged. She had seen her husband before, since they lived in the same village. The general trend is usually to arrange marriages outside the birth village of the girl since in the words of one of the respondents, Monowara:

> there is less chance of bad blood and fights. The parents can also avoid knowing if their daughter is unhappy.

However marriages are also arranged within the village or even within the *bari* itself (for example between cousins). Out of the 317 respondents married after puberty, the majority said they had willingly consented to a match arranged by their parents. In the table below 8.5% (27 respondents) married by choice. This may seem quite a high number considering the stigma attached to 'love marriages'. However all 27 respondents were urban educated university students who quite freely admitted that they had chosen their own husbands. This may explain the high percentage. The following is a chart of the responses obtained:

RESPONDENTS CONSENT, LACK OF CONSENT AND TYPE OF CONSENT TO MARRIAGE

	Frequency	Percent
Willingly consented to the marriage arranged by parents/guardians	280	88.3
Forced into consent against will	2	.6
Forced into marriage without consent being asked	6	1.9
Married by own choice	27	8.5
Do not know	1	.3
Does not recall consent being asked	1	.3
Total	**317**	**100**

The women were quite unaware of the distinctions regarding consent to marriage between a girl who has reached puberty and one who had not. At the time of the marriage being solemnized by the *munshi*, the girl is asked to and does express her agreement. Yaar Jaan says she was asked to say *qabul* at the time of her ceremony; before that she was just informed of the fact that her marriage had been arranged.

Hazera's parents arranged her marriage when she was too young to understand the significance of marriage,

> We were told that small people, when they get married, have small babies while older people have bigger babies!

Hazera says her consent was not asked before the marriage, neither was she asked to say *qabul* or signify her acceptance: I only remember the time when we were formally shown each other at the *shahnazar* ceremony and

when I was asked to pray. The marriage was solemnized outside, without my participation.

Monowara's marriage was arranged by a *ghatak* (marriage negotiator). Monowara described the procedure:

> The guardians' of both the bride and the groom that is, the male guardians, see the prospective bride or groom. The parties themselves do not see each other. At the ceremony the girl is asked to consent by her wakil *(ukil).*

As Jharna Nath[81] reported, the formal consent is asked *'during'* the ceremony and the girl can never disagree because by doing so she would be giving her family a bad name and would also probably lose respect and the possibility of ever getting married. This formal consent which is obtained from the woman at the time of the ceremony is more of an acquiescence than anything else. Girls are brought up with the idea that they would have to agree to any match arranged by their parents.

Sufia was married in 1968 before puberty. She says that unlike girls now, even though she lived in the next village she had never seen her husband, nor visited Dhitua before her marriage. She was informed by her guardians that she was to be married. During the ceremony of marriage she was asked to say *qabul* and she did so, not really comprehending what marriage entailed. When Sufia's daughters got married, their consent was not asked beforehand; they said *qabul* during the wedding ceremony. Sufia explains the lack of consent by saying: "In the village marriages do not take place in that manner".

Most of the respondents, (all above puberty at the time of the marriage) had not seen their prospective husbands before the wedding day.

Consent and Bangladeshi Law

In Bangladesh there is no specific civil law regarding the requirement of consent to marriage. In 1956 the Family Law Commission, dealt with the question as to:

> what machinery should be provided to insure that marrying parties have freely consented to marry each other, and that neither of them has been a victim of undue influence.[82]

---

81. Nath, Jharna (1981). "Belief and Customs observed by Muslim Women During their Life Cycle" in The Endless Day—Some case material on Asian Rural Women; Epstein, T. Scarlett and Watts, Rosemary A. (Editors) Women in Development Series Vol.3; Pergamon Press, Oxford et al at p. 21.

82. The Pakistan Gazette Extraordinary, June 20, 1956 at p.1208.

The Members of the Commission expressed the opinion that it would not be feasible for a Government official to be present at every marriage to satisfy himself that the parties concerned had freely consented to marry each other.[83] Section 5 of the Muslim Family Laws Ordinance prescribes a standard form of *nikah nama* which is to be signed by the parties or their agents. The Commission could only hope that this document would ensure the consent of the parties to the marriage and that, with the spread of education, even in rural areas women would refuse to sign the n*ikah-nama* if they had not given their consent freely.[84] Maulana Ehtishamul-Huq a member of the Commission, who dissented, almost on every point, with the others, nevertheless agreed that legislation could not in any way ensure consent of the parties, although mutual consent was essential under the *Shariat*. He had no objection to the marrying parties signing the *nikah nama* although he quite rightly pointed out that if the parties can be forced into wedlock, their signatures or thumb-impressions can also be taken in the same manner.[85]

Maudoodi,[86] a critic of the Commission's report, in his argument as to why proof of consent was not required, said, 'for legal purposes it is not necessary to ascertain whether the marrying parties have freely consented' to the marriage. According to him the *Shariah* has prescribed a method for ascertaining assent which should suffice. Therefore when pressure is alleged the burden of proving such pressure is on the one who alleges it and demanding proof for absence of pressure will not only completely frustrate the basic purpose of law, but also create a good many practical difficulties, which will merely aggravate the complexities.[87] Since under religious law marriage can be contracted without any particular ceremony, neither does the contract have to be in writing, a marriage is valid even if there is no *nikah nama* or *kabin nama* as required by the Muslim Family Laws Ordinance of 1961. In Bangladesh many marriages take place orally and without any *nikah nama*. In such cases there is no proof as to whether the consent of the parties were taken as required by Muslim law. Although the majority of girls do consent, whether or not through the full

---

83. The Pakistan Gazette Extraordinary, June 20, 1956 at p.1208.
84. Ibid at p.1956.
85. The Pakistan Gazette Extraordinary, Aug.30, 1956 at p. 1577.
86. Maudoodi ,Syed Abul Ala (1961). "The Family Law of Islam (The Questionnaire and its Reply)" in Studies in The Family Law of Islam; Ahmad, Khurshid (ed.) Chiragh-e-rah Publications, Karachi, pp.13-34 at pp.16-17.
87. Op.cit. at p.1 7.

exercise of their right to choose, there may be cases where the parents exert undue influence upon their daughters in order to force them into consenting formally. As discussed earlier, according to the *Hanafi* School even such a marriage is binding although upon this point various jurists have disagreed. There is confusion as to whether such a marriage would be valid, voidable or void or whether ratification later would give it validity. According to Mulla[88], a marriage without the consent of either party (where the parties have attained puberty) is void.

Since marriage is a civil contract, the consent required would fall within the Contract Act, 1872. Until the enactment of this Act, the Muslim law of contract was applied to contracts between Muslims. Since its enactment, the Muslim law of contract is regarded, for all practical purposes, to be superseded by the Contract Act of 1872.[89] In an Indian case, it was held that since Muslim marriage is a civil contract 'it should attract all the incidents of contract as any other stipulated in the Contract Act.[90]

According to Section 14 of the Contract Act of 1872, in order that an agreement may become a contract, free consent of the parties must be present (Sec.10). According to Sec. 14 consent is free when it is not caused by coercion, undue influence, fraud and misrepresentation. Where the relation between the parties is such that one is in the position to dominate the will of the other and to obtain advantage, the contract is said to be induced by undue influence and such consent is not free. Under section 19 of the above Act a contract without free consent is `voidable at the option of the party whose consent was so caused'.[91]

When consent is obtained by fraud or force, such marriage is invalid unless ratified.[92] The confusion which still exists is whether force, coercion or undue influence exercised by the father would fall within the Contract Act, since the Act speaks of coercion, fraud or undue influence exerted by one party to the contract over the other, and the father or other relations who may exert influence, are not directly parties to the contract.

---

88. Mulla (1990). Principles of Mahomedan Law, by Hidayatullah, Arshad; 18th N..M.Tripathi and Co.,Bombay at p.223.
89. Pollock and Mulla (1972) at pp.2-7.
90. *Mahmad Usaf Abasbhai Bidiwale vs. Hurbani Mansur Atar* 1978 Maha. L.J. 26.
91. Op. cit. Pollock and Mulla (1972) at p.170.
92. *Abdul Latif Khan vs. Niyaz Ahmed Khan* 1909 345; *Kulsumbi vs. Abdul Kadir* 1921 45 Bom 15.

In *Mt.Bibi Ahmad-un-Nisa Begum vs. Ali Akbar Shah,*[93] it was held that under the Mahomedan law the regular procedure for obtaining the consent of the girl must be proved and in the absence of the proof that the procedure was gone through, no valid marriage can be taken to have been established:

> Where the girl brings a suit for declaration of her marriage as invalid definitely asserting that she had not consented to the marriage and it was against her wishes and in support of the allegations produces witnesses, the onus shifts to the defendant to prove that the nikah (sic) was properly performed.

Justice Mir Ahmad in his judgment in the above case was forceful in his opinion that 'consummation had no value if there was an invalid marriage ab initio' and lack of consent invalidates a marriage. The doctrine of *factum valet* cannot be invoked to validate an invalid marriage under Muslim law.[94]

When marriages are arranged, as they mostly are in Bangladesh, the question which may arise and with which the courts may have to deal with is whether:

> pressure from one's family or community, stopping short of any threat to life, limb or liberty, amount in law to duress?[95]

In the English case of *Singh vs. Singh*[96], counsel for the petitioners had argued that the command of her parents had as much punitive sanction on the petitioner as if they had been backed by the threat of physical violence.[97] The Court of Appeal in that case strictly construed the rule that duress can be evidenced only if there is fear caused by threat of immediate danger to life, limb and property.

---

93. 29 AIR 1942 Pesh 19.
94. Sampath, B.N. (1969). "Marriageable Age, Consent and the Soundness of Mind in Indian Matrimonial Law: A Plea for Rationalization" in The Benaras Law Journal, 1 &2, Jan-Dec, 1969, pp.28-52 at p. 39.
95. Bradney, A. (1984). "Arranged Marriages and Duress" in the Journal of Social Welfare Law, 1984, pp.278-281 at p.278.
96. 1971 P.226; 1971 2 WLR 963
97. Op. cit. Bradney (1984) at p.278.

According to the Court, since the petitioner had married obeying the wishes of her parents out of respect for or a sense of duty or obligation; there had been reluctance but not fear[98]This case dealt with an arranged marriage where the parties were Sikhs; since arrangement of marriages are based almost on the same considerations for Muslims in Bangladesh the case has bearing on the subject under discussion. In a later and similar case, *Singh vs. Kaur*[99] again in Britain, it was held that the existence of duress in marriage would mean that the parties could challenge their marriages and not that such arranged marriages would be legally invalid *per se*.[100] Recent cases in the sub-continent have also upheld earlier decisions that consent of an adult woman is a pre-requisite to a valid Muslim marriage. In *Dr. A.L.M. Abdullah vs. Rokeya Khatoon*[101] it was held:

> Unless it is established by clear, direct and specific evidence that the woman gave her consent to the marriage anything just short of that will not prove marriage.
>
> In the absence of consent of the bride who categorically denied the marriage the conclusion is that there was no valid marriage between the plaintiff and defendant...[102]

In 2004, in Pakistan, in the much publicized Saima Waheed's case, the Pakistan Supreme Court upheld the decision of the Federal Shariat Court allowing adult Muslim girls to marry without the consent of their *'wali'* or guardian. The Court observed that a female adult is not required to have the consent of her guardian or father to enter into a valid marriage.[103]

The primary problem in Bangladesh is that a woman who has been married without her consent, or who has been forced into consenting under duress to the marriage, will rarely go to court. There is again the system of agency in marriage which may operate to vitiate free consent of the girl. The agent is selected by her relatives, usually her parents. Even if she is formally asked to signify her consent it has rarely happened that at the time she is asked by the wa*kil*, whether she wishes to or not, the girl has refused. The preparations that take place for a wedding and the elaborate ceremonies that take place before the actual solemnization

---

98. Ibid.
99. 1981 Fam.Law 152; 1972 1 WLR 105.
100. Op. cit. Bradney (1984) at p.279-280.
101. 1969 21 DLR 213;
102. Ibid.
103. The Daily Star January 4, 2004. See also *Abdul Waheed vs. Asma Jahangir* PLD 1997 Lah 331.

prevents the wife-to-be from dissenting. The whole affair progresses to the stage that when her formal consent is asked for, she is quite helpless.

Sufia Ahmed and Jahanara Chowdhury[104] consider that the social conditions that exist have made the requirement of consent `nugatory':

> The question of giving consent apart, in many cases the girl is not at all consulted in the matter of selection of the bridegroom with whom her future is almost irretrievably tied and she is under pressure of the social custom to say `yes' to the selection made by father or any other male relation with whom she has to put up.[105]

The last few decades have seen the increase in what may be termed as forced marriages. Bangladesh National Women Lawyer's Association (BNWLA) defines a forced marriage as one "which is contracted between two adults without free consent of both or one of the parties and may involve enticement, fraud, treachery, coercion, mental abuse, emotional blackmail, family or social pressure which may extend to physical violence, abduction, detention, threat of grievous hurt, rape or even murder.[106] Many expatriate Bangladeshi families who have settled in the West wish to continue 'arranging' the marriages of their children, especially their daughters. For the latter, i.e. the younger generation who have been born and brought up in the West, the dichotomy between their private conventional family backgrounds and their more unconventional public lives give rise to conflict. There has been growing concern about the number of Bangladeshi girls being brought back against their will to Bangladesh and being forced into marriages. It was found in a study that 'the degree of compulsion on young women for their consent in such arranged marriages is such that the parents are often known to take recourse to seizing their passports and even their return air tickets'.[107]

Due to the existing economic situation, the poverty-stricken father may give his daughter into marriage to a man in exchange of a price, without regard to her consent or happiness. In 1991 the case of the Indian Muslim girl Ameena made headlines. According to a report published in The

---

104. Ahmed,Sufia &Chowdhury Jahanara(1979). "Women's Legal Status in Bangladesh:" in Situation of Women in Bangladesh ; Women for Women, Dhaka, pp.285-331 at p.302.
105. Ibid at pp.302-303.
106. Op. cit. BNWLA (2001) at p.27.
107. Op. cit. BNWLA (2001) at p.29.

Lawyers,[108] Ameena, whose age was found on medical examination to be between 12 and 14 was married a week after she attained puberty to a 60 year old Saudi Arabian national. Ameena was discovered, reluctant and crying, by an Indian Airlines air hostess when she was being taken by her 'husband' to Delhi from Hyderabad. According to Ameena she had been married without her consent and her parents had been paid a lot of money by Al Sagieh. Hundreds of girls apparently are sold each year into marriage and Ameena's case was merely the 'tip of the iceberg'.[109]

In view of the rise in incidences of illegal trafficking of women and children in Bangladesh, often in the guise of marriages, the Government has been forced to enact progressively stricter laws. Starting from the Cruelty to Women (Deterrent Punishment) Ordinance in 1983, Nari O Shish Nitjaton Daman (Bisesh Bidhan) Ain1995 [Women and Children Repression (Special Provision) Act, 1995] to the Nari O Shishu Nirjaton Daman Ain, 2000 [Women and Children Repression Prevention Act, 2000], successive laws have tried to tackle the growing and world wide problem of trafficking of women and children. Many poor parents are tricked into agreeing to marriages. One of the ways of procurement of young girls and children for the purpose of trafficking, sale and prostitution is through marriages. Men employed abroad and earning a lot of money come back to their village homes to get married:

> After marriage the young wife accompanies the husband to his place of work and since then, no trace can be found of these young girls.[110]

Where the daughter is of age and has consented to the marriage and later is trapped into prostitution or sold, the parents are as innocent and misled as the wife herself. But there are cases where parents, unable to stand the poverty and unable to feed their families, sell their daughters

---

108. Gopal, R. (1991). "Child Welfare: A Far Cry in Ameena's Case" in The Lawyer, October 1991, pp.4-8.

109. See ibid at p.8.

110. Shamim, Ishrat (1992). "Slavery and International Trafficking of Children: Its nature and Impact"; Country paper presented at NGO Forum on Children's Rights in South Asia, 10th December 1992 at p.6.

into marriages, like Ameena. This is another area where the laws regarding consent should be strictly enforced, which means that as far as Muslim law is concerned, a girl over puberty cannot be married without her consent. The other alternative is to make marriages below the minimum age totally void so that there is no danger of parents being in the position to sell their children. The age of marriage and of consent is inextricably interwoven. If there is a uniform age below which a marriage cannot take place and that age corresponds to the age when a girl's consent is required under the law that may go a long way towards solving some of the problems.

Conclusion

When the Muslim Family Law's Ordinance was promulgated in 1961, it did not seem necessary to make special provisions to ensure that the girl had consented. After close to forty five years, when there are still questions as to whether consent is properly given, special provisions need to be made to make sure that free consent on the part of the woman is present.

However, there exists confusion regarding what consent really means. The thought that naturally arises is that the importance placed on consent of the woman is somewhat negated by her general lack of freedom to choose or select. This contradiction is symptomatic of contemporary Bangladeshi society in the sense that while on one hand the state authorities emphasize the crucial necessity for women to participate in economic activities, social institutions continue to hinder such participation.

Keeping the cultural and religious context in mind, freedom of choice for Bangladeshi rural women would mean freedom to choose options other than marriage, for example to postpone marriage in favour of education or gainful employment so that when she eventually enters into the marriage contract she does so as an equal partner.

According to Mohammad Shabbir,[111] the only method of expressing mutual consent in a Muslim marriage, in the absence of a 'viable

111. Shabbir, Muhammad (1988). Muslim Personal Law and the Judiciary; Law Book Company Ltd., Allahabad at p.17.

alternative', is through formal proposal and acceptance. According to him this form of expression 'does not possess the intrinsic value to conclusively and exclusively determine the nature of Islamic marriage'. Since:

> final expression of mutual consent to tie the marriage-knot is a step of definite and precise nature to assert the desire to be united in marriage (sic) it is imperative to put it on firm footing in the best possible manner.[112]

Thus, the procedure of expressing consent in a Muslim marriage, which is so vital to its proper formation, should be such that it leaves no scope for anything less than free consent on the part of both husband and wife.

The system of arranged marriages may seem offensive or unfair on the couple but it would be a mistake to assume that in all arranged marriages the wife is doomed to unhappiness. Given the rate of divorce in Western countries, where there is greater freedom of choice, it also does not follow that choice has anything to do with contentment. Many of the respondents interviewed, married without their consent in any real way being asked, are content with their lives. For example, Moriyom, married at the age of seven back in 1929 was terrified at the time of her marriage and recollected how she dreaded going to her husband's house. She finally went to her new home after one and a half years. Moriyum and her husband were married for 62 years until his death in 1991. Looking back, she says, "I was happy with him".

The women themselves do not see anything wrong in the way marriages take place with the bride, or for that matter the groom, having little say in the choice. In fact it would be wrong to think that arranged marriages are viewed as unfair by the women themselves. As mentioned earlier, when asked whether their daughters' consent would be taken when they get married most replied in the negative. Asked whether the consent of the daughter is taken Raziya says:

> No, we do not consult the daughter. We get her married according to our wishes.

---

112. Ibid.

Hazera's daughters were both married above the age of puberty although below the legal minimum age. Asked whether their consent was asked, Hazera like Raziya replied firmly,

> No, we did not ask their opinion. After all, when we got married, nobody asked us, so we did not ask our daughters. When during the marriage ceremony they were asked to say *qabul* they did so.

Freedom of choice is one of the basic freedoms of a human being and the lack of it means lack of power to decide other important matters. Lack of empowerment to decide her future translates later into perception of inferiority which affects her decision making power in her married life, for example with respect to control of her fertility, matters concerning the children or on the use of her own property. To the women themselves however the system of marriage arrangements, with the consent of the woman being a mere formality, seems suitable enough since they are quite happy to continue the process for their daughters. Monowara for instance says that although she will ask her daughters for their consent at the time of their marriage, they will not be allowed to see or mix with the prospective bridegrooms.

The question therefore remains as to how feasible it is to make laws regarding consent without taking it into consideration that even if a woman freely consents, her decision is one which is affected by many considerations outside the scope of law because there is always a limit to how much the state can interfere with the lives of its citizens. Thus, in truth the only way to ensure that a woman's opinion is given consideration is to ensure her empowerment in other aspects of her life. The most important among these is economic empowerment which is only possible through the recognition of the woman's capability and need to contribute to and participate in economic activities so that she does not have to depend for subsistence on men.

An excellent example in Bangladesh is that of the young girls working in the garment industries who have become economically strong enough to have some say in their own futures. With the spread of female education also, the woman will be better able to dictate the terms of her own marriage contract or at least be aware of her own rights and her signature on the document will have much more significance. The NGOs may play an important role in the above.

Putting aside the debate as to how real a Bangladeshi girl's consent can be, nevertheless the woman's formal consent to her marriage must be more clearly evidenced in order to prevent the worst abuses. This must be done by whatever means possible, whether by procedural mechanisms

or by changing or attempting to change the social structure (specially relating to women's work and economic activities) so that she has a greater say in all aspects of her life.

Thus, the reality of consent of the women to their own marriages can only be ensured by also ensuring a more general reality of choice. Practically of course mechanisms to ensure that consent has been given by both parties can be made stronger. This may be possible by putting more responsibility on the marriage Registrar to ensure that assent to the contract of marriage is present; as well as making sure the woman not only assent orally but that her signature or thumb print is present on the *nikah nama*. This is to make the woman participate in some overt act to show her refusal or acceptance. At present even if the bride does not sign the contract of marriage as long as the agent's signature is present the marriage is valid.

The Western concept of "free" and individual consent is radically different from the meaning of consent in a country like Bangladesh. The view of the majority of the women of the third world countries being passive and submissive, especially as regards consent to marriage is not false, but it must be stressed that cultural norms of obedience to elders and the importance placed on marriage are the constraining factors which erode free will. The problem however is the limits to which enquiries into a person's will and thus consent may go. The problem arises when there is no active dissent; on the other hand there is active assent in the sense that the woman (whether she means it or not) formally consents to the marriage during the ceremony. It is irrelevant for the purposes of judging the validity of the marriage that a party had consented to the marriage because she was expected to, or to escape poverty, or for future economic security; as long as there was absence of real threat of violence, physical or otherwise.[113] For those women who have the means to successfully question in court the validity of their marriages because of lack of viable consent, it would be useful to introduce the concept of nullity in marriage which would make a marriage non-existent from the very beginning so the question of divorce would not arise. As Lim says:

---

113. Lim, Hilary (1996). "Messages from a rarely visited Island: duress and the lack of consent in marriage" unpublished article, manuscript with author, pp.1-14.at p.6.

> a decree of nullity contains a particular magic, a promise that history can be rewritten such that an unwanted marriage, with all its emotional and psychological baggage, is symbolically wiped away.[114]

For most rural women, who cannot go to court, any discussion regarding consent to marriage must take place within the context or situation of their lives which means with an awareness of the lack of alternatives that is characteristic. The only real solution that can ensure freedom of choice to Bangladeshi women in general is to ensure viable alternatives to marriage. As Pateman[115] rightly points out, when women can contribute:

> to all the work of the community along with men, and could make equal call on communal resources in their own right, the basis of sexual domination would be undermined.

---

114. Ibid.
115. Pateman, Carole (1988). The Sexual Contract; Basil Blackwell Ltd., London at p.157.

The Dhaka University Studies, Part-F Vol. XVI (2) : 71—88, December 2005

REFLECTIONS ON THE PERCEPTION OF 'CONSENT' IN RAPE CASES

Dr. Naima Huq

Introduction

Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent female, it leaves behind a traumatic experience. Therefore, victims of sex crime are to be recognised as well as treated with dignity and respect but not as an accomplice in the crime. The traditional criminal law fails to provide adequate justice to women in the true sense of term. In order to reduce violence against women and children the legislature from time to time enacted new laws apart from Penal Code. These are Dowry Prohibition Act (Act XXV of 1980), and the Cruelty to Women (Deterrent Punishment Ordinance, 1983 (Ordinance LX of 1983). The Cruelty to Women (Deterrent Punishment) Ordinance, 1983 was repealed by *Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain*, 1995. Thereafter *Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain*, 1995 was repealed by the enactment of *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) Ain*, 2000. (Women and Children Prevention of Repression (Special Provision) Act, 2000). An amendment Act was also passed in 2003 titled *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) (Shonshodhan) Ain*, 2003. The purpose of these special laws is to provide security and safety of women through enforcement but these fell short of women's perspectives, interests and experiences because of built-in traditional patriarchal values. However, there is a shift in the present judicial attitude, as there is some examples of apparent readiness to deal with cases of sexual crime with utmost sensitivity and to interpret the provision of law with great importance to the changing social and cultural context. It is said that a socially sensitized judge is better statutory armour in case of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.[1] This article analyses the judicial activism in the field while examining the provisions of rape as provided in the Penal Code and the *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) Ain*, 2000 as a discourse for reconceptualisation and reform of the law relating to rape.

---

1. *State of AP V Bodem Sundara Rao* (1995) 6 SCC 230

Analysis of rape under Penal Code

Sex urge is a basic fact of all human life, the expression of which in the human society has always been sought to be controlled and channelised through various social devices, like religion, moral tenets and laws. These devices have acted to restrict sexual activity within certain well-defined areas of law for the protection of society.[2] Rape is typically defined as intercourse committed forcibly and against the will of the victim. To put simplest definition of rape is having sexual intercourse with a woman or girl without her consent.[3] The word 'rape' literally means forcible seizure and that element is the characteristic feature of the offence. In section 375 of the Penal Code rape is defined as:

A man is said to commit 'rape' who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following description:

First	:	Against her will.
Secondly	:	Without her consent.
Thirdly	:	Without her consent, when her consent has been obtained by putting her in fear of death or of hurt.
Fourthly	:	With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly	:	With or without her consent, when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse by a man with his wife, the wife not being under sixteen years of age, is not rape.

The criticisms that are highlighted about rape law in Bangladesh are similar to those highlighted in other countries with the adversarial legal systems. These include: the difficulties in proving non-consent; cross-examinations; rape myths and the use of sexual history evidence in court. In order to secure a conviction for rape it is necessary to prove not only

---

2. See Siddique, Ahmad, Criminology, *Problems and Perspectives*, Eastern, Book Company, Lucknow, 4th edition, 2001, p. 411.
3. Wasim Miah & Others V The State, 12 BLT (HCD) 2004, pp 40-50 at p 47.

that the accused committed an act that meets the legal definition of rape i.e. actus reus but also that the accused knew that the victim was not consenting, i.e. mens rea. The *actus reus* relates to a lack of consent. Baird highlights that there are generally three lines of defence used in rape cases; that intercourse never took place, that it took place but not by the accused or that it took place but that the victim consented to it or that the accused believed that the victim consented to it.[4] The root of the 'consent' problem lies with the requirement of the prosecution to prove the absence of consent (rather than requiring the defence to prove that they had taken steps to ascertain consent), and in many ways this problem is unique to rape cases. If, for example, a person reported that their car had been stolen it would not be necessary to prove that it had been taken without their consent. Similarly, if an individual were physically assaulted, for example punched in the face, they would rarely be asked if they agreed to be punched in the face. A further problem in rape cases is that the only direct witness is likely to be the rape victim, which means that cases often come down to one person's word against the other. If the accused says that the victim consented and the victim says she did not consent then it is difficult to validate either person's statement of act. The nature of the sexual crime is such that it is unlikely that there would be a third party available to directly corroborate either statement.[5]

The Court's analysis of 'consent' is in the shape of voluntary participation not only after the exercise of intelligence based on the knowledge of significance and moral quality of the act but after having fully exercised the choice between the resistance and assent.[6] Thus a woman is said to consent only when she freely agrees to submit herself while in free and unconstrained possession of physical and moral power to act in a manner she wanted. In another case the High Court of Rajasthan in India similarly observed:

> Certainly consent is no defence, if the victim has been proved to be under 16 years of age. If she be 16 of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence and probabilities of the case. The victim of rape stating on oath said that she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other

---

4. Baird, V. (1999) Changes to section 2 of *Sexual Offences Act 1976, Medicine, Science and the Law*, 39 (3), pp 198-208.
5. Wesmarland, Nicole; *Rape Law Reform in England and Wales, School for Policy Studies Working Paper Series* Number 7. www.bristolac.uk/sps
6. State of HP v Mange Ram, 2000 (2) Supreme (Crl) 102

> testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable.[7]

Similarly the High Court Division of the Supreme Court of Bangladesh in an appeal against the judgement of acquittal passed by the *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) Ain*, 2000 (section 9(3)) held:

> The victim herself has deposed before the tribunal narrating the incident of rape on her and also naming the rapists. Her testimony has not been shaken by grueling cross-examination. There is no reason also for her to falsely implicate the accused persons in this case. This victim is an unmarried college student and comes of a respectable family. She has given testimony before the tribunal outraging her own modesty and honour which are dearest to an unmarried girl. We find no reason to disbelieve the testimony of this victim. Her testimony inspires confidence in our mind and we find her testimony reliable... she must not be denied justice for minor defects in the prosecution of the case. The acquittal of rapists in spite of victim's unimpeachable and reliable testimony is not only a great injustice to the victim but it also harms the whole society.[8]

The High Courts of India and High Court Division of the Supreme Court of Bangladesh did not lean in favour of acquittal by giving weight to insignificant circumstances or by resorting to technicalities or by assuming doubts regarding consent and giving benefit of doubt in favour of the accused. 'Non-consent' is not a mere act of helpless resignation but also the inevitable compulsion, acquiescence and non-resistance. In other words consent involves submission but mere act of submission does not involve consent therefore, surrender of body cannot be equated with the desire or will.

Similarly, 'failure to resist' or 'absence of mark of violence' does not necessarily tantamount to consent. The court ought to take certain factors into consideration relevant to the victim where she failed to resist. The inability to resist may be due to extreme youth, being overpowered by actual force used, want of strength or attack by number of men indicating uselessness of resistance, unconsciousness or deep sleep. Therefore, 'failure to resist' or 'the absence of marks of violence' on the private part or elsewhere on the person of the victim cannot be treated as necessary ingredients of the crime.

---

7. *State of Rajasthan v Noore Khan 2000* (1) Supreme (Cr) 312
8. *Fatema Begum v Aminur Rahman and others* 11 MLR (HC) 2006 pp 23-38 at 37 and at p 38

The High Court Division of the Supreme Court of Bangladesh in a case under *Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain* (XVIII of 1995) held:

> In absence of evidence to the contrary the only inference that can be drawn is that the victim, a helpless, village woman is telling the truth about her shameful ordeal in the hands of the accused behind locked door of the Hotel Al Quddus on the night of the occurrence. She has nothing to gain by making false statements about subjecting herself to ignominy and embarrassment of being raped by the accused.[9]

The fact of the case shows that the court relied on the statement of the victim, an adult married woman who was allowed to go with the accused by the husband in good faith to Rajbari for collecting charitable relief money from the office of the Deputy Commissioner Rajbari. When they reached the Rajbari the accused told the victim in the evening that the money will be paid the following day by the Deputy Commissioner's Office and that they have to stay over night. The accused then took the victim to a residential hotel where he introduced himself as the husband of the victim and rented a room and in the mid night raped the victim. The court weighed the testimony of the victim that she did not scream and shout at the night of the occurrence, in fear of the accused, lead one to believe that, in fact, she did not shout and create any commotion on the night of the occurrence.[10]

However, in another case the High Court Division of the Supreme Court of Bangladesh displayed a traditional attitude in its judgement:

> Absence of marks of violence on the body of the victim itself proves that the prosecution case is false. In case of rape it is the duty of the prosecution to produce wearing apparels of the victim to show marks of stain in order to establish claim of rape. If the statement of victim does not tally with the sketch-map, it creates doubt about the place of occurrence.[11]

The principle that the 'prosecution must prove beyond all reasonable doubt' forms the foundation of the criminal jurisprudence, but this technicalities of the law should not allow the accused to take advantage where none existed. In the above case the court required the prosecution to prove 'utmost resistance' or at least 'reasonable resistance' on the part

---

9. *Abdus Sobhan Biswas v State 54 DLR (2002)* pp.556-560 at 560.
10. Ibid at p.560
11. *Abdul (Md) Hakim v The State* BCR 2004 HCD p. 98.

of the victim. The facts of each rape cases ought to be looked into in the light of peculiar circumstances rather than giving importance to the factors like resistance, conduct of the victim and corroboration.

In case of rape like any other criminal offences intention of the accused becomes important to draw an inference as to the commission of the offence. In a recent case the High Court Division emphasized on the intention rather than the act of commission. The court held[12]:

> The culprit first intends to commit the offence and then makes preparation for committing it and thereafter attempts to commit the offence itself. If the attempt succeeds, he commits the offence itself but if he fails due to the reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when preparations are complete and the culprit commence to do an act with the necessary intention, he commences his attempt which is a step toward commission of the offence.

The court further held:

> An attempt is an act done in part execution of a criminal design, amounting to more than mere preparation but falling short of actual consummation. An attempt may thus be defined as an act, which if not prevented would have resulted in the full consummation of the act attempted. In the present case, we have found that the accused made victim Mazeda Khatum nude by removing her payjama and made a determined attempt to ravish victim Majeda. The definite attempt of the accused could not be successful only because of the strong resistance put up by the victim and the timely approach of the inmates of the house to the scene of the occurrence, which compelled the accused to run away, leaving his mission incomplete.[13]

The court was right in its decision that it was an attempt to commit rape. Therefore, it can be said that when a rape did not succeed because there was no consummation, it is still a case of attempt to commit rape under the Penal Code or sexual oppression under *Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain*, 2000. The relevant section of the Penal Code and *Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain*, 2000 did not take into consideration possible offences like; aiding, abetting, counseling and procuring, incitement to rape and conspiracy to commit rape.

The definition of rape also includes sexual intercourse by impersonation. It may occur when a man has sexual intercourse without consent of the

---

12. *Md Abdur Razzauqe v The State*, 24 BLD (HCD) 2004, pp14-18 at p.18.
13. Ibid. at p.18.

woman when the man knows that he is not her husband and she consents because she believes him to be lawfully her married husband. This provision considers 'consent' to be 'no consent' which is obtained through false pretence. The purpose of this clause is to protect a married woman's chastity.

The Penal Code does not uses the terminology sexual harassment or violence, however sexual oppression has been incorporated in the *Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain*, 2000 as amended in 2003. In the Penal Code any act committed against the nature is punishable under section 377. The act against nature means sexual activities of abnormal nature outside marital relationship. The section is intended to punish the offence of sodomy, buggery and bestiality.[14] The legal protection to sexual activity is not determined by whether it is happening in private or in public but whether it meets the traditional standards of morality.[15] In England under Sexual Offences Act, 1967 buggery is no longer an offence if buggery is committed in private between two consenting adult and above the age of 21. Section 377 of the Penal Code does not clarify whether it is an offence if the unnatural sexual activities are committed between two consenting adult.

Marital Rape

The traditional idea is that it is impossible for a man to rape his wife and that somehow, in taking marriage vows woman has accepted that they have no say over her own body and sexuality. Basically this vow is a denial of her right to say 'no'. It is still prevalent notion amongst *wives* as much as amongst the *husbands*. Some women believe that only stranger rape is a 'real rape' and other women see sex in marriage as an obligation and define forced sex as a 'wifely duty' and not rape.[16] Marital rape is most likely to occur in relationships characterized by other forms of violence. Researchers argue that marital rape is 'just one' extension of domestic violence.[17] It is to be understood in the context of an abusive relationship, that is, in the context of emotional and possibly physical abuse. Finkelhor & Yllo viewed that women who are raped by their

---

14. Ratanlal and Dhirajlal, 1997, *The Indian Penal Code*, 28th Edition, Wadhawa and Company, Nagpur, p.1967.
15. Ibid at p.145
16. Bergen, R. K. (1996) *Wife Rape: Understanding the Response of Survivors and Service Providers*. Thousand Oaks, CA: Sage
17. Johnson, I & Sigler, R (1997) *Forced Sexual Intercourse in Intimate Relationships*. Brookfield, VT: Dartmouth/Ashgate p. 22

partners are also battered. In 'battering rapes' women experience both physical and sexual violence in the relationship.[18]

There is a debate that marital rape should not be subsumed under the heading of domestic violence because doing so in the past has led to rape in marriage being overlooked as a distinctive problem.[19] In reality some women are raped by their husbands but do not experience other forms of violence, but some researcher reiterated that marital rape has been conducted with battered women. Husbands often rape their wives when they are asleep, or use coercion, verbal threats, physical violence, or weapons to force their wives to have sex.[20] Finkelhor and Yllo have called "force-only rape" husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships.[21]

Marital rape was only made a criminal offence in England in 1991, until then it was considered impossible for a man to rape or sexually assault his wife.[22] It had previously been judged in common law that married women had no capability or authority to 'not consent':

> 'The sexual communication between them is by virtue of the irrevocable privilege conferred once for all on the husband at the time of the marriage ...'.[23]

Under the Penal Code in Bangladesh a husband cannot be convicted of rape of his wife, when the wife is above sixteen years of age. Thus, if a wife is above sixteen then forcible intercourse or intercourse without her consent is not rape. The law presumes that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsists between them.

However, the "consent" as discussed earlier in this paper means consent only when the woman freely agrees to submit herself while in free and

---

18. Finkelhor, D & Yllo, K (1985), *License to Rape: Sexual abuse of wives*. New York: Holt, Rinehart, & Winston.
19. Russell, D.E.H (1990). Rape in Marriage, New, Macmillan Press. See also Bergen, R. K. (1996) *Wife Rape: Understanding the Response of Survivors and Service Providers*. Thousand Oaks, CA: Sage
20. Browne, A (1987) *When Battered Women Kill*. New York: The Free Press
21. Finkelhor, D & Yllo, K (1985), *License to Rape: Sexual abuse of wives*. New York: Holt, Rinehart, & Winston.
22. Hidden Hurt: *Domestic Abuse* Information, *www.hiddenhurt.co.uk/article/marital rape htm.*
23. (R v Clarence, 1888), 22 QBD. 22.

unconstrained possession of physical and moral power to act in a manner she wanted. While sex is a normal concomitant of marriage, use of violence or force in sexual intercourse is an offence against the dignity of a woman's body and emotions whether in marriage or out of marriage.[24] The husband's violent or nonconsensual act of intercourse should entitle a wife to bring an action for criminal assault or injury or matrimonial relief should be incorporated as a principle of liability of spousal rape in our Penal Code.

Analysis of rape under *Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain*, 2000

Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain, 2000 is a protective legislation for the women and children. This Act deals with the major offences that are committed against women such as: rape, sexual assault, abduction, kidnapping, trafficking, torture for dowry etc. Rape is the focus of our discussion here and therefore other offences are not considered in this article.

Section 9 of this Act retained the definition of rape as provided for in the Penal Code and it only provides stringent punishment for rape, gang rape and custodial rape. The section provides as follows:

Punishment for rape and death caused due to rape

If any man commits rape to any woman or child shall be punishable with rigorous imprisonment for life and in addition, shall be liable to fine.

Explanation: If any man not being lawfully married to any woman above sixteen years of age have sexual intercourse without her consent or consent obtained by force or inducement or person having sexual intercourse with any woman under sixteen years of age with consent or without consent, then he will be said to commit rape to such woman.

(2) Whoever causes death to any woman or child while rape being committed or any other act which causes death after the commission of the rape, shall be punished with death or rigorous imprisonment for life and in addition, shall be liable for fine to the extent of taka one lakh.

(3) If a group of person causes death or hurt to any woman or child while rape being committed, all such person will be punished with death or rigorous imprisonment for life and in addition, shall be liable to fine to the extent of taka one lakh.

---

24. Saxena, Shobha, 1995, *Crimes Against Women and Protective Laws*, Deep and Deep Publications, New Delhi, pp. 82

(4) Whoever

a) causes death or hurt to any woman or child after committing rape, shall be punished with rigorous imprisonment for life and in addition shall be liable to fine.

b) attempts to commit rape to any woman or child shall be punished with rigorous imprisonment for term not exceeding ten years but not less than five years and in addition, shall be liable to fine.

(5) If any woman is raped while in police custody, then in whose custody such rape was committed, such person or persons who were indirectly liable for custody, each of such person, if otherwise not proved, for failure of custody, shall be punished with rigorous imprisonment for a term not exceeding ten year but not less than five and in addition, shall be liable to fine not exceeding taka ten thousand.

As per the Statutory explanation of section 9 the words 'without consent' means consent obtained by force or inducement. The recent amendment to the Act also failed as the corresponding provision of the Penal Code to include other circumstances exhibiting lack of consent like, inability to resist due to factors like insanity, involuntary intoxication, unconsciousness or state of deep sleep. The victims falling within these circumstances have no other alternative but await judicial activism giving recognition to the above factors for the interest of these victims.

However it will not be out of place to mention here that this section has the potential to secure vulnerable women by inserting a new provision of rape committed in **police custody**. Here the police may be accused not so much for committing rape but may be accused for the offence by omission, that is for the failure to secure the safety of the woman or child in police custody. The custody is not limited to those women who are remanded to judicial custody or are taken into custody by arrest but also women kept under protection, charge, care, guardianship or procured under search warrant etc., are included as persons in 'police custody'. There was no provision in the Penal Code for punishing person in authority for the offence of omission to provide security and safety to women who were taken to police custody.

This provision is incorporated in the Act of 2000, after the incidence of Yasmin,[25] who was killed after being gang raped by the person in authority on 24-8-95. Yasmin was picked-up by the police forces of Tero

25. *The State V Md Moinul Haque and others*, 21 BLD (HC) 2001 at pp 465-494 .

Mile patrol camp, who were in patrol on the high way. According to the accused persons, when they reached Dosh Mile Point, they noticed a gathering of few people questioning a girl, Yasmin and on the request of the people, Yasmin was picked up by the police. The defence case is that the girl jumped out of the pickup van. They stopped the van and saw her lying with bleeding injury. They took the girl in the van and started for Dinajpur Sadar Hospital but after a while they found the girl motionless. The inquest report was made by an A.S.I. and the dead body was sent to the hospital for post mortem. On examination the doctor opined that the cause of death was head injury. Thereafter the dead body of Yasmin Akhter was buried as an unidentified dead body. Such burial caused a mass uproar and agitation throughout Dinajpur and throughout the country. The dead body was taken out of the graveyard and another inquest was made by the Magistrate of Dinajpur and a second post-mortem examination reported stated that the girl was killed by throttling after being raped, followed by head injury which was ante mortem and homicidal in nature and that the deceased was raped before her death.

The High Court Division confirmed the sentence of death passed by the trial court under section 6(4) of the *Nari-O-Shishu Nirjaton (Bishesh Bidhan) Ain*, 1995 and held:

> Where the girl in question was in a helpless and vulnerable condition in the police custody and she was gang raped and murdered by persons in authority and by uniformed people whose duty was to protect her, this Court did not find any mitigating circumstances in the instant case to consider any alternative sentence and even if there was a discretion left to us this is not a case where such a discretion should be exercised.[26]

The Criminal Petition for leave to appeal to the Appellate Division in the above case upheld the decision of the trial court and held that it is not necessary to prove individual overt act to connect them with the offence under sub-section 4 of section 6 of the Act which provides for punishment both for individual as well as for constructive liability of a gang. It is pertinent to note the word 'gang' and the word 'cause of death' as has been used to make not only the acts but also omission as defined in section 32 of the Penal Code punishable under section 6(4) of the *Nari-O-Shishu Nirjaton (Bishesh Bidhan) Ain*, 1995.[27]

The court strongly condemned the custodial rape and expressed its disgust by stating that an innocent girl was subjected to such barbaric

---

26. Ibid at.492.

27. *Moinul Haque (Md) and another v State* 56 DLR (2004) pp 81-86 at 86.

treatment by a group of person who were in a position of trust. Their culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. The girl was in the van in helpless condition in the police custody and she was entrusted to the police personnel who are paid from the public exchequer for the protection of the citizen and therefore they having committed rape upon the victim and murdered, deserve extreme punishment in the facts and circumstances of the case.[28] The sensitized court weighed the gravity of the offence and responded to the loud cry of justice of the society by imposing a proper sentence.

Unlike Indian Penal Code,[29] this provision of *Nari-O-Shishu Nirjatan Doman (Bishesh Bidhan) Ain*, 2000 does not include sexual abuses of woman in custody, care and control by other categories of persons like public servant, Superintendent of Jail, Remand House, or by any member

---

28. Supra note 25 at 492

29. Section 379(2) of the Indian Penal Code provides :

Whoever,-

(a) being a police officer commits rape-
  (i) within the limits of the police station to which he is appointed; or
  (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
  (iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

of the management or staff of a hospital etc. The women are likely in such cases to be seduced, induced or even persuaded by these people to surrender to their overtures who can not to be considered to have given free consent.

Women are prey to social custom and are easily victimized by the indigenous court i.e *shalish*. *Shalish* has traditionally been an adjudicating body maintaining peace and render so-called justice at the village level. It is basically comprised of village elites and members of the *Union Parishad* and quite often the Chairman of the *Union Parishad*. Women have no voice or position in the traditional *shalish*. They are particularly vulnerable to the system of gender bias verdict and often subjected to harsh penalties and humiliation. This sometimes lead them to commit suicide. Prior to the passing of this law the co-called *shalishdars* (arbitrators) could not be brought to justice because of lack of appropriate provisions of law by virtue of which such criminal could be penalized. Section 9A provides:

> **Punishment for abetting woman to commit suicide etc:** If any person voluntarily does any act to insult a woman without her consent or against her will and due to such insult the woman commits suicide, then he will be liable for abetment of suicide and shall be punished with rigorous imprisonment for a term not exceeding ten years but not less than five years and in addition shall be liable to fine.

Nari-o-Shishu Nirjaton Domon (Bishesh Bidhan) (Amendment) *Ain*, 2003 amended the provision of section 13 of the 2000 Act in order to protect the interest of the child born as a result of rape. Now the provision reads as follows:

Notwithstanding anything contained in any other law, if a child born as a result of rape:-

---

Explanation 1.- Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.- "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or widow's home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.- "Hospital" means the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation

(a) such child can be kept in custody of the mother or the maternal relatives;

(b) such child shall have the right to be known by her mother or father or both;

(c) such child shall be maintained by the State;

(d) such child shall get maintenance till the age of twenty-one years and in case of female till she is married and in case of disabled child until he can maintain himself;

> The amount payable as maintenance of the child under sub-section 1 will be determined by the provision of the Government.
>
> The Government can recover the amount payable to the child as maintenance from the rapist and if the amount cannot be recovered from the existing property of the rapist then it can be recovered from his property owned or acquired in future.

This new provision enables a child to be known by the father or mother or both. The law has given a choice for the child to be known by either of the parents or both but who has the power to exercise this choice is not mentioned in this provision. If the child is known by the father this will not entitle the child to inherit the property of the father nor the father will get the legal guardianship of the child as per provision of Muslim law. Although this section secures the social position of the child born as a result of rape, it may be repression for the woman who does not want to have any connection with the rapist. Rape in fact makes a woman a living death. A victim of rape needs sympathy and reassurance yet she is ostracized by the society and even by the family. The case of raped women is worse because rape is not just a physical violence or injury, its significance lies in the physical repugnance, mental and emotional trauma and the severe social repercussions. In the process she ceases to be a person or a social being, she merely becomes a rape victim.[30] It appears that the provision under discussion will compel her to bear with the stigma permanently. Law should protect woman who chooses not to have child born as a result of rape and therefore, abortion in circumstances should be legalized.

Proof of rape: corroborative evidence

The cardinal principle of Criminal law is that every man is presumed to be innocent until the contrary is proved. The prosecution shall have to prove the guilt of the accused and until then the accused has no onus to discharge. The other relevant evidential principle is that there must be

---

30. Supra note 24 at p. 325.

corroboration or supporting evidence on material point by independent, neutral and neighboring witnesses.[31] It is already mentioned before that in rape cases the burden of proof lies on the victim on the question of the 'consent.' In this patriarchal society a rape victim, irrespective of age and status, is treated as an object of shame and despair and by way of inference she is presumed to be an accomplice to the rape. The prosecution faces difficulties in obtaining corroboration. In assessing the testimonial potency of the victim's version, the human psychology and behavioural probability must be looked into. The inherent bashfulness and the feminine tendency to conceal the outrage the masculine sexual aggression are the factors relevant to improbabilise the hypothesis of false implication.[32] The general rule is that the court can act on the testimony of a single witness i.e. provided her credibility is not shaken by adverse circumstances. In a case the court held:

> Corroborative evidence is not an imperative component of judicial credence in the every case of rape. Corroboration as a condition for judicial reliance in the testimony of a victim of sex crime is not a requirement of law but merely a guidance of prudence under given circumstances. The rule is not that corroboration is essential before there can be a conviction. The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessities looking for corroboration of her statement, the court should fine no difficulty in acting on the testimony of a victim of sex crime alone to convict an accused where her testimony inspires confidence and is found to be reliable.[33]

In the present society there gender bias, exists and where money, power, influence and corruption are rampant In addition, work of the investigation officer sometimes are not satisfactory due to various reason or where witnesses are reluctant to depose before the court. In view of this situation it would not be unfair on the part of the court to shift the burden of proof upon the accused. In section 9 of the *Nari-o-Shishu Nirjaton Domon (Bishesh Bidhan) Ain*, 2000, the burden of proof has been shifted on the accused if the victim in a rape case is recovered either from the custody of the accused or from a place which is within the control of

---

31. Haque, Justice Md. Hamidul, 2005, "Law relating to offences Against Women and Trial of such Offences," *jATI* (Judicial Administration Training Institute) Journal, Volume IV, May 2005, Old High Court Building, Dhaka, pp. 1-16 at p 10.
32. *Krishan Lal v State of Haryana* (1980) 3 SCC 159.
33. *Al-Amin v State* BLD (1999) 307, 51 DLR 154.

the accused, then the onus is upon the accused to explain how the victim came to his custody or came to that place.

In a case the court[34] held that evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit. The evidence of a victim of a sexual offence is entitled to a great weight, notwithstanding absence of corroboration. Section 134[35] of the Evidence Act is based upon the well known maxim "evidence has to be weighed and not counted" Therefore, conviction can be recorded on the sole testimony of the victim if her evidence inspires confidence and there are no such circumstances which militate against the veracity.[36] The courts appear to be right when the very injuries were considered sufficient to lend corroboration to the testimony of the victim, particularly when no motive was attributed to the victim for falsely implicating the accused.

The principle of benefit of doubt in favour of the accused is accepted as a matter of public policy in the Criminal Jurisprudence. Under this protective principle the accused is often graced with a verdict of acquittal. Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. This doubt is not an imaginary doubt and fanciful doubt.[37] Benefit of doubt to the accused would be available provided there is supportive evidence on record. The 'benefit of doubt' had been explained by Mr. Justice A.K Badrul Huq and he emphasised that reasonable benefit of doubt must be real, substantial, and serious, well founded actual doubt arising out of the evidence and existing after consideration of all the evidence. The negative definition are more frequent and perhaps more helpful. Hence a mere whim or a surmise or suspicion furnishes an insufficient foundation for raising a reasonable doubt and so a vague, conjecture, whimsical or vague doubt, a capricious and speculative doubt an imaginary, uncertain, trivial indefinite of a more possible doubt is not a reasonable doubt. He further stated that the desire for more evidence of guilt, a capricious doubt or misgiving suggested by

---

34. *Misti and others v The State*, 6 MLR (HC) 2001 p.395. A case under *Nari-O-Shishu Nirjaton, (Bishes Bidhan) Ain*, 1995.
35. "No particular number of witnesses shall in any case be required for the proof of any act."
36. *State of HP v Raghubir Singh* (1923) 2 SCC 622.
37. *Awal Fakir (Md) v The State* (2004) 9 MLR (HC) 305

an ingenious counsel or arising from a merciful disposition or kindly feeling towards a prisoner, or from sympathy for him or his family cannot be a consideration for recording an order of acquittal upon the offender of sexual assault upon an unfortunate victim of sex crime. The dedication to the doctrine of "benefit of doubt" should not be allowed to reign sodden and supreme. Justice is as much due to the accuser as to the accused and the balance must be maintained.[38] Therefore it is to be understood that the court relying on a vague or unsubstantial evidence will not only lead to an absurdity but also would be opposed to the basic tenets of law.

Conclusion

The analysis of the law and the decisions of the courts reflect that there is a shift from the traditional attitudes of the society. That attitude of the society is formulated in such a way that excludes perspectives, interest and experiences of woman. The composition of the legal regime of rape presuppose that women are weak, soft and their sexuality must be protected according to the moral code of the society, religion and culture. Under the present legal regime the term "without consent" is meant consent procured through force, threat, fraud or misrepresentation. The provisions of the law does not take into account victim's inability to resist due to other factors beyond the control of the victim, such as youth, being overpowered by force, unconsciousness or in the state of deep sleep.

The provisions of law contained in *Nari-O-Shishu Nirjaton Domon (Bishesh Bidhan) Ain*, 2000 protect women's sexuality by protecting married women when a man commits rape by impersonating as her husband. The definition of rape in the Penal Code upholds the precepts of the traditional society and reinforces the notion that rape cannot be committed by the husband unless the wife is minor by ignoring the fact that the wife beyond that age has a right to protect the dignity of her body against the unsolicited approach by the husband. Gender injustice is the resultant perpetuation of patriarchal bias in the law and conceptualization that woman is nothing more than a property of the husband.

The newly enacted law, *Nari-O-Shishu Nirjatan Domon (Bishesh Bidhan) Ain*, 2000 could not go beyond traditional norms and values of the patriarchal society. This gender specific law may be repressive for same

---

38. Huq, Justice A.K. Badrul Huq, 2000,*Violence Against Women: Judge's Attitude*, 52 DLR, Journal, p.44

women, when the law imposes certain consequences such as leaving her to encounter the rapist because of the child born out of rape. Abortion following rape, if legalized, may release her from such unacceptable position and enhance woman's dignity as human being.

The analysis of the judicial decision showed that the court are presently manifesting some sign of change in their mind-set by do not adhering to the strict application of law. The Supreme Court has rightly observed: "Judicial response to Human Right cannot be blunted by legal bigoty".[39] The court often takes into consideration the prevailing vulnerable condition of the women in the society while arriving at a correct or proper decision of the court. The court would respond better to the cry for reducing gender discrimination if it applies the same principle for shaking the credibility of the accused as that of the victim.

It would not be out of place to plead that Criminal Law needs an exhaustive review in the backdrop of woman's vulnerable position in the society. Enactment of new laws piecemeal alone will not protect woman against crime, the protection is likely to enhance only if certain social practices and values affecting the position of women are treated as evil, inhuman and oppressive. In this regard there is need to arouse social consciousness and public opinion against injustice against women and to generate resistance to arbitrariness of social norms and practices affecting women. Rape has not only a legal facet but has a social and economic dimension which is required to be felt and dealt with by all concerned including the judiciary, executive, the politician, and reformers, intelligentia and the law enforcing agency.

---

39. Ibid at p.46

The Dhaka University Studies, Part-F Vol. XVI (2) : 89—102, December 2005

WATER RESOURCES: LIMITATIONS IN THE INDO-BANGLADESH LEGAL REGIME

Dr. Md. Nazrul Islam

1. Introduction

Water, at present, dominates almost every global dialogue on sustainable development.[1] This is partly due to huge demand of water, the consumption of which has doubled over the last 50 years and lack of its availability to meet the rising demand. As a UN study cautioned, if current consumption patterns continue, half the world's population, along with freshwater ecosystems, will face acute shortage of freshwater by 2025.[2]

In response to this critical situation, the UN Millennium Development Goals aim, among other things, at reducing by half the proportion of people without access to safe drinking water and basic sanitation by 2015[3] and the Millennium Declaration calls on nations to stop the unsustainable exploitation of water resources.[4] In line with that call, The World Summit for Sustainable Development at its 2002 Plan of Implementation underscored the need to develop and implement national and regional strategies, plans and programmes with regard to integrated river basin, watershed and groundwater management.[5]

The global recognition of the needs for integrated efforts for ensuring sustainable development of water resources has rarely been reflected in the dialogue between the South Asian countries. For example: the recently concluded meeting of the India-Bangladesh Joint Rivers Commission (JRC) makes no reference to the desirability of the basin

---

1. UNDESA, UNDP and UNECE, 2003, *Governing Water Wisely for sustainable development*. Available online: *http://www.unesco.org/water/wwap/wwdr/pdf/chap15.pdf*
2. UN, 2002, *Global Challenge Global Opportunity: Trends in Sustainable Development*. Available online: *http://www.johannesburgsummit.org/html/media_info/pressreleases_factsheets/1308_critical_trends_report.pdf*
3. UNESCO, 2002, *The Millennium Development Goals and Water*. Available online: *http://www.unesco.org/water/wwap/facts_figures/mdgs.shtml*
4. See Part IV of the UN Millennium Declaration at *http://www.un.org/millennium/declaration/ares552e.htm*
5. See Para 26, Plan of Implementation of the World Summit on Sustainable Development, in UN, 2002, *Report of the World Summit on Sustainable Development*. Available online: http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf.

wide efforts for the development and management of the common rivers.[6] In the meetings of the commission, in response to Bangladesh's concern about the Indian unilateral projects like River Linking Project and Tipaimukh Multipurpose Hydroelectric Power Project, India only assured Bangladesh of no harmful consequence of the projects without elaborating the elements of that assurance. At the end of the meeting, both country reiterated their commitment to cooperate each other in regard to utilisation of the waters of common rivers and dealing with flood related issues. They, however, fell short of underscoring the needs for beefing up institutional efforts and widening the JRC's mandate for considering basin wide development and management of water resources of the region.

Against the above backdrops, this paper analyses the relevant legal and institutional relations between Bangladesh and India to examine the reform needs for a more effective, efficient and accountable mechanism for sustainable utilisation of water resources of the region. First: it analyses the agreements and understandings between the two states to examine their efficiency in effectuating cooperation for water resources utlisiation. Second: it compares the existing legal regime between Bangladesh and India to the global rules and regional practices to understand the extent to which cooperation between the two countries needs to be intensified. Third: it makes a mapping exercise for suggesting reform measures in the approaches of the countries of this region towards sustainable utilisation of the water resources.

2. Legal and institutional relations

Bangladesh (erstwhile East Pakistan) and India first recognised the needs for cooperation in the utilisation of the common rivers in an agreement of 1959, which titled 'Indo-Pakistan Agreement on East Pakistan Border Disputes'.[7] Article 7 of the 1959 Agreement provides that: "The need for evolving some procedures for the purpose of mutual consultations in regard to utilisation of water resources of common rivers was recognised by both sides". The textual interpretation[8] of this

6. See The Daily Star reports on the JRC meetings in 14 and 15 August 2005.
7. For the text of the Treaty, see, UN, 1963, *Legislative series*, p. 300.
8. In case of unavailability of any authentic interpretation, it is valid to make a textual interpretation, which requires an ordinary meaning to be given to the terms of the treaty. See, Article 31 of the Vienna Convention on the Law of Treaties of 1969. Authentic interpretation can be made by an interpretative declaration or by a protocol or a supplementary treaty by the Parties to the original treaty. For detail about interpretation of treaties, see Sinclair, 1984, *The Vienna Convention on the Law of Treaties*, pp. 114-58.

provision suggest that the contracting parties to the treaty agreed that some obligations should precede or accompany the utilisation of a common river, although they did not spell out the content of those obligations.

A more concrete commitment for cooperation for the mutually beneficial utilisation of common rivers was made in a 25 years Treaty of friendship in 19 March 1972.[9] The said Treaty identified areas of co-operation between the two States and included a provision in Article 6 which reads: 'The high contracting Parties agree to make joint studies and take joint actions in the field of flood control, river basin development and the development of hydro-electric power and irrigation'.

2.1. The JRC and its mandate

In order to institutionalise the intentions of the 1972 Treaty for coordinated measures, the Joint Declaration of the two Prime Ministers in which the 1972 Treaty was announced, contained a decision to establish, on a permanent basis, a Joint Rivers Commission comprising experts of both the States.[10] The Statute of the Joint Rivers Commission (Indo-Bangladesh Joint Rivers Commission; hereinafter the JRC) was agreed in an officers' level meeting in 24 November 1972.[11] Article 4 of the Statute describes functions of the JRC:

(1) The commission shall have the following functions in particular:
   (a) to maintain liaison between the participating Countries in order to ensure the most effective joint efforts in maximising the benefits from common river systems to both Countries',
   (b) to formulate flood control works and recommended implementation of joint projects
   (c) to formulate detailed proposals on advance flood warning, flood forecasting and cyclone warning

---

9. See 'Treaty of Friendship, Cooperation and Peace between the Republic of India and the People's Republic of Bangladesh, 19/3/72', in Bangladesh, 1990, Ministry of Irrigation, Water Development and Flood Control, Indo-Bangladesh Joint Rivers Commission, *Documents*, p. 5. [hereinafter *Joint Rivers Commission Documents*]. This Treaty expired in 1997.
10. Joint Declaration of the Prime Ministers of India and Bangladesh, 19/3/72, Dhaka, in *Joint Rivers Commission Documents*, ibid, p. 1.
11. Statute of the Indo-Bangladesh Joint Rivers Commission, in *Joint Rivers Commission Documents*, ibid, pp. 8-10. The Statute was signed by the Secretary, Ministry of Flood Control and Water Resources of Bangladesh and by the High Commissioner for India in Bangladesh.

(d) to study flood control and irrigation projects so that the water resources of the region can be utilised on an equitable basis for the mutual benefit of the people of the two Countries

(e) to formulate proposals for carrying out research on problems of flood control affecting both the countries.

(2) The commission shall also perform such other functions as the two governments may, by mutual agreement, direct it to do.

Similar to the constituent instruments of other international river commissions, the JRC statute spells out the procedural rules for carrying out its objectives. Chapter V of the statute provides that the ordinary session of the commission shall be held generally "four times a year" and in addition special meeting may be convened at any time at the request of either country. Chapter VI provides that the Commission shall also submit 'its annual report by the 31st January, next year.'

The JRC, however, failed to live up to its mandate. Instead of convening meetings "four times a year", it could convene only 36 meeting in the last 33 years. It also failed to produce and submit its annual reports to the governments or maintain regular liasion between them. More importantly, the JRC had never been able to agree any joint project for development of the water resources. In the absence of political will and direction and lack of independence[12] the JRC has rather been reduced to a forum for discussion and debate on water sharing issues.[13] It is also alleged that India, the upstream country, has undermined the mandate and spirit of the JRC as well as a number of bi-lateral agreements by undertaking or planning a number of unilateral projects on the common rivers.[14]

2.2. Narrowing down the focus of cooperation

It is clear from the above account, that the bi-lateral negotiations between Bangladesh were primarily premised on recognition of the need for harnessing the water resources of the region through joint efforts. A 1974

---

12. According to Article 9 of the statute, the JRC is instructed to refer any difference between its member to the governments of the contracting parties and it has no mandate to take decisions unless that is unanimous.

13. Crow and Lindquist, 1990, *Development of the rivers Ganges and Brahmaputra*, p. 11

14. Before conclusion of the 1985 MOU, construction of barrages on the rivers Teesta and Gumti was imminent and construction or planning was underway for utilisation of some other common rivers. See, Crow and Lindquist, n. 13, p.13. Regarding India's unilateral steps in relation to the River Linking project and the Tipaimukhi project for harnessing the water resources of three major common rivers–The Ganges, The Brahmaputra and The Meghna, see Asif Nazrul, *JRC meeting and the RLP*, the Daily Star, 13 August 2005

Joint Declaration of the two Prime Ministers assigned the JRC to study best means of augmentation of the water resources of the region available to the two countries in order 'to meet the requirements of the two countries'.[15] Subsequent JRC discussion continued for more than one decade and failed to produce any such agreed study in relation to major common rivers like the Ganges and the Brahmaputra. The main reasons for the failure was India's objection to the Bangladesh proposal to include Nepal in the augmentation planning and Bangladesh's rejection of India's link canal project for diverting Brahmaputra water to the Ganges without guaranteeing Bangladesh's share in both rivers.[16]

The stalemate in the JRC in regard to the augmentation proposals induced two countries to form a Joint Committee of Experts (JCE) under the 1985 MOU to make a fresh start.[17] In the face of disagreements on any joint project, Bangladesh was then offered an alternative to consider a project of internal link canal, flowing entirely within her territory, to transfer the Brahmaputra water to augment the Ganges flow.[18]

In the subsequent meeting of the JCE, Bangladesh asked for a guaranteed share of the Brahmaputra and Ganges water for considering the internal link canal proposal. Bangladesh argued that such guarantee was essential for deciding 'how much augmentation was needed in the Ganga [Ganges] and how much diversion was possible from the Brahmaputra'.[19] Accordingly, in 1986, Bangladesh proposed India to consider an overall sharing on the basis that Bangladesh be guaranteed a minimum of 25,000 cusecs at the lowest level of the Ganges flow, 75% of the Brahmaputra water of which 50% would be allowed to flow to the sea for environmental purposes and 50% of the flow of the other common rivers.[20] But no progress was achieved on that proposal evidently because of India's

---

15. Joint Indo-Bangladesh Declaration of the Prime Ministers of India and Bangladesh, 16/5/74, in *Joint Rivers Commission Documents*, n., 9, pp. 15-16.
16. For detail, see, Indo-Bangladesh Joint Rivers Commissions, 1985, *Updated proposals and comments of Bangladesh and India on augmentation of the dry season flows of the Ganges*, Dhaka.
17. Rangachari and Iyer, 1993, 'Indo-Bangladesh talks on the Ganga waters issue' in Verghese and Iyer, (eds.), 1993, *Harnessing the Eastern Himalayan Rivers*, p. 185, observed that the JRC was replaced because it was not acting as a joint body but merely as a forum where two sides confronted each other.
18. Crow and Lindquist, (1990), n. 13, pp. 29-30.
19. Rangachari and Iyer, (1993), 'Indo-Bangladesh talks on the Ganga waters issue', 188.
20. See, Crow and Lindquist, n.13, p. 31; Verghese, (1990), *Waters of hope*, 395; Rangachari and Iyer, (1993), 'Indo-Bangladesh talks on the Ganga waters issue', 191.

insistence that Bangladesh should first agree with the India's augmentation proposals. Crow and Lindquist summarised two States' position: "India will not consider sharing without augmentation from the Brahmaputra, and Bangladesh will not consider augmentation from the Brahmaputra without a guaranteed share in the principal joint rivers".[21]

Bangladesh and India later responded to the prevailing crisis by narrowing down the agenda of bi-lateral discussion. A Joint Communiqué of two Prime Ministers issued in May 1992 focused predominantly on the sharing issues with a pledge to negotiate sharing of the Ganges water on an urgent basis.[22] Para 10 of the Communiqué clearly highlighted the importance of a long-term sharing of the waters of the Ganges and the Teesta.[23] It specifically referred to the inadequacy of the flows of these two rivers and the need of 'an equitable, long-term and comprehensive arrangements for sharing of the flows of these and other major rivers'. The latter part of the Communiqué underscored the urgency of interim-sharing of the Ganges water. It included an assurance of the Indian Prime Minister that 'every possible effort will be made to avoid undue hardship to Bangladesh by sharing the flows in Ganga/Ganges at Farakka on an equitable basis' and an agreement that 'the concerned Ministers would meet for this purpose [sharing of the Ganges] on an urgent basis'.

2.3. The 1996 Treaty: its potentials and lacking

The 1992 Communiqué resulted into a Treaty in 1996 between Bangladesh and India. The Treaty focuses mostly on sharing arrangement of the Ganges River and undermined the importance of integrated approach for harnessing the water resources. This approach is evident even in the title of the treaty that reads: 'Treaty between the Government of the Republic of India and the Government of the People's Republic of Bangladesh on Sharing of the Ganga/Ganges Waters at Farakka'.[24] Quite similarly to the previous agreements, the 1996 Treaty completely disregards the impact of Indian projects in upstream areas of Bihar and Uttar Pradesh and makes provisions only for allocation of residual flows available at the downstream point of Farakka.

---

21. Crow and Lindquist, ibid.
22. Quoted in Bangladesh, (1994), *The impacts of Farakka Barrage on Bangladesh*, 11.
23. For a brief reference to the Teesta river issues, see, Abbas, 1982, *The Ganges water dispute*, pp. 16-17. On the problems of utilisation of Indo-Bangladesh common rivers, See Islam, (1992), 'Indo-Bangladesh common rivers: the impacts on Bangladesh', 1 *Contemporary South Asia* 203-25.
24. For the text of the Treaty, see 36 *ILM* 523 (1997).

2.3.1. Underlying principles

The 1996 Treaty has three parts: the preamble, the operative part containing 12 Articles and the Annexes. Article I to XI set forth the provisions for sharing of the Ganges flow and related matters. And according to Article XII, the Treaty entered into force on the date of its signing (that is 12 December 1996), it has duration of thirty years and it could be renewed on the basis of mutual consent.

The preamble of the 1996 Treaty makes reference to the guiding principles: 'mutual accommodation' for sharing of the flows at Farakka and 'optimum utilization' of the waters of the region. While elaborating 'optimum utilization', it makes reference to 'flood management, irrigation, river basin development and generation of hydropower for the mutual benefit of the people of the two countries'. It describes the sharing arrangement enshrined in the treaty as 'fair' and 'just', which conform to the principle of equitable utilization.[25]

The preamble makes no reference to conservational or environmental aspects of water utilization. It is silent on the question of maintaining "environmental flow" that many environmental conventions like the 1972 Ramsar Convention and 1992 Convention on Bio-Diversity considered essential for sustaining the normal functions of a river.[26]

2.3.2. Sharing under the 1996 Treaty

The 1996 Treaty describes three different possibilities of water availability at Farakka according to which water shares of the two States would vary.[27] Accordingly, if water availability at Farakka is more than 75,000 cusecs (expected in January, February and last 10-day of May), India receives her full requirement of 40,000 cusecs, and Bangladesh the rest. If the flow is between 70,000-75,000 cusecs (expected during first 10-day

---

25. See in this regard, Para 9, commentary to Article 5, Report of the ILC on the work of its 46th session in UN, *GAOR*, 49th session, Supplement no. 10, pp. 221-2, UN. Doc. A/49/10 (1994).

26. As regards environmental flows, an International Conference on Ramsar Convention provides that "Water system require water (the right quantity in the right place) to function properly and to secure a constant and quality supply for other use. ... Human use can only be satisfied in the long run by first ensuring the "environmental allocation" that the system requires to continue to perform." See, The Bureau of the Convention on Wetlands, *The key role of wetlands in addressing the global water crisis*, Paper communicated to the Contracting Parties by diplomatic notification on 1998 and presented to the delegate at the International Conference in Paris, 19 March 1998, pp. 4-5.

27. See, Annexure I and Annexure II to the Treaty

of March and second 10-day of May), Bangladesh receives 35,000 cusecs, and India the rest. In the driest periods of 10 March-10th May, if the available water at Farakka is less than 70,000 cusecs but more than 50,000 cusecs, the two States share that water on a 50:50 basis.[28] The 50:50 sharing is subject to a provision that Bangladesh and India each receives guaranteed 35,000 cusecs of water in alternative ten-day periods during 10 March to 10 May.[29]

The applicability of the Treaty has been delimited by providing that in cases of availability of below 50,000 cusecs of water, the sharing formulas of the Treaty would have no relevance. In such cases, as Article II (iii) of the Treaty provides, India and Bangladesh 'will enter into immediate consultations to make adjustment on an emergency basis, in accordance with the principle of equity, fair play and no harm to either party'.

Although sharing under the 1996 Treaty depends on stable flows at Farakka, the 1996 Treaty contains no effective provision to ensure such flows. It only contains an assurance of India for protecting the water flows at Farakka. That assurance falls far short of amounting to an obligation of controlling or regulating uses of the Ganges water in the upper basin.[30] The fragility of that assurance can be discerned from the provision in Article II (iii) in which both the States recognized the possibility of water availability of below 50,000 cusecs.

2.3.3.Augmentation

The 1996 Treaty, in its preamble, recognised 'the need for a solution to the long term problem of augmenting the flows of the Ganga/Ganges are in the mutual interests of the peoples of the two countries.' In its operative part, Article VIII of the Treaty merely repeats that need without elaborating or indicating relevant follow up measures.[31] The Treaty thus makes no references to previously discussed proposals for augmentation of the Ganges flow and requires no more study on those proposals or any new proposal for harnessing the water resources of the region.

The priority of the Treaty on sharing issues is also evident in its Article IX. This Article provides that "Guided by the principles of equity,

---

28. See Article II(i) and II (ii) of the 1996 Treaty. See also Annexure I and Annexure II to the 1996 Treaty.
29. Annexure I to the 1996 Treaty.
30. The relevant provision of Article II (ii) provides that India 'would' make 'every effort' to protect flows of water at Farakka.
31. Article VIII reads: "The two Governments recognise the need to cooperate with each other in finding a solution to the long- term problem of augmenting the flows of the Ganga/ Ganges during the dry season."

fairness and no harm to either party both the Governments agree to conclude water sharing Treaties/ Agreements with regard to other common rivers".

3. 1997 Convention: Comparable rules

The 1997 UN Watercourses Convention[32] is the only watercourse convention that has global relevance.[33] It was negotiated by almost every member of the international community including Bangladesh and India and was adopted by a vote of 103 in favour [including Bangladesh] to 3 against with 27 abstentions [including India and Pakistan].[34] It will enter into force on the 19th day following the date of deposit of the 35th instrument of ratification, acceptance or accession with the UN Secretary General (Article 36). Pending its application as treaty law, some of the provisions of the 1997 Convention could still be applicable as reflective of established or emerging rules of customary international law.[35]

The Convention sets forth the general principles and rules governing non-navigational uses of international watercourses in the absence of specific agreements among the States concerned and provides guidelines for the negotiation of future agreements.[36] Although it preserves existing agreements, it recognizes the necessity, in appropriate cases, of harmonizing such agreements [for example, 1996 Ganges Waters Treaty] with its basic principles.[37] A brief comparison of the contents of those principles with the provision of 1996 Treaty is outlined below for indicating the areas in which the 1996 Treaty may need to be reviewed.

First: The 1997 Convention provides for taking all appropriate measures to prevent the causing of significant harm to other watercourse State (Article 7). Further to this provision, the Convention, by elaborating the post-harm obligation, has established a firm relation between equitable

---

32. The title of the convention is 'Convention on the Law of the Non-navigational Uses of International Watercourses' See the text of the 1997 Convention in 36 *ILM* 700 (1997).
33. MaCaffrey and Sinjela, 1998, 'The 1997 United Nations Convention on international watercourses', 92 *AJIL* 106.
34. UN, *GAOR*, 51st session, 99th plenary meeting, 21/5/97, p.7-8.
35. For a discussion on this point, see Islam, M., N., 'Environmental Impacts of the Ganges Water Diversion and ItsInternational Legal Aspects' in Mirza, M.,Q.,2004, *The Ganges water Diversion: Environmental Effects and Implications*, Kluwer, Academic Publishers, pp. 215-218.
36. UN *Press Release*, GA/9248, 21/5/97, 'General Assembly adopted Convention on the Law of Non-navigational Uses of International Watercourses'.
37. Article 3(1) and 3(2) of the 1997 Convention.

utilization and harm factor, which is not done in the 1996 Ganges Treaty. The 1996 Treaty does not oblige its Parties to take any preventive measures. It also fails to spell out that unlimited upstream diversion and use of the Ganges water can not ensure adequate protection of the river, which is essential component of the provisions of Article 5-7 of the 1997 Convention. Article II of the 1996 Treaty only provides for applying the principles of equity and no-harm if the available Ganges flow falls below 50,000 cusecs at the agreed point of apportionment. It is, however, difficult to agree that the very notion of sharing an unlimited lower flow, without investigating its uses in the upstream areas and without coordinating those uses, could properly reflect equity or no-harm principle.[38]

Second: The Convention requires exchange of all relevant information on watercourse condition (Article 9) and on planned measures (Article 11) and adequate consultation between the watercourse States for determining and maintaining equitable utilization. Comprehensive application of these provisions would, therefore, require India to consult with Bangladesh regarding all the upstream projects on the river Ganges. But (under Article I, II, and IV) the 1996 Treaty provides for exchange of information relating only to the projects at Farakka and more downstream areas and for consultation apparently on the basis of such information.[39] The necessity of exchanging information on river condition and on the new or existing uses of the Ganges water above Farakka, and holding consultation about the effects of those uses on the water availability at Farakka has not been reflected in any provision of the 1996 Ganges Treaty. Therefore, the 1996 Treaty can be said to have represented only a partial reflection of the procedural requirements of the 1997 Convention.

Third: The Convention requires watercourse States to settle their dispute by bilateral negotiation and, if it fails, by third-party procedures including a mandatory Fact-finding Commission. But Bangladesh and India have failed to make any provision of third-party dispute settlement in the 1996 Treaty. Consequently, in regard to issues like defining and mitigating economic and environmental harm, adjustment of sharing arrangement during review meetings, sharing of below 50,000 cusecs water or interpretation of the Treaty, conflicts between the two States can lead to a long lasting deadlock.

---

38. See, in this regard, Islam, M., N.,1999, *Equitable sharing of the water of the Ganges: Applicable procedural rules under international law and their adequacy*, Unpublished PhD thesis, SOAS, University of London, pp. 154-57, 213-219.

39. Ibid, pp. 262-271.

Fourth: The 1996 Treaty is completely silent on environmental and conservational provisions, which are laid down in detail in the 1997 Watercourse Convention. The underlying purpose of environmental provisions of 1997 Convention, particularly of its Part IV is to protect the watercourse itself, an obligation which include protecting aquatic bio-diversity, ensuring their growth and regeneration and halting the climate change process that may be caused by drying up of a river. The 1996 Treaty appears to have taken into account only economic aspects of the Farakka project, not environmental aspects of that project or upstream projects.

Finally: Unlike the 1996 Treaty, the 1997 Convention requires integrated efforts between watercourse states for utilisation, development and management of transboundary watercourses. Article 5(2) provides that Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Article 24 of the Convention recommends establishment of a joint management mechanism for planning sustainable development of an international watercourse and providing for implementation of any plans adopted and promoting protection of the watercourse.

4. Integrated Approach: Regional Model

The above provisions of the 1997 convention have already been reflected in various agreements all around the world. As it is observed in the Report of the ILC on the work of its 46th session the 'modern agreements' rather than 'specifying the respective rights of the parties', have gone 'beyond the principle of equitable utilisation by providing for integrated river basin management'.[40] While Europe and America pioneered basin wide approach[41] the same is practiced in many regions of Asia, Africa and South America. Some representative examples of such approaches are narrated below.

A. Sustainable Development of the Mekong River Basin[42]

The Mekong River Agreement on the 'Co-operation for the Sustainable Development of the Mekong River Basin' was signed in 1995 by Cambodia, Lao PDR, Thailand and Vietnam, while the other two basin countries China and Myanmar participate in the regime as 'observers'. The Agreement sets up a framework for co-operation between the riparian

---

40. UN, *GAOR*, 49th session, supplement no. 10, p. 224, para. 12
41. Snds, P., 2003, *Principles of International Environmental Law*, Cambridge University Press, pp. 477-89,
42. Source: FIELD, 2005, *Implementation of Multilateral Environmental Agreements for Efficient Water Management*.

states in all fields of the river basin's sustainable development. Under the Agreement, Parties have to protect the environment of the basin from pollution and other harmful effects resulting from development plans and uses of the waters and related resources. The Agreement specifically requires minimum stream flows for the protection of ecosystems, indicating that Parties must co-operate in maintaining flows 'of not less than the acceptable minimum monthly natural flow during each month in the dry season.' The 2004 Work Programme, approved by the Parties to the Agreement, highlights the importance of integrated river basin management.

The agreements established a powerful commission called Mekong River Commission to plan, coordinate and execute projects and programmes. Each of the four countries to the commission has a National Mekong Committee (NMC) that co-ordinates and implements Mekong related projects at the national level.

In 2000, the GEF and the World Bank funded the 'Mekong River Basin Water Utilisation Project' to promote and improve sustainable water management in the Mekong River Basin while protecting ecological balance of the basin.

B. Zambezi river management

Under the auspices of the Southern African Development Community (SADC), eight African Countries concluded the 1987 agreement for the environmentally sound and integrated water resource management of the Zambezi River.[43] The Zambezi Action Plan is implemented by the SADC, an Inter-governmental Monitoring and Coordinating Committee and national focal points.

In 1995, the contracting parties concluded a protocol on shared watercourses including the Zambezi in order to 'foster closer cooperation for judicious, sustainable and coordinated management, protection and utilisation of shared watercourses and advance the SADC agenda of regional integration and poverty alleviation.[44]

C. Basin Management of Lake Victoria[45]

Uganda, Kenya and Tanzania entered into the 1994 Agreement on the Preparation of a Tripartite Environmental Management Program for Lake Victoria. They agreed in 1997 to implement the Lake Victoria Environment Management Program (LVEMP) for joint management of land and water resources around Lake Victoria. The LVEMP is a multi-

---

43. For text, see 27 *ILM* 1109 (1988).
44. The protocol was revised in 2000. For detail see Sands, n., 41, p. 490.
45. FIELD, 2005, *Implementation of Multilateral Environmental Agreements for Efficient Water Management*

disciplinary and multi-sectoral comprehensive development programme that was designed to introduce environmentally and socially sustainable economic development to the Lake Victoria Basin. The LVEMP activities are implemented by the ministries responsible for natural resources, environment, fisheries, agriculture, lands, water and finance in the respective governments.

The above examples show that integrated basin wide approach is the modern trend for sustainable development of a transboundary watercourse in which all or most of the watercourse states participate. This approach aims at ensuring not only optimal utilisation of the water resources by watercourse states, but also at maintaining and protecting watercourse environment as well. The institutions established through such approaches ensure that adequate information exchange and consultations between the watercourse states take place before any project is undertaken. The clarity of legal relations between the watercourse states encourages multilateral donor agencies to provide financial and technological support to the basin wide projects. This, in turn, has facilitated efficient regimes for utilisation and development of concerned watercourses.

5. Conclusion

The fundamental characteristics of transboundary watercourse are such that it is imperative for watercourse states to adopt an integrated approach in order to ensure sustainable utilisation of the watercourses. The foregoing sections of this paper suggest that Bangladesh and India had failed to agree to adopt any such approach from the very beginning of their negotiations. They rightly recognised the importance of 'cooperation' in water resource development and utilisation, but the mechanism they have established for implementing 'cooperation' was either wrong or inadequate in many aspects. They established a bi-lateral institution in the form of JRC in order to study projects on rivers that flows through some other states and when the involvement of one such state was offered by Bangladesh the whole negotiation on coordinated augmentation of the rivers gradually fell apart.

Later negotiations and the consequent 1996 Treaty undermined the needs for coordinated efforts for development of the watercourses by focusing predominantly on sharing issues. The inadequacy of those negotiations can also be observed from the fact that the two states have so far succeeded on establishing sharing arrangement for only the Ganges and that arrangement also has many loopholes.

Another worrying aspect of Bangladesh-India legal relations on water issue is India's disregard to comply with procedural principles of information exchange and consultation. For example: no information had so far been exchanged in regard to the River Linking Project concerning the Brahmaputra and the Ganges and the Tipaimukh

Hydroelectricity Projects concerning the Barak-Meghna. As these rivers sustain and support the economy and environment of Bangladesh, the utility of the JRC and the 1996 Treaty could again be seriously questioned unless a meaningful and effective discussion regarding the aforesaid projects could be carried out soon.

It must not be forgotten here that the potentials of integrated water resource management depend mostly on clarity and transparency in the upstream-downstream relations and full execution of those relations through efficient institutional arrangements. The responsibility in this regard lies mostly on the upstream states. As a Global Water Partnership study pointed out:

> Upstream users must recognise the legitimate demands of the downstream users to share the available water resources and sustain usability. Excessive consumptive use or pollution of water by upstream users may deprive the downstream users of their legitimate use of the shared resource. This clearly implies that dialogue or conflict resolution mechanisms are needed in order to reconcile the needs of upstream and downstream users.[46]

It is, therefore, suggested that the problems regarding the utilization of the transboundary rivers can be mitigated by utilising comprehensive procedural techniques rather than by delimiting their role. In the international domain, the benefits of enhancing the role of procedural principles are being increasingly recognised even in some water shortage areas.[47] This is done by concluding treaty instrument for establishing competent joint institution for integrated river basin development and management. In the 1996 Treaty, Bangladesh and India have apparently abandoned such possibility by excluding the programmes of studying the previous development proposals including the proposal Bangladesh made for an integrated river basin development. The 1996 Treaty has established a narrow legal relationship for sharing the Ganges water and made a pledge for sharing waters of other common rivers. The objectives of the Treaty are even unlikely to be effectively materialised unless the procedural principles of information exchange, prior consultation and cooperation are fully complied with and unless the mandate of the JRC is fully respected.

---

46. GWP, Technical Advisory Committee, 2004, *TAC Background Papers*, No. 4. P. 15.

47. International donor agencies' and countries' preference to such integrated development plan has already become noticeable. It was assumed that after the adoption of the 1997 Convention, whatever would be its legal force, this preference would become more dominant in future. See, in this regard, Sergent, 1994, 'Comparison of the Helsinki Rules to the 1994 UN draft articles' 8 *Vill. Envtl. L.J.* 477.

The Dhaka University Studies, Part-F Vol. XVI (2) : 103—122, December 2005

DISPENSING JUSTICE TO THE POOR: THE VILLAGE COURT, ARBITRATION COUNCIL *VIS-A-VIS* NGO MEDIATION

Dr. Nusrat Ameen

Poor people are rarely able to use the formal legal systems to pursue their claims. The costs of engaging a lawyer, the time and the related cost spent in court, the level of skill and education required to litigate, all serve as deterrents. Poor people therefore, prefer, or rather have no choice but, to use the traditional and customary systems. NGOs' play an important role here.

NGOs' like Bangladesh Legal Aid Services Trust (BLAST) and Madaripur Legal Aid Association (MLAA) works with people whose lives are handicapped by extreme poverty, illiteracy, lack of knowledge regarding their rights. Women are more vulnerable especially in the rural areas where the husbands are unable to support the family in the face of increasing landlessness, unemployment and illiteracy. The resultant tensions and frustrations are often vented in assaults on wives, the most accessible victims. With multifaced activities these NGOs' strives to bring about a positive change in the quality of life of the poor and disadvantaged people of Bangladesh. For example, like providing legal aid to poor litigants to safeguard their fundamental rights through judicial system, conducting mediation, or protecting women workers' economic rights, NGOs' plays a significant role in empowering women.

This article shows how the NGOs' are making a positive impact on the lives of the rural mass by providing legal aid and mediation. And it will show how they are benefiting women in particular through economic empowerment. Likewise, the Village Court and the Arbitration Council are also capable of imparting justice to the doorstep of the rural people and thus making a positive impact on their lives. Keeping this in mind the article recalls the importance of Village Court and Arbitration Council and how they can benefit the rural mass in the whole of Bangladesh even in the absence of NGO's. In this regard the effort of MLAA will be considered. MLAA strives to reactivate the concept of Village Court and Arbitration Council to the benefit of the rural mass. The field experience of the researcher is gathered much from her interaction with BLAST and MLAA while working for them.[1]

---

1. Research in appraisal mission of Bangladesh Legal Aid and Services Trust (2002) and Madaripur Legal Aid Association (2004).

In an NGO, the legal aid activity starts as soon as a client comes to the office with a complaint. The complaint is registered in a specific form and counselling begins. A notice is sent to the opposite party to appear before the committee for mediation. The very usual case of this is family disputes. Disputing parties along with their guardians, relatives or local elites appear before the mediation sessions. The committee tries to mediate the dispute in a fair and impartial manner after the parties present their grievances. Mediators discuss the conflicting issue with the parties and assist them in bringing about a solution which is acceptable to each party. Finally, the parties agree to the grounds set out by the NGO. The grounds may differ according to the issue of dispute. For example, the grounds for divorce, or in case of re-union the grounds are not alike.

If the mediation fails either the matter ends in a divorce or a case is instituted. However, in case of divorce the committee plays a significant part in the settlement. The client is made aware of all legal and social consequences before she takes a decision. Nevertheless, the decision is taken by herself. The committee also entertains cases instituted by the husband; if it ends in a divorce, the committee plays an impartial role. One pertinent point in all cases is that NGOs' does not put pressure on the parties but leaves it on them to decide. And it is a win-win situation that NGO ensures. It ensures that the status and capability of the parties should be taken into consideration while mediating.

Activities Of Bangladesh Legal Aid and Services Trust (BLAST)

The case studies of Gopibagh Clinic shows how women are getting economic empowerment through the service of BLAST. For example, Rashida who suffered abuseS by husband for dowry demand got redress from the clinic through mediation. She received taka 53, 000 on 23rd August, 2002 from her husband by mutual consent as dower and maintenance before divorce was complete. She had deposited the money in the bank in her name and is now working at a boutique. She sounded determined to establish herself as an independent business woman in the long run with the experience from the boutique.

Again, Rina Akhter also benefitted from the mediation of the BLAST clinic. The case in short is that the husband preferred a complaint against Rina to bring her home as she was staying at her parents. When the parties were summoned it was actually found from the local people who accompanied the parties that Rina was a victim of physical and metal abuse as the husband kept demanding dowry off and on after marriage.

He is a daily labourer and has little income. However, the abuse increased gradually and his sister also took part in the abuse. Therefore, Rina was reluctant to go back but agreed to go back only if they stayed separately. The husband was not ready to leave his sister. The disagreement finally resulted in mutual divorce. The dower money of 50,000 taka was too huge a sum for the husband to pay and he agreed to pay 8,000 taka in three instalments and Rina consented. Rina is now working in a handicrafts and earning 1000 taka per month. She invested some of her earning with the 8,000 taka and bought three cows. She is also getting money from selling milk from one cow. She is pursuing her studies and is determined to be independent.

Lakhini Bibi, 38 years of age was married to Golam Mustafa in 1988. They have a daughter aged 13 and a son aged 9. Her husband has rickshaw business. According to Lakhini her husband is of bad character and had married twice after marrying her. Both the times she filed cases against the husband. But he persuaded her each time to withdraw the cases against him and then came back to Lakhini. However, he also left the other wives. This time when he wanted to marry again, Lakhini along with a female chairman of the local body tried to reconcile the matter. However, she was recommended to contact BLAST.

On July 31st, 2002 she came to BLAST and registered a complaint against her husband. On 11th August mediation was complete and the couple agreed to certain conditions, namely, they would live as husband and wife fulfilling all marital obligations. They would continue to live on Lakhini's house, which Mustafa built on Lakhini's father's land inherited by her. The Commissioner of their Ward would monitor them from time to time. However, BLAST would initiate another proceeding if any one of them starts a fight. On 6th September, BLAST officials visited Lakhini and found them happy. Lakhini on 23rd October 2002 informed that after so many legal battles and local *Shalish,* finally BLAST could make a positive impact on her husband. She opined that her husband thought that BLAST has the ultimate power because it has convinced the local Commissioners and members to monitor the mediation. Moreover, the fingerprint that he has given in the mediation proceeding also works as a fear, although, like Lakhini and Mustafa, most ignorant people fear the mediation paper as a legal document.

Noorjahan, aged 35, came to BLAST on 30th June, 2002 with land dispute. She was married in 1985. Unfortunately, her husband is a vagabond and left her after seven days of marriage. She never married since then and thinks that he will return one day. She inherited a piece of land from her brothers. However, her nephews forcefully evicted her from the land.

She came to BLAST for help. There was a mediation and ultimately BLAST could mediate the matter. She has regained the land and has settled there.

Shilpi Akhter, aged 22, came to register a complaint against her husband at BLAST office in Comilla on 17th July 2001. They were married on 8th January 2001. After a few months of their marriage, Ishaq, her husband started demanding dowry from her. The office mediated the matter on 30th July 2001. The mediation stated that the couple should stay in maternal home of Shilpi until the husband becomes solvant to live on own. The husband should pay 500 taka to Shilpi and the money would be spent on living expenses and not for Shilpi's personal spending. If Ishaq demanded dowry the office would initiate legal proceedings against him.

After the mediation they were living happily and had a son. Her husband is now active and struggling to get established. The reason for asking dowry could be gathered from the conversation. They married on their own without the consent of elders and the mother of the groom did not accept Shilpi and started to abuse her soon after marriage. And so for Ishaq dowry was just an issue to fight. There were also several local *Shalish* which failed to settle the matter between the two families. Finally on hearing about BLAST activities the mother of shilpi took her to BLAST.

Julia Akhter, aged 18 was married on 10th March, 2002. She was given gold necklace, earring by her parents and 35,000 taka was also given to the groom for business. However, after one month of marriage the husband started to abuse her for more dowry. Learning about BLAST from her uncle who is a lawyer, she came for help. She registered a complaint on 3rd September, 2002 and mediation was done on 16th October, 2002. The mediation failed as she refused to go back to husband. So instead BLAST mediated and got back her belongings that was given to her on marriage including the gold necklace, earrings. The cash 35,000 taka was agreed to be given back to Julia by the husband at the BLAST office. Julia said she had to come to BLAST office on 12th December, 2002 to get the first instalment. She wishes to pursue her studies and become independent.

The above case studies reflect the fact that women are being benefited by NGOs' like BLAST. For Lakhini, Shilpi and Noorjahan the social and economic empowerment was essential for survival. For Julia, along with economic empowerment she also got the social empowerment by convincing the society that she endured enough torture and had a right to come out of marriage and choose her own life.

Therefore, to reduce poverty as well as social injustice (like wife abuse and other discriminations) it is essential to economically empower women. This is possible through NGOs' like BLAST which is playing a significant role in providing legal aid and rural mediation and by doing so making an impact on the promotion of women's rights and economic interests. Therefore, alternate dispute resolution does benefit women to ventilate their grievance and promote their rights. This is also possible through the government initiative by reactivating the Village Court and Arbitration Council. This forum gives opportunities to the poor people, especially the women to come forward and establish their rights through a formal body but in an informal manner. For example, a woman who wins a maintenance case may cause other men to think of providing maintenance to their wives rather than going to court for not providing. Likewise, the working of MLAA in mediation and or alternate dispute resolution shows the strength of its success in bringing a change in poor people's lives.

Activities Of Madaripur Legal Aid Association (MLAA)

The mediation cell of MLAA in Madaripur, Shariatpur and Gopalgonj also shows successful mediation through their office. Monitoring the mediation for a certain period, for example, three to six months is also done by the committee to watch whether the mediation really benefits the couple. For example, in case of maintenance, the money is first given to the committee by the husband and then taken by the wife officially for some time until she gains confidence in her husband. This is done where the parties unite. However, in case of divorce the husband usually agree to pay a certain amount to the office either in one instalment or several instalments depending on capability of the man. The office then hands over the money to the wife.

Rumi Begum had received a portion of land from her husband before he died. She lives with her in-laws. But after the death of her husband, Badshah, her broth-in-law started to abuse her and denied her possession to the land and destroyed the trees she planted on it. Rumi came to MLAA for mediation on 25/10/03. On 29/01/04 a settlement was reached between the parties. They agreed to stay together in the same house by mutual agreement and the brother-in-law agreed to give her possession of the land. Thus, the land was demarcated according to the agreement and was witnessed by the mediation worker. The family is now living together.

Jharna and Shiraz got married eight years ago. They have a son aged two years. They were living happily when on the advise of the parents of the

in-laws Shiraz started to abuse her demanding 30,000 Taka as dowry and on 19/04/04 physically abused her for not meeting the demand. Jharna came to MLAA on 21/04/04 to complain against her husbands illegal dowry demand and abuse. The office mediated the matter and parties reached an agreement on 29/04/04 to live together and the husband agreed not to demand dowry or abuse her.

Aleya was married to Jahangir 14 years earlier. They have a daughter who is now 12. They had some differences which resulted in divorce after 6/7 years of their marriage. Soon they realized they had committed a mistake and went to MLAA for advice. MLAA mediated their differences and married them again. The couple were reunited by MLAA about six years back. They are happy and they have a son who is 5 years and a daughter who is one and a half years old now.

There are cases in the legal cell also which are ultimately settled through mediation by MLAA. For example, in the cases of Lylee of Shariatpur, who came to seek redress against her husband for not maintaining her and her daughter had to file a case against her husband, Motahar. A Family Suit was filed by the Shariatpur Sadar Thana Family Court on 19/08/98. The court ordered to pay 45,000 Taka as maintenance and dower to Lylee and 1,500 Taka as monthly maintenance for the daughter. The defendant did not comply with the court order and MLAA filed an execution case in favour of Lylee to realise the money. The defendant realising the danger came to MLAA for an out of the court settlement. At last Lylee received 15,000 Taka and got divorced. She has kept the money in postal savings.

Same happened to Ratna of Gopalgonj, where failing mediation a dowry case was filed in the Magistrates Court. When the Magistrate sent the husband, Jitu Munshi to jail and fixed a date for fixing the charge, the family of Jitu came and persuaded Ratna to settle the matter through mediation. The dispute was finally settled and Ratna was paid 50,000 taka which she kept in the postal savings.

Thus, MLAA has been working in the field of providing free legal aid to the poor and marginalized people since 25 years. MLAA has a mediation and legal aid committee in the three districts of Madaripur, Shariatpur, Gopalgonj. They are run either by co-ordinator or Senior Assistant or Assistant Co-ordinator. There are advocates in this committee but their number is not fixed because the panel lawyers are engaged to institute cases in situations where it is required. The number of panel lawyers also differs from place to place. MLAA currently has 75 panel lawyers in the three districts. Initially the organisation provided legal assistance to those who are incapable of having any access to the state legal machinery

due to lack of awareness regarding their rights coupled with poverty which acts as hindrance to surface their grievances.

However, in doing so the organisation felt the limit of litigation on the impact of the poor in their actual lives. Traditional shalish has its origin in history throughout the Indian Subcontinent. Nevertheless, the present day shalish that is applied in the rural areas has its limitation for being prejudicial and biased as the shalishkars often imposes the shalish arbitrarily on the weaker party. Moreover, the shalish hardly follow any uniform principle of equity and justice. In recognition of such limitation MLAA developed an alternative forum for dispute resolution for the rural poor through the reformed shalish, popularly known as the Madaripur Model of Mediation (MMM). The object obviously is to introduce a free, equitable and effective alternative to a large number of commonly occurring litigation. The most significant role of MLAA is to introduce the community members in the mediation process. There is a committee known as Community Based Organisation (CBO) that is mandatory in the UP and Ward level. The participation of CBO members enhances the confidence of the disputing parties.

Apart from traditional mediation there are options for the rural people to resolve disputes at the local level. Thus, in Bangladesh, by law, there is a council or parishad established in every union, called the Union Parishad (UP). Each UP consists of a Chairman and members of the Parishad amongst whom three are elected women representatives. The Muslim Family Law Ordinance, 1961 obliges the UP Chairman to convene a Council to handle certain family matters, for example, divorce, polygamy, dower, maintenance. It is only applicable to Muslims. In an effort to encourage and effectuate the already existing but non-functioning forum, since March 2000 MLAA under its access to justice programme is imparting basic training to the UP Chairmen and members of the Parishad. Through the intervention of MLAA programme 80 arbitration assistants are working with dedication directly with the UP Chairmen and members and providing them technical assistance regarding methodological, legal, documentation and follow-up issues of equitable mediation, a responsibility that the local bodies in Bangladesh were vested with decades ago.

However, research in this field shows that functioning of Village Court was not as regular or in a concerted way as should have been. After the withdrawal of the Magistrate Courts and Munsif Courts from thana level in the early 1990 legal services and the judiciary in the rural areas seem to be facing a crisis. The vacuum can be filled by the Village Court which can play a significant role at the village level. Moreover, as the formal judicial system is expensive, complicated and lengthy, it puts the poor at

mercy and beyond their capacity to avail any redress. For obvious reasons it is difficult often for the poor to come to city to pursue the litigation. MLAA at this point makes a difference in the lives of the poor by re-activating the Village Court through their support and thus ensuring safety, security and justice to the rural poor. It is more than two years since 2003 that MLAA is imparting this responsibility. The task that MLAA has taken is definitely noble as NGO's cannot alone take the burden of imparting justice to the door of the poor in the whole of Bangladesh, whereas, the Village Court and Arbitration Council can do it through government initiative.

Therefore, the article finds that it is time to recall and re-establish the formal 'rural justice system' in a coordinated manner to serve the poor for whom these laws were enacted. Thus, the question of working of the Village Court (VC) and the Arbitration Council (AC) arises. Nevertheless, in order to make a quality impact assessment it is necessary to undertake a comprehensive analysis spread over a considerable time schedule. However, in the present circumstances within a very short span of time, there was very little scope for a more in-depth evaluation of the different models applied in the relevant fields. Nevertheless, the value of the study rests less on methodologies and much more on the qualitative assessment of the impact on the capacity and future plans. Thus, keeping in mind the time constraint it was not possible for the researcher to go into detail of the Village Court Act and its impact on local justice. However, it could only predict or assess the importance of VC/AC through other researches and the role of MLAA in relation to the working of VC/AC.

Village Court and Arbitration Council

From time immemorial and before the arrival of the British, judicial functions have been performed informally or through prevalent customs by the village elders. The village Panchayet also performed some judicial functions. There were provisions for the formation of courts in the union level. The presidents of the then Union Boards discharged informal judicial functions. After the introduction of the Basic Democracy system, the chairman of the union councils were authorised to act as conciliation court in the rural areas as provided in the Conciliation Court Ordinance, 1961.

During the British Rule, the first proposal for establishment of village level court on legal basis, was given by the Fraser Commission Report, 1902-03. Later on, the Hobhouse Commission of 1907-09 and Levinge Committee of 1913 proposed creation of the village level courts to solve the trivial cases of the village people. On the basis of the reports of the

above committee/commission, the Bengal Village Self-Government Act, 1919 was passed. The Act empowered the Union Board with judicial powers by creating the Union Bench and the Union Court. The former tried petty cases of criminal nature and he latter of the civil nature.[2]

In 1961 two Ordinances were promulgated, namely, The Muslim Family Law Ordinance (MFLO) and the Conciliation Courts Ordinance (CCO). The MFLO provided regulatory measures and procedures of marriage, divorce, maintenance, polygamy, child marriage, inheritance, and empowered the Union Council at village level to deal with the provisions of the Muslim Family Laws. Likewise the CCO empowered Union Council to deal with minor cognisable offences or disputes relating to criminal or civil cases for which no criminal or civil court had 'jurisdiction to try any such cases".[3]

Thus, Village Court, one of the forgotten rural institutions, has been playing an important role in resolving rural litigation of petty nature for many years but in a very slow pace and informal manner. Village Courts had emerged in the early 1960's with a view to improve the traditional shalish system existing in the rural areas. During the post liberation of Bangladesh the concept of Village Court operation was suspended for a few years but was restored by an ordinance, namely, Village Court Ordinance, 1976. By the same ordinance the Conciliation Courts Ordinance, 1961 was repealed.

The Village Court (VC) was established in every union of the country for disposal of some civil and criminal cases locally with the help of nominated representatives of the parties to the dispute. The intention of the Ordinance was to settle petty disputes and cases of trivial nature locally without going to the district courts and thus saving the poor people from unnecessary cost and trouble. Nevertheless the idea of Village Court has its root in ancient history where villages were under the control and administration of the Village Panchayets. The Village Panchayet was chaired by the village headman. His responsibility was to ensure peace and security in his village areas. Each village, thus, had its own local court of Panchayet, composed of a headman and village

---

2. Rahman, Md. Moksudur: A Study of Two Village Courts. In The Journal of Local Government. Vol.XIV. No. 2. July- December 1985. p175. [quoted from Khan, Md. Aftabuddin: Working of the Village Courts in Four Union Parishads in Bangladesh- A case Study. Seminar paper submitted to BPATC of Sixteenth Senior Staff Course. October 7-December 20, 1992.]
3. Qadir, Dr. S.A.: Modernization of an Agrarian Society. Dhaka; National Institute of Local Government. 1981. pp 1-8.

elders. The Panchayet dealt with minor disputes, that is, civil, criminal, religious and social.[4] An appeal could be made to the ascending hierarchy of the judicial officers of the government. The head of the ascending hierarchy was the Emperor, the highest court of appeal.[5]

In 1976, the Government of Bangladesh constituted village courts in all the unions and repealed the CCO to settle minor disputes of criminal and civil nature. The Village Court shall have jurisdiction to try cases within the local limits of the union where the offence has been committed or cause of action arisen. Its decision is compensatory in nature to seek amicable conciliation of the dispute. The Act of 1976 did not repeal the provisions under Muslim Family Law Rules that deal with the Constitution of Arbitration Council for the matters mentioned. As a result, both the Village Court and the Arbitration Council exist in practice in the rural Bangladesh till date.

Nevertheless, all these exist in paper and not in practice due to several reasons, for example, lack of initiative, awareness, training and skill on the part of the village functionaries, technical support and incentive from the government. With a view to strengthening and implementing the statutory provisions as regards constitution of Union Parishad Arbitration Council the MLAA undertook the task. The object was to ensure enforcement of women's legal rights through this inexpensive and less formal court for dispute resolution.

Structure, Power and Finality of a Village Court

According to section 5 of the Village Court Ordinance, 1976, the VC consists of a chairman and two members who are nominated by each of the parties to the dispute. One of the members nominated by each party shall be a member of the Union Parishad (UP) concerned. The Chairman of the UP shall be the Chairman of the Village Court, but where he is, for any reason, unable to act as Chairman or his impartiality is challenged by any party to the dispute, any member of the UP appointed in the prescribed manner shall be the Chairman of the Village Court. Likewise, in case of a disputed member, any party with the permission of the Chairman may nominate any other person of the UP to be a member of the court.

---

4. Khosla, G.D.: Our Judicial System. Allahabad. The University Book Agency. 1949. pp 16-17; Siddiqui, Dr. Kamal (ed.): Local Government in Bangladesh. Dhaka, National Institute of Local Government. 1984. pp 5-7.
5. For detail please see Matthai, John: The Village Government in British India. New Delhi. Niraj Publishers. 1983.

On the basis of the petition the chairman calls both the parties to nominate their members within a period of seven days, and then constitute the court. After the formation of the Village Court, the respondent is asked to submit a written objection within a period of three days and fix the day of hearing and the production of documents by the parties. The court has power to hold inquiry if the petitioner fails to appear, and if the Chairman finds negligence, the application shall be dismissed for default.

All cases relating to offences specified in Part I of the schedule and matters specified in part II thereof shall be triable by the Village Courts and no civil and criminal court shall have the jurisdiction to try any such case or suit.[6] The Village Court has power to award compensation to the aggrieved party of an amount not exceeding five thousand taka under part I of the schedule. But it dos not have power to convict a guilty person of any sentence of imprisonment or fine. In a suit relating to Part II of the schedule, the court has power to order payment of money up to the amount mentioned there in respect of such matter or delivery of property or possession to the person entitled thereto.

If the decision of a VC is binding on the parties, it shall be enforceable in accordance with the provisions of the Ordinance. If the decision of the VC is by a majority of three to two, any party may, within thirty days of the decision, apply in the prescribed manner either to the Thana Magistrate or Assistant Judge as the case may be.[7] The VC has the power to enforce its decrees according to the manner prescribed under the Ordinance.[8]

Structure, Power and Finality of Arbitration Council

In Bangladesh, the Union is the focal point of all governmental administrative activities.[9] By law, there is a Council or Parishad established in every Union called the Union Parishad (UP). Each UP consists of, among others, a Chairman and three women members. Local Government Act, 1983 as amended in 1997, which provides for the direct election of women members in the three seats previously kept reserved for them.

---

6. See for detail Village Court Ordinance, 1976, section 7.
7. Ibid, section 8.
8. Ibid, section 9.
9. Sattar, Rana P: A Study on the Overall Impact of Madaripur Legal Aid Association's Mediation Activities and the Monitoring and Evaluation Capacity of the Organisation. Conducted by Social Development Consultants, Dhaka. September, 2000.

This is a positive step for ensuring women's empowerment in the local administration.

The Muslim Family Laws Ordinance, 1961 obliges the UP Chairman to convene a Council to handle certain family law matters mentioned above. For example, section 7 of the Ordinance gives a man the absolute right to dissolve his marriage extra-judicially, but the UP chairman must take all possible steps necessary to bring about a reconciliation. While the objective of this section is to prevent hasty dissolution of marriages without any attempt being made at reconciliation on the part of the parties and the UP chairman, the percentage of such reconciliation in Bangladesh is very low, particularly in rural areas.[10] A study shows that the reason for the low percentage of reconciliation is the lack of initiative by the UP to reconcile.[11]

In case of polygamy the UP Chairman is obliged to convene a council under section 6. This section requires that a man seeking to contract a marriage during the subsistence of an existing marriage must obtain permission of the Council. While the rules framed under the Ordinance make it plain that the Council may take into consideration such circumstances as sterility, physical infirmity and insanity on the part of an existing wife, the law makes no clear provision to control the discretionary power of the Council. However, the Council on their part is hardly seen to take all these into consideration and found to permit second marriages on insignificant excuse.[12]

Nevertheless, MLAA by providing training has imparted to shoulder the responsibility of educating the UP Chairmen, secretaries and members regarding their statutory duties. It was observed that the rural people even the local government representatives are hardly aware of the forum for family dispute, namely the Arbitration Council.

If the UP Chairman is a non-Muslim or if he himself is a party, then the Council requires a Muslim UP member to be nominated by the Parishad by a resolution. The decision of the Council is determined by majority. Where it is not by majority then the Chairman's decision will be final. If any party is dissatisfied with the decision it may apply to the Court of

---

10. Huq, Naima: The Muslim Family Law Ordinance, 1961 and a Wife's Safeguard. CLEP Bulletin August 1996.
11. Supra 1 and 9
12. Serajuddin A.M: Sharia Law and Society, Tradition and Change in the Indian Subcontinent. Asiatic Society of Bangladesh. 1999, 109.

Assistant Judge within thirty days for reconsidering it. The party, however, must furnish reasons for such consideration. The judgement of the court will be final.

Observation on Village Court and Arbitration Council

In a case study of VC in two UP's of Dhaka, Solaiman found that the VC is not functioning due to several reasons: i) lack of knowledge among the people and the UP functionaries in the VCs', ii) corrupt practices by the UP functionaries; and iii) lack of enough power in the VCs' to summon the accused and to compel the people to carry out its verdict.[13] The success of VC depends on the ability, status and position of the UP Chairman and members. But instances are not few where it is found that there are allegations of corruption against the functionaries of the VC which might affect the function of the VC.[14]

Similarly, taking two Unions under Paba Thana of Rajshahi regarding the working of VCs', Rahman found that the VCs' with limited power and jurisdiction settled disputes on marriage, divorce, property, monetary affairs and cattle trespass at minimum cost and trouble.[15] These two case studies dealt only with the general functioning of VCs'.

On the working of VCs' in four Union Parishad's Khan[16] found that, there was no clear answers regarding the issue of the constitution of VC, sending of reports by the UP's to the Thana Magistrates, maintenance of registers of cases, transfer of cases to the courts of Thana Magistrates. Therefore, it was assumed that i) the VC's functionaries are not serious about the working of the VC, ii) there is lack of interest on the part of higher authority, iii) lack of knowledge among the UP Chairmen and secretaries; and iv) complexity in the system.

Nevertheless, the functionaries however, stressed the need for continuation of the VC on the grounds that, people are not required to go to the court for petty disputes as VC settles these at minimum cost and

---

13. Solaiman, M: The Village Courts- A Case Study of Two Union Parisad's. Local Government Quarterly, Vol. 10, No. 1-2, (March-June, 1981). pp 31-42.
14. Ibid, pp31-42.
15. Rahman, Md. Moksudur: A Study of Two Village Courts. The Journal of Local Government. Vol. XIV, No. 2 (July-December, 1985). pp 174-188.
16. Khan, Md. Aftabuddin: Working of the Village Courts in Four Union Parishads in Bangladesh- A case Study. Seminar paper submitted to BPATC of Sixteenth Senior Staff Course. October 7-December 20, 1992.

trouble. The parties are known to the Chairmen and members which makes it easier to hold local inspection and solve their disputes. Moreover, the VC saves the people from harassment by the 'touts' and cost of legal practitioners.[17]

Moreover, Khan observes the reasons for the continuation of VC as felt by the respondents are numerous. For example, the people, particularly the poor get an opportunity to settle disputes at their door step, which saves them from journey and also huge expenditure. Moreover, the persons delivering judgement are known to them and are aware of their situation than any outsider in a formal court. Therefore, they are better equipped to decide a dispute on the basis of investigation. The VC settles disputes amicably or on conciliation which are pre-requisites to restore harmony and cohesion in the rural society and thereby maintain law and order in the rural areas.[18]

The observation in Madaripur of two VC and AC proceedings shows that AC and VC were not functioning or functioning in a non-formal way.[19] However, it was observed that when MLAA stepped in as facilitator these courts started functioning. This is the strength of MLAA and the general acceptance of MLAA in the area of justice delivery. MLAA is a service oriented organisation. MLAA has a social acceptability and sound image in the area of VC and has a considerable amount of committed workers in this field.

MLAA is providing vital services to the poor of Bangladesh by providing mediation, legal aid and assistance in reactivating and effective running of AC/VC and alternate dispute resolution (ADR) in rural areas of the local government level. This is essential for a systematic change and was felt that by concerted advocacy MLAA can make a substantial improvement to the justice system.

MLAA has 80 field workers for AC, 95 VC workers and 30 mediation workers. The chairmen are pretty dependant on the MLAA assistants. However, in VC/AC the court decorum is not maintained and ignorance about law make the chairman's role questionable in court and reflection of his judgement in court may have serious consequence. A parallel

17. Ibid, p25.
18. Ibid, p28-29.
19. Research carried by Ameen, Nusrat in the three districts of Madaripur, Shariatpur and Gopalgonj for MLAA in 2004.

system may cause confusion in the minds of the people at this stage. The people in general including the chairman has little credibility to differentiate between VC/AC/ADR.

Therefore, people's confidence has to be restored on the chairman for conducting the cases under VC/AC observed District Commissioner of Shariatpur. Here MLAA can play a role by bringing a change in the mindset of the people regarding the fair trial in the local body which would save them money. He said VC/AC can really help people of Shariatpur as they are poorer owing to flood each year than other districts. The DC also observed that MLAA is quite visible in this respect as they are helping to activate the concept of local justice. Nevertheless, the government should be more active to implement rather than depend on NGO assistance.

In some cases owing to the ignorance of the AC/VC cases are being instituted beyond jurisdiction. It was also observed in a court that the secretary of the UP was conducting the session in the absence of the chairman, which is a gross violation of law. In the absence of the chairman the law clearly states that a member of the UP appointed in a prescribed manner [under section 5(2) and rule12 of the Ordinance and Rules, 1976] should conduct the case. Moreover, where a case is filed for lack of legal knowledge beyond jurisdiction, it is too late to rectify the wrong.

Moreover, it was observed that mostly the court decorum is not followed. The chaos of the parties and the presence of members and relative of the parties place the VC/AC in an informal platform. It was observed in a VC that the application was not filed accordingly, the amount was not specified which has to be within 5000 Taka and no adequate information of the incident was mentioned. In one court there were two separate cases instituted by the husband and wife on the same issue. It was felt that the casual nature of shalish which had been followed for years is still being practised. Moreover, if the verdict is disobeyed, the Chairman sometimes refer it to the local NGO. Again this shows the incapacity of the Chairman regarding the legality of VC which specifically states the forum in case of non compliance.

Thus, owing to ignorance it is beyond the understanding of the Chairman that legal errors being committed. This is dangerous for the sustainability of VC. In the long run if legal procedures are not strictly adhered to, the whole institution will fall apart. Therefore, it is suggested that the chairman should be well versed regarding the issue and procedural laws and cases should be scrutinized before it is actually sent to the court. The functionaries should do qualitative and not only quantitative evaluation

of the work of AC/VC to ensure that cases have been chosen according to law and also that the procedure of the court have been followed according to law.

From the interviews of the District Judges it was found that the working of the VC is absolutely dependent on MLAA assistance. District Judge of Madaripur said that he is aware of MLAA's function of re-activating the VC which is successful but what about the other districts where it is not working? Joint District Judge is however, sceptical about VC and says that it cannot offer justice as most of the chairmen are politically biased.

In this regard, the study of VC in Kalirbazar, 1995 shows that, there was a decline in the cases which reflected the lack of interest by the Chairman and his members. Settlement of cases at the villages by the Chairman becomes important as it provides him and his members opportunities to demonstrate their capacity, efficiency and sense of justice which will be reflected in the next election. Thus, with the fall of Ershad government, in Barapara, 1990-91 saw not a single case filed in the court as the Chairman was disinterested for obvious reasons.[20]

However, regarding political bias, the reaction of the chairmen differed. Ten chairmen were interviewed. Shirajul Islam, chairman of Jhawdi, Madaripur, said that he sits twice a week in the VC/AC and also mediation. He feels that the decision of chairman has nothing to do with politics. He sits as a judge and if the party belongs to him, he logically makes them understand the situation. Moreover, if the verdict is impartial, the party in default also fears to raise any question as he would not be backed by the local people. Nevertheless, Islam said, in respect of popularity, if the chairman is doubtful about the outcome, he may send the case for mediation to NGO. Thus, it shows the ignorance of the Chairman about the legal implication of VC. If a case is within the jurisdiction of VC and is sent for mediation by the chairman- it shows the incapacity of the local body in the context of justice delivery. Moreover, this also shows that as there is a parallel system, the confusion is quite apparent.

Chairman of Ghatmajhi Union has rented a place where he regularly holds the AC/VC and mediation. In his opinion the personality and social status of the chairman is required to effectuate the verdict whether AC/VC or mediation. In Naria, chairman of Bhojeswar UP, sits once a

---

20. Quader, Md. Abdul: The Functioning of Village Courts in Bangladesh. Bangladesh Academy for Rural Development (BARD). Comilla. July 1995.

week. He said that before MLAA's initiative, the VC worked earlier without any documentation. This shows the ignorance of the chairman regarding the legality of VC.

The Chairman of Haridaspur, Md. Zahidur Rahman also sits for VC/AC every Friday. He is re-elected four times as Chairman. He thinks his involvement in the VC/AC and mediation has a direct link to his being re-elected. However, he also acknowledges the assistance of MLAA for bringing the clients to the court. It is not possible for him or his secretary to do this additional job. Haridaspur has a proper court room to conduct the AC and VC cases. Rahman feels that if verdict is neutral, it has a long term effect on the credibility of the office of the chairman.

In Patgathi UP the same observation was made regarding the dependency on MLAA. The chairman here also admitted that before the involvement of MLAA only few cases were entertained. However, after MLAA stepped in the cases have gone up to three times. It was observed that in Rajbari union the concept of VC was already existing but was not being done in a structured way. After the MLAA's initiation it is being done according to law.

Few female members of the UP were also interviewed. Some are found vocal and can voice their rights. They take part in the VC when the case is from their constituency. Sometimes they are ignored by some chairmen who are guided by patriarchal norms. But if it so happens, a few female members do question the chairman to account. These members also found that MLAA has made a difference in their pursuit as a member as they are aware of their rights through the trainings of MLAA and attending workshops and seminars.

All the chairman interviewed opted for the assistance of MLAA assistants. In their word they have the power to dispense justice through AC/VC but local body cannot perform it by themselves. When asked whether the secretary can help in this regard, all said that the secretary has other work. Thus it was found a double opinion amongst the chairman when they were asked, which do they prioritise – development or justice delivery? All said the justice! However, if that is so, then their word and action is contradictory. In the one hand they are keen to work the judicial process which by law is vested on them, on the other hand, in the absence of MLAA they cannot function it. It prompts that the local bodies are too dependent on NGO assistance. It is a vital impediment for successful working of VC/AC. Moreover, the chairmen's own submission on NGO's dependency calls for a question on independent working of the VC/AC.

Regarding the remedial and conciliatory nature of the verdict of the VC the functionaries feel that sometimes it does not serve the interest of the party affected. Because in most cases when a plaintiff files a case against an accused, he expects something more in his favour. At least some physical punishment or punishment in the form of financial loss like payment of fines by the accused is the minimum expectation of a plaintiff. This is obviously a limitation on the jurisdiction of the VC.[21]

Conclusion

In conclusion, it is noted that, the article shows the impact and importance of local justice; be it non-legal mediation by NGOs' or legally binding Arbitration Council or Village Court. The article clearly shows how the mediation by NGOs' become binding on parties who respect the local justice. Likewise, in discussing the impact of local justice through the AC and VC, it emphasises the need of these forums for dispensing justice to the door step of the village people. The need of Government of Bangladesh to reactivate the AC and VC is therefore imminent. GOB needs to play a role in the enforcement of VC verdict and policy. In the experience of the researcher it is seen that the summons are sent by MLAA assistants to most places. But again, the question regarding the rest of the districts where there is no NGO assistance remains unanswered. Moreover, the reluctance of chawkidar is clear and the reasons may also be related to the payment of their salary which is paid by union parishad and government by 50% each. The union parishad because of fund constraints seldom pay the 50%. Therefore, local government should be equipped to provide fund if VC is to function.

From the article it is also observed that for re-activating Village Court and Arbitration Council MLAA has proved its manifest commitment for upholding local justice. However, the question remains - ? How about the local justice in the whole of Bangladesh? Moreover, from the article it is also observed that NGOs' like MLAA and BLAST are providing mediation (ADR) to the poor and grass-root people. However, mediation cannot replace the courts and can never be considered as a substitute for the formal justice system. As the objective is to secure equal access to rule of law, mediation must serve as auxiliary to the formal justice system and should not be promoted as a substitute system for the poor and

21. Ibid, p 32.

marginalized who have an equal right to have access to the formal system.[22] Thus, it is time to look into the proper implementation of the already existing but non-operative system of local justice, that is the Village Court and the Arbitration Council. Therefore the following suggestions have been made:

1. The power of chawkidar should be re-introduced, so that it becomes easy to serve summons. As UP incurs additional expenses to run the VC, the UP should be allowed to impose fees, for example taka 100 for each case. From the sstudy it is observed that VC should be given power to sentence short term imprisonment. In order to implement such decree, there should be arrangement of 'Hajat' at the union level. To make VC effective and powerful, it is necessary to organise a security force at the union level.[23]
2. GOB should hold series of meetings, seminars with DC, UNO and chairmen/secretaries at the same platform to voice for the effective functioning of VC/AC. It should provide extensive training to the local bodies to make them aware of their duties to dispense justice at the door step of village people which is their legal right.
3. GOB should then hold meetings and seminars in the national level with like minded NGOs' and government bodies and provide training on local justice delivery.
4. Presently, there is a national forum of UP. The forum feels that secretaries have other job and are not accountable to the local people being a government employee. they are reluctant to function in the VC. NGOs' can make a difference by involving this forum in their advocacy towards the GOB for re-activating the VC. The accountability of the office of the chairman is mandatory to sustain the VC/AC. NGOs' should advocate for the accountability of chairman and secretary for the functioning of AC/VC by the GOB.
5. NGOs' ADR/AC/VC work is helping to create a culture of rights and through their programme to promote a system change. By linking its work and its policy NGO's can promote reform. The situation can be improved, if NGOs' like MLAA take reform within

---

22. Alternate Dispute Resolution: Community-based mediation as an auxiliary to formal justice in Bangladesh; the Madaripur Model of Mediation (MMM). Penal Reform International. Paris. November, 2003.
23. Ibid, p37.

and advocacy from outside. While state provision of AC/VC is critical, it is not a substitute for the independent advocacy done by any particular NGO or NGO's. In this respect NGOs' should be more organised in the local level through their advocacy. NGOs' should develop a broader formal network with each other for effective and sustainable change.

6. The pecuniary jurisdiction of the VC should be enhanced to 50,000 taka and amount of compensation from taka 5,000 to 20,000 taka to meet the present day context.
7. It is necessary to amend the ordinance according to the need of the day. There should be a specific legal procedure against disobedience of the verdict.
8. Most of all the government should hold the local government accountable for the working of VC and AC.

In conclusion it is noteworthy to say that by re-activating the Village Court and the Arbitration Council not only the rural people will benefit by amicable settlement of dispute locally, it will also empower them socially and economically. The Arbitration Council and the Village Court give opportunity to the people to locally settle their grievances without going to the formal court. This saves them from harassment, unnecessary economic expenditure and waste of time. The advice given by a country lawyer, Abe Lyncoln, in 1850, 145 years ago is worth mentioning,

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As peacemaker the lawyer has a superior opportunity of being a good person."[24]

24. Lincoln, Abraham: "Notes for A Law Lecture", July 1, 1850, from Bruce Bohle, The Home Book of American Quotations, Dodd, Mead, New York. 1967, 226.

The Dhaka University Studies, Part-F Vol. XVI (2) : 123—154, December 2005

THE CONCEPT OF 'BASIC STRUCTURE': A CONSTITUTIONAL PERSPECTIVE FROM BANGLADESH

Muhammad Ekramul Haque

Introduction

One of the important constitutional laws in Bangladesh is that its basic structure cannot be changed by the Parliament even it can not be done by referendum. The chief advantage of such a doctrine probably is to secure the Constitution, the solemn expression of the will of the people, from unwanted encroachment to be made by the legislatures exercising their arbitrary and capricious use of the strength of majority. But, though the Constitution of Bangladesh is an elaborate written Constitution which is also one of the largest constitutions in the world it does not contain any specific provision regarding its basic structure or does not say anything regarding unamendablity of its basic structure. It has been established only in 1989 in the famous milestone case of Anwar Hossain V. Bangladesh[1] popularly known as the 8th Amendment case. Thus, now the basic structure of our Constitution is set beyond the purview of the amending power and a new interpretation of Article 142 has also been given. The object of writing this article is to trace the history of basic structure and examining the concept of basic structure in the context of the constitutional law of Bangladesh. In doing so, obviously, much more emphasis has been given on the Constitution 8th Amendment case by frequently referring and quoting from it. Because, the 8th Amendment case is the only authority in Bangladesh that deals with the concept of basic structure and the judgment is so elaborate that includes so many references of cases, legal literatures and full with arguments. Thus, studying the concept of basic structure in Bangladesh necessarily also leads towards the study of the glorious 8th Amendment case.

Origin and development of the doctrine of basic structure

Before the 8th Amendment case in Bangladesh a lot of cases have been decided in India through which the doctrine of basic structure was established and developed further. But, in fact the origin of this doctrine

---

1. 1989 BLD (Spl) 1

in this sub-continent is found at first in a decision of the then 'Dacca High Court' in Md. Abdul Haque V. Fazlul Qader Chowdhury, PLD 1963 Dacca 669, as 'Dr. Kamal Hossain has emphasized that the doctrine of basic structure as applied by the Indian Supreme Court had originated from a decision of the then Dhaka High Court which was upheld in appeal by the Pakistan Supreme Court in the case of Fazlul Qader Chowdhury V. Abdul Huq, PLD 1963 SC 486=18 DLR SC 69.'[2] Shahabuddin Ahmed, J in the following words, summarized this case:

> The question raised in the case of Fazlul Qader Chowdhury related to interpretation of Art. 224(3) of the Constitution of 1962 and President's Order No. 34 of 1962 made there under. Under that Constitution is Presidential Form of Government was provided with a cabinet consisting of Ministers who should not be members of Parliament. Mr. Fazlul Qader Chowdhury was elected a member of the Parliament but he was appointed a member of the President's cabinet as well. Under Art. 224(3) of the Constitution the President was empowered for the purpose of removing any difficulties that may arise in bringing this Constitution into operation, to direct by an Order that the provisions of the Constitution shall have effect subject to "such adaptations, whether by way of modification, addition or omission, as he may deem necessary or expedient". The President made Order No.34 for removing the difficulties providing that a Minister of his Government might retain his seat in the Parliament. This Order was challenged by a writ petition before the High Court on the ground that the President's power to remove "difficulties" in launching the Constitution does not extend to amend the Constitution altering one of its basic structures—namely, no person shall be a Minister and a member of Parliament at the same time. This contention was upheld and the President's Order was struck down as ultra vires of the Constitution.[3]

Thus, it appears that ultimately in Fazlul Qader Chowdhury case the concept of basic structure was recognized. 'This decision was cited by the Indian Supreme Court in Sajjan Singh's case AIR 1965 SC p. 845 at p. 867 in support of the proposition that amending power could not be exercised to destroy the basic structure of the Constitution':[4]

---

2. Ibid., para 309.
3. Ibid., para 310.
4. Ibid., para 426.

> "If upon a literal interpretation of this provision an amendment even of the basic feature of the Constitution would be possible it will be a question of consideration as to how to harmonize the duty of allegiance to the Constitution with the power to make an amendment to it. Could the two be harmonized by excluding from the procedure for amendment, alteration of a basic feature of the Constitution? It would be of interest to mention that the Supreme Court of Pakistan has in Fazlul Qader Chowdhury V. Mohd. Abdul Haque, PLD 1963 SC 486 held that franchise and form of Government are fundamental features of a Constitution and the power conferred upon the President by the Constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution."

Let us now trace the development of this doctrine in the context of the Indian constitutional law where the doctrine of basic structure was recognized by the judiciary even before Bangladesh. In fact, in Kesavananda case[5] in 1973 this doctrine was recognized formally for the first time in India. But apart from this case there are also some pre-development of this doctrine through different cases. Again, after Kesavananda case this doctrine was applied further in some other cases. Seervai[6] discussed this entire development of the doctrine dividing it into four periods. I will prefer to discuss it dividing into the following three phases based on the Kesvananda case:

1. First phase: Pre-Kesavananda position
2. Second phase: Kesavananda case
3. Third phase: post Kesavananda case

First phase: Pre-Kesavananda position: At this phase though the doctrine of basic structure was not established as a concept, yet the ground was prepared to have this doctrine. This phase starts in 1951 with Sankari Parasad's Case[7] and comes to an end in 1967 with Golak Nath's Case[8]. Apart from these two cases the third case that will be considered here is Sajjan Singh's case.[9]

---

5. *Kesavananda Bharati V. State of Kerala,* AIR 1973 Sc 1461.
6. Seervai, H. M. *Constitutional Law of India,* 4th ed. Universal Book Traders, Delhi, 1996, vol.3; p. 3109.
7. *Sankari Prasad Singh Deo V. Union of India,* AIR 1951 SC 458.
8. *I.C. Golaknath V. State of Punjab,* AIR 1967 SC 1643.
9. *Sajjan Singh V. State of Rajasthan,* AIR 1965 SC 845.

In **Sankari Prasad Singh Deo V. Union of India**[10], 'the first case on amendability of the Constitution'[11], the validity of the Constitution (First Amendment) Act, 1951, curtailing the right to property, one of the fundamental rights guaranteed by the Constitution, was challenged. The Court in this case recognizes unlimited amending power and says that even the fundamental rights are not beyond the reach of this amending power. Jain sums up the Court's ultimate stand in the following words[12]:

> The court held that the terms of Art. 368 were perfectly general and empowered Parliament to amend the Constitution without any exception. The fundamental rights were not excluded or immunized from the process of constitutional amendment under Art. 368. These rights could not be invaded by legislative organs by means of laws and rules made in exercise of legislative powers, but they could certainly be curtailed, abridged or even nullified by alteration in the Constitution itself in exercise of the constituent power. The Court insisted that there was a clear demarcation between ordinary law, which was made in exercise of legislative power, and constitutional law, which was made in exercise of constituent power. ... the Court thus disagreed with the view that the fundamental rights were inviolable and beyond the reach of the process of constitutional amendment.[13]

Thus, in this case the amending power of the Constitution was considered as absolute which ultimately destroys the possibility of recognition of anything like basic structure of the Constitution to keep them beyond the purview of such amending power.

Later on in 1965 in **Sajjan Singh V. State of Rajasthan**[14], the Constitution (Seventeenth Amendment) Act, 1964 was challenged on the ground of curtailing fundamental rights. But the Supreme Court again rejected the contention altogether by a majority of 3:2following the decision of Sankari Prasad. Thus it was decided by the majority that the fundamental rights were not inviolable and beyond the reach of the constitution amending power. But, the two dissenting Judges in this case expressed their doubts that whether the parliament can really make the fundamental

---

10. AIR 1951 SC 458.
11. Jain M.P., *Indian Constitutional Law*, 4th edition reprint, Wadhwa and Company Law Publishers, Agra, Nagpur, India, 2002; p. 876.
12. Ibid., 877.
13. Ibid.
14. AIR 1965 SC 845.

rights as their 'play-thing'. Their concluding opinions have been summarized by Jain, M P in the following words:[15]

Hidayatullah and Mudholkar, JJ., however, in separate judgments, raised doubts whether Art. 13 would not control Art. 368. 'I would require stronger reasons than those given in Shankari Prasad'a case', observed Hidayatullah, J., 'to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of the States,' because, 'the Constitution gives so many assurances in Part III that it would be difficult to think that they were play-things of a special majority.' Mudholkar, J., felt reluctant 'to express a definite opinion on the question whether the word 'law' in Art. 13 (2) of the Constitution excludes an Act of Parliament amending the Constitution and also whether it is competent to parliament to make any amendment at all to Part III of the Constitution.' But Mudholkar, J.'s argument was set in a broader frame. His basic argument was that every constitution has certain fundamental features which could not be changed. As will be seen, Golak Nath was based on Hidayatullah J.'s argument of non-amendability of fundamental rights, but Kesavananda was based on Mudholkar J.'s view of basic features.

In 1967, again the same question of amendability of fundamental rights was raised before the Court in **I.C. Golaknath V. State of Punjab**[16]. The majority Judges in this case decided fundamental rights as inviolable and beyond the reach of the amending power but not on the ground of basic structure, rather the ground is that these are the fundamental rights. The minority view still decides in line with the Sankari Prasad. Their fear was that the Constitution would become static if no such power were conceded to Parliament.[17] However, 'to make the fundamental rights non-amendable, the majority refused to accept the thesis that there was any distinction between 'legislative' and 'constituent' process'[18] and decided amending power as merely legislative in nature. This was the crux of the whole argument.[19]

---

15. Supra note 11, p. 877.
16. AIR 1967 SC 1643.
17. Supra note 11, p. 879.
18. Ibid.
19. Ibid.

Golak Nath raised an acute controversy in the country; one school of thought applauded the majority decision as a vindication of the fundamental rights, while the other school criticized it as creating hindrances in the way of enactment of socio-economic legislation required to meet the needs of a developing society.[20]

Subsequent to this decision curtailing the power of the Parliament an initiative was taken to bring another amendment in the Constitution so as to increase the power of the Parliament removing the impact of Golak Nath case, but it failed. The effort taken by the them Parliament has been summed up by Jain in the following words:

> To neutralize the effect of Golak Nath, Nath Pai introduced a private member's bill in the Lok Sabha on April 7, 1967, for amending Art. 368 so as to make it explicit that any constitutional provision could be amended by following the procedure contained in Art. 368. The proposed bill was justified as an assertion of "Supremacy of Parliament" which principle implied 'the right and authority of Parliament to amend even the fundamental rights.' Nath Pai's bill did not however make such headway in Parliament. It was criticized as "an effort to the dignity of the Supreme Court" and as placing the fundamental rights at the "mercy of a transient majority in Parliament." There was also a feeling that the bill when enacted would itself be subject to a challenge in the courts and could be declared unconstitutional if the Supreme Court were to reiterate its Golak Nath ruling.[21]

This is true that Golak Nath case by declaring all fundamental rights generally as beyond reach of the amending power has been criticized by many including Seervai who termed the majority judgment as 'clearly wrong'.[22] However, apart from that criticism, this decision in fact paved the way to recognize the doctrine of basic structure in future as it has somehow restricted the amending power which is at the basis of basic structure theory. It is worth mentioning here that though the concept of basic structure was not discussed by the judges in this case as Seervai comments that 'In the result, there was no pronouncement by the majority in Golak Nath's Case on the doctrine of basic structure'[23] yet the

---

20. Ibid.
21. Ibid., p. 882.
22. Seervai, H. M. *Constitutional Law of India*, 4th ed. Universal Book Traders, Delhi, 1996, vol.3, at p. 3110.
23. Ibid., p.3136

phrase basic structure was introduced for the first time by the counsels while arguing for the petitioners in the Golaknath case as it was contended that 'The fundamental rights are a part of the basic structure of the Constitution and, therefore, the said power can be exercised only to preserve rather than destroy the essence of those rights'[24]. The counsels also explained the meaning of the term 'amendment' that restricts the amending power so as to accommodate the doctrine of basic structure. It was contended that 'the word 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed and it cannot be so construed as to enable the parliament to destroy the permanent character of the Constitution.'[25]

Second phase: Kesavananda case: This is the milestone phase in the sense that in this case of Kesavananda Bharati V. State of Kerala[26] for the first time the Indian Supreme Court recognized the doctrine of basic structure. It was decided by the majority that the Parliament's constituent power to amend the Constitution is subject to inherent limitations and the parliament cannot use its amending power so as to damage, emasculate, destroy, abrogate, change or alter the basic structure or framework of the Constitution.[27]

The reason of Kesavananda case arose in 1971 when the Parliament to undo the effect of Golak Nath case passed the Constitution 24th Amendment Act introducing some basic things that declares the amending power of the Constitution as 'constituent' to be found only in Art. 368 and that the Parliament can amend any part of the constitution, including the provisions regarding the fundamental rights. This Amendment was challenged in Kesavananda case where the majority recognized the power of parliament to amend any or all provisions of the Constitution provided such an amendment does not destroy its basic structure.

Jain M P properly compared Kesavananda Bharati case with the Golak Nath case terming Bharati case as an improvement over the formulation in Golak Nath case at least in the following three respects, which are, in his words:[28]

---

24. *I.C. Golaknath V. State of Punjab,* AIR 1967 SC 1643, at p. 1652.
25. Ibid., pp.1652-53.
26. AIR 1973 SC 1461.
27. Ibid.
28. Supra note 11, p. 884.

1. It has been stated earlier that there are several other parts of the Constitution which are as important, if not more, as the fundamental rights, but Golak Nath formulation did not cover these parts. This gap has been filled by Bharati by holding that all 'basic' features of the Constitution are non-amendable.
2. Golak nath made all fundamental rights as non-amendable. This was too rigid a formulation. Bharati introduces some flexibility in this respect. Not all fundamental rights are now to be non-amendable but only such of them as may be characterized as constituting the "basic" features of the Constitution. Theoretically, Kesavananda is therefore a more satisfactory formulation as regards the amendability of the Constitution than Golak Nath which gave primacy to only one part, and not to other parts, of the Constitution.
3. Bharati also answers the question left unanswered in Golak Nath, namely, can parliament, under Art. 368, rewrite the entire Constitution and bring in a new Constitution? The answer to the question is that Parliament can only do that which does not modify the basic features of the Constitution and not go beyond that.

However, the most important thing is that the Kesavananda Bharati case frustrated the intention of the Parliament passing the 24th Amendment to enjoy an absolute power to amend the Constitution, as the Supreme Court ultimately made this amending power subject to the basic structures of the Constitution.

Third phase: Post Kesavananda case: After the establishment of the doctrine of basic structure in Kesavananda case during this third phase in fact this decision has been reaffirmed in different cases. At this stage also the conflict between the judiciary and the Parliament becomes evident as the Parliament still tried to undo the impact of even Kesavananda case and in that battle the judiciary won finally.

The Kesavananda decision was first affirmed in Indira Nehru Gandhi V. Raj Narain[29] popularly known as Election case, where the election of Indira Gandhi was challenged on the ground of electoral malpractice, that reaffirms the concept of basic structure keeping it beyond the scope of amending power. In this case, even pending appeal before the Court the parliament passed a new Amendment to the Constitution (39th Amendment) to avoid any unfavourable decision of the Supreme Court, but finally the Parliament failed. The relevant events have been chronologically described by Venkatesh Nayak in the following words:[30]

---

29. AIR 1975 SC 2299.
30. http://www.humanrightsinitiative.org, last visited 01/5/06.

> A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds of electoral malpractice in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, parliament passed the Thirty-ninth amendment to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute.
>
> Amendments were also made to the representation of Peoples Acts of 1951 and 1974 and placed in the ninth Schedule along with the Election laws Amendment Act, 1975 in order to save the Prime Minister from embarrassment if the apex court delivered an unfavourable verdict. The *malafide* intention of the government was proved by the haste in which the thirty-ninth amendment was passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day.... It was gazetted on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney general asked the Court to throw out the case in the light of the new amendment.
>
> Counsel for Raj Narain who was the political opponent challenging Mrs. Gandhi's election argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. ... Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute.

Thus, the Supreme Court reaffirmed the concept of basic structure fighting with the parliament though the judges differed regarding what actually constitute basic structures.

Ray, C. J. then formed a bench to review the Kesavananda verdict with a view to change the decision but effort was failed. As Venkatesh Nayak compiles:[31]

---

31. Ibid.

> Within three days of the decision on the Election case ray, C. J. convened a thirteen judge bench to review the Kesavananda verdict. ...In effect the review bench was to decide whether or not the basic structure doctrine restricted Parliament's power to amend the Constitution. ...Meanwhile Prime Minister Indira Gandhi, in a speech in Parliament, refused to accept the dogma of basic structure (*Speech in Parliament- October 27, 1976: see Indira Gandhi: Selected Speeches and Writings, vol. 3, p. 288*).... N. N. Palkhivala appearing for on behalf of a coal mining company eloquently argued against the move to review the Kesavananda decision. Ultimately, Ray, C. J. dissolved the bench after two days of hearings. Many people have suspected the government's indirect involvement in this episode seeking to undo an unfavourable judicial precedent set by the Kesavananda decision. However no concerted effort were made to pursue the case.

Thus, another politically motivated judicial effort was failed to frustrate the Kesavananda judgment that establishes the concept of basic structure.

Then the government, surprisingly, took another initiative to undo Kesavananda case. In 1976, the Constitution Forty-second Amendment was passed that includes also the following provisions:

1. No amendment of this Constitution shall be called in question in any court on any ground.
2. For removal of doubts it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this constitution under this Article.

The background of passing this new 42nd Amendment has been summed up by Jain in the following words:

> The government did not relish the Supreme Court's pronouncement in the *Indira Nehru Gandhi* case declaring Cl. 4 of the Thirty-ninth amendment invalid and it very much desired to ensure that never in future the courts should have the power to pronounce a constitutional amendment invalid. Accordingly, Art. 368 was again amended by the Forty-second Amendment enacted in 1976. a major argument advanced by the Law Minister in favour of such an amendment was that the supremacy of the parliament must be asserted in the area of constitutional amendment, and that a constitutional amendment should be taken out of judicial purview. Many adverse comments were made by him in the Houses of Parliament during the course of discussion on the Amendment Bill on the Supreme Court pronouncements in Golak Nath and Bharati.

> The doctrine laid down by the Supreme Court in Kesavananda Bharati that Parliament in the exercise of its constituent power could not amend the basic features of the Constitution was much criticized. It was asserted by him that there was no basic feature of the Constitution which Parliament as the constituent power could not amend. ...In justification of the new amendments to Art. 368, the Law Minister had claimed that—(i) there was no basic feature of the Constitution which needed to be protected from amendment; and (ii) the supremacy of Parliament ought to be established in the area of constitutional amendment.[32]

Thus, the arguments made by the Law Minister in favour of the 42nd Amendment really seem to be highly astounding. Anyway, this Amendment was challenged in **Minerva Mills Ltd. V. Union of India**[33] and 'the Supreme Court again reiterated the doctrine that under Art. 368, Parliament cannot so amend the Constitution as to damage the basic or essential features of the Constitution and destroy its basic structure.'[34] It was also decided that the power of Parliament to amend the Constitution is a limited power, Parliament can not give to itself unlimited power of amendment and the limited power of amendment is also a basic feature of the Constitution.

The same proposition that Parliament does not have an absolute power to amend the Constitution so as to destroy its basic structure was again reaffirmed and applied by the Supreme Court in **Waman Rao V. Union of India.**[35] Basic structure as a concept was also recognized in **A. K. Roy V. India.**[36]

Amending power and the basic structure of the Constitution

The Constitution does not contain any direct provision regarding the basic structure. So, how can it be deduced from the Constitution? Since the theory of basic structure ultimately restricts the absolute amending power, so the issue of the amending power of the Constitution conferred by it is of great importance in making any discussion about basic structure. Obviously, if there would have been any clear provision in the

---

32. Supra note 11, p. 887-8.
33. AIR 1980 SC 1789.
34. Supra note 11, p. 889.
35. AIR 1981 SC 271.
36. AIR 1982 SC 710.

Constitution identifying them as the basic structure and a special provision also would have been there keeping them beyond the reach of amendment, then no such requirement would arise. Thus, in the absence of any clear constitutional provision, in fact, the existence of basic structure is dependant on the nature of the amending power of the Constitution. If the amending power can be exercised absolutely irrespective of the basic structure then nothing remains there as basic structure beyond the reach of amendment. So, to determine the existence of certain provisions as basic structure keeping beyond the reach of amendment procedure is only possible if the nature of the amending power permits it.

Article 142 says:

1. "Notwithstanding anything contained in this Constitution—

   (a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament:

   Provided that—

   i. no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;

   ii. no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament;

   (b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period. (1A) Notwithstanding anything contained in clause (1), when a Bill, passed as aforesaid, which provides for the amendment of the Preamble of any provisions of articles 8, 48 or 56 or this article, is presented to the President for assent, the President, shall, within the period of seven days after the bill is presented to him, cause to be referred to a referendum the question whether the Bill should or should not be assented to.

   (1B) A referendum under this article shall be conducted by the Election Commission, within such period and in such manner as may be provided by law, amongst the persons enrolled on the electoral roll prepared for the purpose of election to Parliament.

   (1C) On the day on which the result of the referendum conducted in relation to a Bill under this article is declared, the President shall be deemed to have—

a) assented to the Bill, if the majority of the total votes cast are in favour of the Bill being assented to; or

b) withheld assent therefrom, if the majority of total votes cast are in favour of the Bill being assented to.

(1D) Nothing in clause (1C) shall be deemed to be an expression of confidence or no-confidence in the cabinet or parliament.

2. Nothing in article 26 shall apply to any amendment made under this article."

Thus, briefly speaking, above article formulates basically two different modes of amendment of the Constitution:

1. *General process:* By the votes of at least two-thirds of the total number of members of Parliament. Following this process any provision of the Constitution may be amended except its preamble and articles 8, 48, 56 or 142.

2. *Special process:* To amend the Preamble, article 8, 48, 56 or 142, votes of at least two-thirds of the total number of members of Parliament and a referendum also will be required.

Apparently the amending power seems to be an absolute power so as to amend any provision of the Constitution since it says 'notwithstanding anything contained in this Constitution—any provision thereof may be amended'.[37] But there are also many other interpretations of this Article 142. According to those other interpretations this amending power is not an absolute one. The concept of basic structure in fact imposes some restrictions on such amending power.

Meaning and nature of the amending power of the Constitution

B.H. Chowdhury, J commented that 'the power to frame a Constitution is a primary power whereas a power to amend a rigid constitution is a derivative power derived from the constitution'.[38] Thus the amending power is secondary in nature in comparison with the constituent power. So, if this interpretation is accepted then it appears that by exercising the power of amendment everything which could be done by constituent power that can not be done. In other words, there must have a difference between primary power and secondary power and then the basic structure is based on that difference. Shahabuddin Ahmed J also expressed the same view that the "constituent power" belongs to the people alone. Even if the "constituent power" is vested in the Parliament the power is

37. Article 142 of the Constitution of the People's Republic of Bangladesh.

38. *Anwar Hossain V. Bangladesh,* 1989 BLD (Spl) 1, at 83.

derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge.[39] He says that the word "amendment" is a change or alteration, for the purpose of bringing in improvement in the statute to make it more effective and meaningful, but it does not mean its abrogation or destruction or a change resulting in the loss of its original identity and character.[40] The term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed.[41] Though A.T. M. Afzal, J, the dissenting Judge in the 8th Amendment case, says that 'The power to amend any provisions of the Constitution by way of addition, alteration, substitution or repeal is found to be plenary and unlimited except as provided in article 142 itself',[42] but ultimately he favours the opinion regarding the existence of basic structure, as he says that 'There is, however, a built-in limitation in the word "amend" which does not authorize the abrogation or destruction of the constitution or any of its there structural pillars which will render the Constitution defunct or unworkable.'[43] Thus, he dissented with the majority judgment on a different ground that the said amendment does not violate the basic structure, not on the ground of non-existence of basic structure or that the amending power is absolute. As he says that 'The impugned amendment of article 100 has neither destroyed the Supreme Court/High Court Division as envisaged in the Constitution nor affected its jurisdiction and power in a manner so as to render the Constitution unworkable.'[44] It seems that this dissenting Judge has accepted basic structure in a very limited sense and not in the sense the others have taken it. However, throughout the judgment he opposed the existence of basic structure from various angles.

Among the learned counsels for the appellants Dr. Kamal Hossain (with reference to Mridha's case, 25 DLR 335 at p.344 on structural pillars) argues that 'the amending power is a power within and under the Constitution and not a power beyond or above the Constitution.[45] It does not empower Parliament to undermine or destroy any fundamental

---

39. Ibid. para 342
40. Ibid. para 336
41. Ibid., para 192, *per* B. H. Chowdhury, J.
42. Ibid. para 635
43. Ibid.
44. Ibid.
45. Supra note 38, p.23.

feature or 'structural pillar' of the Constitution.[46] He explains it further in the following words:

> The amending power under Art. 142 is a power under the Constitution and not above and beyond the Constitution and is not an unlimited power. Any power of amendment under Constitution is subject to limitations inherent in the Constitution. The structural pillars or basic structure of the Constitution established by framers of the Constitution cannot be altered by the simple exercise of amending power. The contention that Parliament has unlimited power of amendment is inconsistent with the concept of supremacy of the Constitution which is expressly embodied in the Preamble and Art. 7 and is undoubtedly a fundamental feature of the Constitution. (Ref: Marbury V. Madison, 2 L.Ed. 5-8; Cahn: Supreme Court and Supreme Law (1954) p.18).[47]

Mr. Asrarul Hossain, another counsel, argued :

> The Parliament is a creature of the Constitution and it cannot have unlimited power. Its power of amendment is one within and under the Constitution. Even in the case of unwritten constitution like the British Constitution, the Parliament is not omnipotent and it has its limitations.... The power to amend 'any provision' in Art. 142 does not include the power to replace or destroy the Constitution and in exercise of that power the basic structures of the Constitution cannot be altered or damaged.[48]

The learned Attorney General in the 8th Amendment case has termed the amending power under Article 142 as "constituent power"[49] which has been ultimately rejected by the majority view of the Judges in this case.

Scope and extent of the amending power: About the scope of amending power B.H. Chowdhury, J has made the following points:[50]

1. This derivative power is subject to limitations.[51]

---

46. Ibid.
47. bid. P.27.
48. Supra note 38, Summary of submissions, p.42.
49. Ibid., para 270.
50. Ibid.
51. Ibid. para 145

2. Laws and the amendment of a rigid constitution will be ultra vires if they contravene the limitations put on the law making or amending power by the Constitution, for the Constitution is the touchstone of validity of the exercise of the powers conferred by it.[52]
3. The term "amendment" implies such an addition or change within the line of the original instrument as will effect an improvement or better carry out the purpose for which it was framed.[53]
4. Call it by any name—basic feature or whatever but that is the fabric of the Constitution which can not be dismantled by an authority created by the Constitution itself, namely, the Parliament.[54]

Shahabuddin Ahmed, J has made the following comment regarding the scope and extent of the amending power:

> Amendment is subject to the retention of the basic structures.[55] By amending the Constitution the Republic can not be replaced by monarchy, democracy by oligarchy or the Judiciary can not be abolished, although there is no express bar to the amending power given in the Constitution.[56]

Original Article 142 of our Constitution says that the Constitution 'may be amended or repealed by an Act of Parliament'. But it was amended in 1973 to qualify the term amendment by the terms 'by way of addition, alteration, substitution'. It may create a confusion that this amended Article has widened the scope of amending power adding the said explanation and the same has made it unlimited. But Shahabuddin Ahmed, J has removed this confusion saying that this amended Article 142 only indicates to the different kinds of amendment.[57] Syed Ishtiaq Ahmed, the learned counsel, in his submission argued that 'Expressions like addition, alteration, substitution or repeal are merely modes of amendment and do not increase the width of the power of amendment.'[58] Shahabuddin Ahmed, has distinguished between Constitution and its amendment in the following words:

> There is... a substantial difference between Constitution and its amendment. Before the amendment becomes a part of the

---

52. Ibid.
53. Ibid. para 192
54. Ibid. para 195
55. Ibid. para 378
56. Ibid. para 377
57. Ibid. para 338
58. Ibid., p. 31.

> Constitution it shall have to pass through some test, because it is not created by the people through a Constituent Assembly. Test is that the amendment has been made after strictly complying with the mandatory procedural requirements, that it has not been brought about by practicing any deception or fraud upon statutes and that it is not so repugnant to the existing provision of the Constitution, that its co-existence therewith will render the Constitution unworkable, and that, if the doctrine of bar to change of basic structure is accepted, the amendment has not destroyed any basic structure of the Constitution.[59]

However, the only dissenting Judge in the 8th Amendment case, A. T. M. Afzal, J does not think that there are some provisions in the Constitution which are kept beyond the reach of amending power. He says—

> It will be seen, in the first place, that there is no substantive limitation on the power of the Parliament to amend any provision of the Constitution as may be found under Art. V of the Constitution of the USA... The limitation which is provided in Art. 142 related only to procedure for amendment and not substantive in the sense that no article is beyond the purview of amendment.[60]
>
> Sub-art. (1) shows that any provision of the Constitution may be amended by way of addition, alteration, substitution or repeal by Act of Parliament. Any provision evidently includes all provisions. The language is clear and suffers from no ambiguity. Any provision could not mean some provision. This clear language amply indicates the wide sweep and plenitude of power of the Parliament to amend any provision of the Constitution. It is difficult, therefore, to conceive, as contended by the appellants, that there are some provisions called "basic" which are not amenable to the amendatory process... it is significant that the Article opens with a non-obstante clause. Non-obstante clause is usually used in a provision to indicate that, that provision should prevail despite anything to the contrary in the provision mentioned in such non-obstante clause... In the presence of such a clause in Art. 142, it is difficult to sustain the contention of the appellants that some provision containing basic features are unamendable or that the amendment of any provision has to stand the test of validity under Art. 7.[61]

---

59. Ibid. para 341
60. Ibid. para 529
61. Ibid. para 534, 535.

But the learned Attorney General, M. Nurullah, in the 8th Amendment case rejects the idea of basic structure and portrayed the amending power under article 142 as unlimited. He in fact has relied on the plain and simple meaning of this article 142 instead of deducing any principle from there.[62] He argued 'that Parliament's amending power is unlimited, unrestricted and absolute and it is capable of reaching any Article of the Constitution excepting the Articles specified in clause (1A) of Art. 142, which provides for a referendum for amendment'.[63]

Syed Ishtiaq Ahmed argued before the Court that 'Amendment of any provision of the Constitution is the power to bring about changes to make the Constitution more complete, perfect or effective, and repeal is different from amendment.'[64] He continues:

> This power is given to the Parliament under the Constitution, and is not a power beyond or above the Constitution. Parliament itself is a creature of the Constitution and is merely donee of this limited power which cannot be exercised to alter the basic structure of the Constitution.... Treating amending power as constituent power so as to grant unlimited power of amendment to Parliament except for the express limitation of Art. 142(1A) is to displace the carefully implanted supremacy of the Constitution by supremacy of Parliament.... Concept of unlimited amending power is opposed to Art. 7.[65]

An examination of the objections against the doctrine of basic structure

There are many objections against the doctrine of basic structure that were raised in the Constitution 8th Amendment case; some of them are discussed with their replies.

1. When Constitution makers have imposed no limitation on the amending power of Parliament, the power cannot be limited by some vague doctrines of repugnancy to the natural and unalienable rights and the preamble and state policy.[66] The argument that Parliament cannot change the basic structure of the Constitution is untenable.[67]

---

62. Ibid. para 163
63. Ibid. para 270.
64. Ibid., p.30.
65. Ibid.
66. Ibid. para 163, submission of the Attorney General.
67. Ibid.

Shahabuddin, J rejects the claim of 'vague doctrines' altogether saying that the 'main objection to the doctrine of basic structure is that it is uncertain in nature and is based on unfounded fear. But in reality basic structures of the Constitution are clearly identifiable.'[68]

Badrul Haider Chowdhury, J also refutes the contention made by the Attorney general terming it as a 'clear wrong'. In his words:

> The Attorney General is clearly wrong. This is not the case of "vague doctrines of repugnancy". Article 142(1A) itself says that the Preamble amongst other can only be amended when in referendum the majority votes for it otherwise the Bill though passed by the Parliament does not become law. Here is the limitation on legislative competence.[69]

2. The Attorney general argued that the amending power is a constituent power.[70] It is not a legislative power and therefore the Parliament has unlimited power to amend the Constitution invoking its constituent power.[71]

   Badrul Haider Chowdhury, J made the following points in giving reply to this contention made by the Attorney General:[72]

   i. The argument is not tenable. He argued this point keeping an eye on Article 368 of the Constitution of India which says that " Parliament may in exercise of its constituent power amend". Our Constitution does not have any such provision.

   ii. Our Constitution is not only a controlled one but the limitation on legislative capacity of the Parliament is enshrined in such a way that a removal of any plank will bring down the structure itself.

   iii. The constituent power is here with the people of Bangladesh. If Article 26 and article 7 are read together the position will be clear.

   iv. The contention of the Attorney general on the non-obstante clause in Article 142 is bereft of any substance because that clause merely confers enabling power for amendment but by interpretive decision that clause can not be given the status for swallowing up the constitutional fabric.

---

68. Ibid. para 377
69. Ibid. para 164
70. Ibid. para 165
71. Ibid.
72. Ibid. para 167.

3. Rigidity in the amendment process as it is today if made more rigid by implied limitation, will leave no scope for peaceful change and this may lead to change by violent and unconstitutional means, such as, revolution.[73]

Shahabuddin Ahmed opposed this argument on the ground that absence of basic structure cannot guard against revolution. He observes:

> I would not very much appreciate this argument for, now a days, there is hardly any revolution in the sense of French or Russian revolution for radical change of the socio economic structure. What is spoken of as revolution in the third world countries is the mere seizure of state power by any means fair foul. If a real revolution comes, it cannot be prevented by a Constitution however flexible it might be.[74]

4. The Constitution has undergone so many radical changes... that the doctrine of basic structure merely evokes an amazement why if it is such an important principle of law.... It was not invoked earlier in this Court.[75]

M. H. Rahman says that 'Because the principle was not invoked earlier in the past the Court cannot be precluded from considering it'.[76]

Shahabuddin Ahmed, J said that the 'trump-card of the learned Atty. Gen. is that some of the past amendments of the Constitution destroyed its basic structures and disrupted it on several occasions'.[77] Then he starts giving a long reply to this contention citing different changes in the constitution in the following words:

> It is true that such mishaps did take place in the past. The Constitution Fourth Amendment Act, dated 25 January 1975, changed the Constitution beyond recognition in many respects and in place of democratic Parliamentary form of Government on the basis of multiple party system a Presidential form of Government authoritarian in character on the basis of a single party was brought about overnight thereby. Fundamental rights to form free association was denied, all political parties except the Government party were banned and members of Parliament who did not join this Party lost their seats though

---

73. Ibid. para 346, submission of the Attorney General.
74. Ibid., para 346.
75. Ibid., para 442.
76. Ibid., para 442.
77. Ibid., para 330.

> they were elected by the people. Freedom of the press was drastically curtailed; independence of the Judiciary was curbed by making the Judges liable to removal at the wish of the chief Executive; appointment, control and discipline of the subordinate Judiciary along with Supreme Court's power of superintendence and control of subordinate courts were taken away from the Supreme Court and vested in the Government. The change was so drastic and sudden, Friends were bewildered, Enemies of the Liberation had their revenge and the Critics said with glee that it is all the same whether damage to democracy is caused by democratically elected persons or by undemocratic means like military coup.[78]
>
> Within a short time came the first martial Law which lasted for four years. By Martial Law Proclamation Orders the Constitution was badly mauled on 10 times.... All these structural changes were incorporated in and ratified, as the Constitution fifth Amendment Act, 1979.[79]
>
> In spite of all these vital changes from 1975 by destroying some of the basic structures of the Constitution, nobody challenged them in court after revival of the Constitution; consequently, they were accepted by the people, and by their acquiescence have become part of the Constitution.[80]

Thus, Shahabuddin Ahmed, J concluded negativing the contention made by the Attorney General saying that 'The fact that basic structures of the Constitution were changed in the past, cannot be, and is not, accepted as a valid ground to answer the challenge to future amendments of this nature, that is, the impugned amendment may be challenged on the ground that it has altered the basic structure of the Constitution.'[81]

5. In the absence of a full catalogue of these basic structures neither the citizens nor the Parliament will know what is the limit of the power of amendment of the Constitution.[82]

Shahabuddin Ahmed, J has rightly rejected this contention made by the Attorney general saying that 'There are many concepts which are not capable of precise definition, nevertheless they exist and play important part in law'.[83]

---

78. Ibid., para 330.
79. Ibid., para 331.
80. Ibid., para 332
81. Ibid.
82. Ibid., para 328, argued by the Attorney General.
83. Ibid., para 329.

However, the dissenting Judge in the 8th Amendment case, raised the following objections against the concept of "basic features":

1. It is inconceivable that the makers of the Constitution had decided on all matters for all people of all ages without leaving any option to the future generation.[84]
2. If it is right that they (framers of the Constitution) wanted the so-called "basic features" to be permanent features of the Constitution there was nothing to prevent them from making such a provision in the Constitution itself.[85]
3. The makers placed no limitation whatsoever in the matter of amendment of the Constitution except providing for some special procedure in Art. 142. Further after the incorporation of sub-art. (1A) providing for a more difficult procedure of referendum in case of amendment of the provisions mentioned therein, the contention as to further 'essential features' becomes all the more difficult to accept.[86]
4. All the provisions of the Constitution are essential and no distinction can be made between essential and non-essential feature from the point of view of amendment unless the makers of the Constitution make it expressly clear in the Constitution itself.[87]
5. If the positive power of amendment of the Constitution in Art. 142 is restricted by raising the wall of essential feature, the clear intention of the Constitution makers will be nullified and that would lead to destruction of the Constitution by paving the way for extra-constitutional or revolutionary changes.[88]
6. The limitation which is provided in art. 142 relates only to procedure for amendment and not substantive in the sense that no article beyond the purview of amendment.[89]
7. It is significant that the article (142 of the Constitution of Bangladesh) opens with a Non-obstante Clause. A Non Obstante Clause is usually used in a provision to indicate that, that provision should prevail despite anything to the contrary in the provision mentioned

---

84. Ibid., para 536
85. Ibid.
86. Ibid.
87. Ibid., para 537
88. Ibid.
89. Ibid., para 530.

in such Non Obstante Clause... In the presence of such a clause in art. 142, it is difficult to sustain the contention of the appellants that some provision containing 'basic features' are unamendable or that the amendment of any provision has to stand the test of validity under art. 7.[90]

8. In our context the doctrine of basic features has indigenous and special difficulties for acceptance. The question naturally will arise "basic features" in relation to which period? What were or could be considered to be 'basic' to our Constitution on its promulgation on 16th December 1972, a reference to the various amendments made up to the (Eighth) Amendment Act will show that they have ceased to be basic any more. The 'basic features' have been varied in such abandon and with such quick succession that the credibility in the viability of the theory of fundamentality is bound to erode. Few examples, will be sufficient. There has been repeated reference to art. 44 by all the learned Counsels saying that this article providing for guarantee to move the High court Division for enforcement of fundamental rights is one of the cornerstones of our Constitution. It is well-known that this article was completely substituted by the Fourth Amendment Act (Act 11 of 1975) excluding the Supreme Court entirely. It somewhat ironical that the article has come back to the Constitution by a Proclamation Order. (Second Proclamation Order No. IV of 1976). It has been claimed that art 94 is another cornerstone providing for an integrated Supreme Court with two Divisions. We have the experience of abandoning this Supreme Court and establishing altogether two different Courts, the Supreme Court and the High Court in a unitary state (see Second Proclamation Order no. IV of 1976). And this was again done away with and the Supreme Court as before was restored by the Second Proclamation Order No. 1 of 1977.[91]

9. The changes made in the basic features within a span of 17 years have been too many and too fundamental and it is not necessary to refer to all of them nor is it my purpose to find fault with any amendment or anybody or any regime for the amendments made in the Constitution... I have only endeavoured to show how the organic document, such as a Constitution of the Government is, has developed and grown in our context in fulfillment of the hopes and aspirations of our people during this brief period of 17 years. In view

---

90. Ibid., para 535.

91. Ibid., para 551.

> of the experience as noticed above, any doctrinaire approach as to 'basic features', in my opinion, will amount to turning a blind eye to our constitutional evolution and further will not be in the interest of the country. I shall give one example. To-day a basic feature in our constitution is the Presidential form of government. We can take judicial notice that there is a demand by some political parties to restore Parliamentary for of Government as it originally obtained. Why should a road block be created by the Court, if people choose to send the members of those political parties to the Parliament, against amending the Constitution providing for Parliamentary system?[92]

Sources of the concept of the basic structure

It is true that the Constitution of Bangladesh does not contain any direct provision regarding the existence of basic structure or even does not restrict the amending power of the Constitution expressly, then from where has this principle been deduced? M. H: Rahman, J terms the doctrine of basic structure as 'one growing point in the constitutional jurisprudence'.[93] He adds further –

It has developed in a climate where the executive, commanding an overwhelming majority in the legislature, gets snap amendments of the Constitution passed without a Green Paper or White Paper, without eliciting any public opinion, without sending the Bill to any Select Committee and without giving sufficient time to the members of the Parliament for deliberation on the Bill for amendment.[94]

Then he terming this doctrine as 'a new one' says that this is in fact an extension of the principle of judicial review.[95] Thus, this interpretation has added a new dimension to the basic structure theory to prove its existence through an easier way. That the Court had already the power to set aside the unconstitutional laws and actions, and the doctrine of basic structure theory just gives an extended power in the hands of the judiciary to give special protection to constitutional basic structures. Thus, he tried to portray that this concept is not new in the sense of totally innovative idea, rather it has been emerged as a new extended interpretation from an existing principle. '...it may take some time before

---

92. Ibid., para 553.
93. Ibid., para 435.
94. Ibid.
95. Ibid. para 438.

the doctrine of basic structure gets acceptance from the superior courts of the countries where constitutionalism is prevailing.'[96]

Inherent in the Constitution: Implied limitation on the amending power is 'deducible from the entire scheme of the Constitution.'[97] In fact, limitation on the amending power will justify the existence of non-amendable basic structures. Shahabuddin Ahmed J explains further in the following words that such limitation exists in the Constitution itself:

"There is no dispute that the Constitution stand on certain fundamental principles which are its structural pillars and if those pillars are demolished or damaged the whole constitutional edifice will fall down. It is by construing the constitutional provisions that these pillars are to be identified. Implied limitation on the amending power is also to be gathered from the Constitution itself including its Preamble...."[98]

Badrul Haider Chowdhury, J thinks that the basic structure can be deduced from the constitutional scheme, if followed carefully. As he says:

Now, some features are basic features of the Constitution and they are not amendable by the amending power of the Parliament. In the scheme of Article 7 and therefore of the Constitution the structural pillars of Parliament and Judiciary are basic and fundamental. It is inconceivable that by its amending power the Parliament can deprive itself wholly or partly of the plenary legislative power over the entire Republic... the constitutional scheme if followed carefully reveals that these basic features are unamendable and unalterable.[99]

Inherent in the term amendment: The meaning of the term amendment itself shows that it has some limitations and not absolute in its operation. Shahabuddin, J rightly commented that "As to implied limitation on the amending power it is inherent in the word 'amendment' in Art. 142".[100] Even the dissenting Judge in the 8th Amendment case, A. T. M. Afzal, J said that 'there is a limitation inherent in the word "amend" or "amendment" which may be said to be a built-in limitation'.[101]

---

96. Ibid. para 439.
97. Ibid., *per* Shahabuddin Ahmed, J, para 278.
98. Ibid. para 376
99. Ibid. para 255-56.
100. Ibid. para 378
101. Ibid. para 562

However, the Honourable Judges as well as the learned counsels in the Constitution 8th Amendment case have cited extracts from many legal literatures in support of the existence of basic structure, some of them are quoted below:

Shahabuddin Ahmed, J makes the following citations—

I shall also keep in mind the following observation of Conrad in "Limitation of Amendment Procedure and the Constitutional power"— "Any amending body organized within the statutory scheme, however verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority". He has further stated that the amending body may effect changes in detail, adopt the system to the changing condition but "should not touch its foundation". Similar views have been expressed by Carl J. Friedman in "Man and his Govt.", Crawford in his 'Construction of Statutes' and Cooley in his 'Constitutional Limitation'.[102]

Dr. Kamal Hossain in his submission quoted:

Power to amend does not extend to destroying the Constitution in any of its structural pillars or basic structure (Ref: Murphy: Constitutions, Constitutionalism and Democracy; Baxi: "Some reflections on the nature of constituent power" in Indian Constitution: Trends and Issues (1978), pp. 123-24).[103]

What are the basic structures of the Constitution of Bangladesh?

Though it has been decided by 3:1 majority in the 8th Amendment case that the Constitution of Bangladesh has the basic structure which is beyond the purview of the amending power of the Constitution, yet there is no unanimous opinion regarding the number of basic features. The Judges differ on the point of identification of the basic structures of the Constitution of Bangladesh.

Badrul Haider Chowdhury, J gave the following clear and long list of 'unique features' which are 21 in number:[104]

1. It is an autochthonous constitution because it refers to the sacrifice of the people in the war of national independence after having proclaimed independence.

---

102. Ibid., para 376.
103. Ibid., Summary of submissions, p.27.
104. Ibid., para 254

2. The Preamble: It postulates that it is our sacred duty to safeguard, protect, and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh.
3. Fundamental aim of the State is to realise through democratic process a society in which the rule of law, fundamental human rights and freedom, equality, and justice will be secured.
4. Bangladesh is a unitary, independent, sovereign Republic.
5. All powers in the Republic belong to the people. The Constitution is the supreme law of the Republic and if any other law is inconsistent with the Constitution that other law shall be void to the extent of inconsistency. Such article e.g. Article 7 cannot be found in any other Constitution.
6. Article 8 lays down the fundamental principles to the Government of Bangladesh. This article is protected like the Preamble and can only be amended by referendum.
7. Article 44 figures as a fundamental right and sub-article (2) says without prejudice to the powers of the High Court Division under Article 102 Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers; ...
8. Article 48. The President shall be elected by direct election. This is also a protected Article which can only be amended by referendum.
9. The President shall appoint as prime Minister who commands the support of the majority of the members of Parliament. This Article 58 is also protected and can be amended by referendum. This presupposes the existence of parliament within the meaning of Article 65.
10. There shall be Supreme Court for Bangladesh to be known as the supreme Court of Bangladesh comprising the Appellate Division and High Court Division (Article 94). This is given by the Constitution which the people of Bangladesh "do hereby adopt, enact and give to ourselves this Constitution".
11. This Constitution has erected three structural pillars e.g., Executive, Legislature, and Judiciary—all these organs are creatures of the Constitution. None can compete with the other.
12. Judges shall be independent in the exercise of their judicial functions (Article 94(4) and 116A).

13. In case of necessity a Judge of the High Court Division can sit as ad-hoc Judge in the Appellate Division-that shows to the oneness of the Court itself. (Article 98).
14. If any question of law of public importance arises the President can refer the question to the Appellate Division although it is the opinion of the Supreme Court (Article 106).
15. In the absence of the Chief Justice the next most Senior Judge of the appellate Division may perform those functions if approved by the president. Such clause cannot be found in any other Constitution. It thus safeguards the independence of judiciary (Article 97) (See Art. 126 and 223of Indian Constitution).
16. The plenary judicial power of the Republic is vested in and exercised by the High Court Division of the Supreme Court (Articles 101, 102, 109 and 110) subject to few limitation e.g. in Article 47, 47A, 78, 81(3) and 125.
17. The power of superintendence of subordinate Courts is exercised by the High Court Division and these courts are subordinate to the Supreme Court (Article 114).
18. If a point of general public importance is involved in a case pending before a subordinate court the High Court Division has the power to transfer the case to itself. This is unique feature of the Constitution because this power is not available to any High Court either in India or in Pakistan. Nor such power was available under the Government of India Act, 1935.
19. The plenary judicial power of the republic is not confined within the territories of the Republic but extends to the functionaries and instrumentalities of the Republic beyond the Republic. See Article 102.
20. The declaration and pledges in the preamble have been enacted substantively in Article 7 and 8. while Preamble and Article 8 have been made unamendable, necessarily Article 7 remains as unalterable.
21. Judges cannot be removed except in accordance with provisions of Article 96-that is the Supreme Judicial Council. Sub-article (5) says if after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable to properly performing the functions of his office or has been guilty of gross misconduct, the President shall, by order remove the Judge from office. This is unique feature because the Judge is tried by his own

peers, 'thus there is secured a freedom from political control' (1965 A.C. 190).

It has been erroneously thought by some that he identified above 21 as basic structure. The fact is that he says that some of those features are basic features which are unamendable. After giving the list of 21 he says in the next paragraph clearly that 'some of the aforesaid features are the basic features of the Constitution and they are not amendable by the amending power of the Parliament.'[105] What are those 'some' which are basic structures and as such unamendable? He does not give the list, rather he identifies some of those as basic structure in a scattered manner. However, by an examination of his judgment following appear to be the basic structures according to his opinion:

1. Structural pillars of Parliament and judiciary, as he says that 'In the scheme of Article 7 and therefore of the Constitution the structural pillars of Parliament and judiciary are basic and fundamental'.[106]
2. Articles 48, 58 and 80 of the Constitution are also basic structure which is evident from his following observation:

To illustrate further, the President must be elected by direct election (Article 48). He must have a council of ministers (Article 58). He must appoint as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament (Article 58(3)). Both these Articles 48 and 58 are protected and so is Article 80 which says every proposal in Parliament for making a law shall be made in the form of a Bill.... Hence the constitutional scheme if followed carefully reveals that these basic features are unamendable and unalterable.[107]

However, there are anomalies regarding Articles 48 and 58 as in another place he says that these may be amended by referendum.[108] But, this is expressed in para 254 whereas the above has been mentioned in para 256 which is subsequent to this one. In fact, if the above opinion is accepted that even Article 48 constitutes a basic structure which is unamendable then another legal problem arises because this Article 48 has been changed by the Constitution 12th Amendment subsequent to this

105. Ibid., para255.
106. Ibid., para 255.
107. Ibid., para 256.
108. Ibid., para 254, points (8) & (9).

amendment when the country switched towards parliamentary form of government replacing the presidential form that prevailed at the time of pronouncing this judgment.

3. Preamble, Articles 7 and 8 are basic structures, as he says that 'While Preamble and Article 8 have been made unamendable, necessarily Article 7 remains as unalterable'.[109]

Shahabuddin Ahmed, J identified the following eight features as the basic structures of the constitution:

1. Supremacy of the Constitution as the solemn expression of the will of the people.
2. Democracy.
3. Republican Government.
4. Unitary State
5. Separation of powers.
6. Independence of judiciary.
7. Fundamental Rights
8. One integrated Supreme Court in conformity with the unitary nature of the state.

The recognition of seven out of above eight is found at one place of his judgment that he observes that 'Supremacy of the Constitution as the solemn expression of the will of the people, Democracy, Republican Government, Unitary State, Separation of powers, Independence of judiciary, Fundamental Rights are basic structures of the Constitution'[110] and 'there is no dispute about their identity'.[111] The eighth one is obvious from his observation that 'High Court Division, as contemplated in the unamended Article is no longer in existence and as such the Supreme Court, one of the basic structures of the Constitution, has been badly damaged, if not destroyed altogether'.[112]

---

109. Ibid., para 254, point (20).
110. Ibid., para 377
111. bid.
112. Ibid., para 378.

It appears among the three concurring Judges in the 8th Amenment case, only M. H. Rahman, J does not give any clear list of basic structure, in whatsoever form. But it is evident that the 'unitary character' of our Republic, according to him, is a basic structure as he gives his judgment relying on this fact.[113] 'Preamble' and 'Rule of law' are also seemed to be identified by him as basic structures which may be presumed from his following observations:

The provisions contained in Part VI for the Supreme Court are not entrenched provisions and they can be amended by the legislature under art. 142. but if any amendment causes any serious impairment of the powers and the functions of the Supreme Court, the makers of the Constitution devised as the kingpin for securing the rule of law to all citizens, then the validity of such an amendment will be examined on the touchstone of the Preamble.[114]

I have indicated earlier that one of the fundamental aims of our society is to secure the rule of law for all citizens and in furtherance of that aim Part VI and other provisions were incorporated in the Constitution. Now by the impugned amendment that structure of the rule of law has been badly impaired.[115]

Conclusion

As we have seen that in Bangladesh in the 8th Amendment case it was seriously tried by the Attorney General to establish that the amending power under Article 142 is a constituent power so that the amending power will be unlimited which was denied by the opponents. But, in India we see that Indian Constitution in spite of having an express declaration in Article 368 that the amending power is constituent power doctrine of basic structure has been recognized. Thus, it may be concluded that in fact the term 'amendment' inherently bears the limitation of basic structure and that need not be proved by any other argument.

Unlike in India, in Bangladesh there was no repeated tussle between the Parliament and judiciary to establish the concept of basic structure. Almost without any challenge coming from the executive or the legislature it has been established peacefully in the 8th Amendment case. Even after

---

113. Ibid., para 484
114. Ibid., para 391
115. Ibid., para 456.

pronouncing the 8th Amendment judgment so far no initiative is taken yet by the Parliament to undo it. Thus, unlike the Indian Parliament, the reaction of the Parliament in Bangladesh towards the doctrine of basic structure curtailing the amending power of the Constitution seems to be more tolerant and patient.

However, in spite of the existence of the theory of basic structure in the jurisprudence of constitutional law in Bangladesh, still the actual number of basic structure is uncertain, due to the absence of clear judicial authority in this regard. Obviously, such a situation goes against this theory for lack of its preciseness and clarity, and even if it is argued that it will be settled from time to time what constitutes basic structure that also does not become free from the criticism that such a theory then creates an unknown restriction that will be determined after allegation of its violation is made.

Finally, it seems to be a highly useful doctrine at least in a country like Bangladesh where many laws are passed purely for political purposes. The country where even a democratic government by its majority in the parliament did establish one party political system, curbed the independence of judiciary, banned the newspapers and so on, this doctrine undoubtedly will remain there as an effective check to such drastic autocratic steps to be taken through constitutional process in the future.

The Dhaka University Studies, Part-F Vol. XVI (2) : 155—202, December 2005

CONSIDERATION IN CONTRACT: A COMPARATIVE ANALYSIS OF ENGLISH AND BANGLADESHI LAWS

Dalia Pervin

Consideration is the value that passes from one party to an agreement to the other for binding each of them to any particular promise or promises which culminates in a contract. The value may be expressed in terms of promise to do something or forbearance from doing something. E.g. A wants to sell his car for TK 100. B promises to buy the car for TK 100. The promise to pay TK 100 from B is the consideration for the promise to sell the car by A. When the parties agree to these terms, the contract becomes enforceable. The consideration is urged to be a unique common law product. The origin is thought to be evolved from either in the concept of "Quid pro quo" or in the notion of "bargains" by the parties.[1] In civil law jurisdictions enforceability of contract does not depend on the concept of consideration. The rationale for such a concept lies in the fact that in an agreement there may be numerous promises. However, consideration ascertains which promises ought to be enforced. In other words, only those promises which are supported by consideration are enforceable, others are not binding, even if the promisor intends to bind himself by the promise.[2] Consideration also evidences the existence of the contract. Authors like Simpson[3] or Atiyah[4] believes that consideration only developed as a means or reason for enforcing a promise. There may be three main reasons as to why consideration ensures enforcement of a contract. The first is the forewarning requirement - parties usually look into the pros and cons of a deal before they make a bargain. The second is the evidentiary requirement - parties are more likely to keep in mind a promise made due to a bargaining process. The third is the fact that the parties are more likely to stipulate their specific requirements when they negotiate for them. Each of these rationales ensures that contracts are not entered into through mistakes and parties are held to keep their promise. Lush J. in *Currie v Misa*[5] referred to consideration as consisting of a

---

1. Chesire however feels that the source of consideration is civil law or cannon law. Cheshire, Fifoot & Furmston's the Law of Contract, Thirteenth Edition, p 9
2. PS Atiyah, an introduction to the Law of Contract, 5th Edition 1995, p 118.
3. 1975a, Chapters IV-VII, p 321
4. 1986, Chapter VIII
5. (1875) LR 10 Exch 153

detriment to the promisee or a benefit to the promisor :

"...some right, interest, profit or benefit accruing to one party, or some forebearance, detriment, loss or responsibility given, suffered or undertaken by the other."

Two theories of consideration :

Detriment and benefit theory

A consideration in an agreement may be expressed in either some benefit conferred on the promisor or detriment suffered by the promisee. It could be both as well. The benefit to be bestowed to the promisor may consist of any interest, right, profit or benefit given to him at his instance. The detriment to be endured by the promisee may be any disadvantage, harm, forbearance, loss suffered or undertaken by the promisee (or under the Bangladesh law, by any other person) at the demand of the promisor. In many agreements, both may be found in the same contract. A buyer's promise to buy goods is supported both by a detriment to him and benefit to the seller. "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable[6]." In *North Ocean Shipping Co. Ltd* v *Hyundai Construction Co. Ltd*[7], the defendants builders agreed to build a tanker for the plaintiff owners at a price fixed in U.S. dollars to be paid by instalments. After the first installment the U.S. dollar was devalued by 10 per cent and the defendant builders insisted on further installments being increased by 10 per cent. The plaintiff owners refused and suggested arbitration, but it became apparent that the defendant builders would not continue their work without this agreement. The plaintiff owners paid the increased amount "without prejudice" to their rights. Initially the builders gave a letter of credit as security for repayment[8] in the price. The owner agreed to pay the increase demanded without protest ("without prejudice") and the builders agreed to increase the amount of the letter of credit. It was held that the agreement to carry out the contractual duty to build was no consideration, but the increase in the letter of credit was, it being additional obligation or liability to increased detriment.

---

6. House of Lords in *Dunlop v Selfridge* [1915] AC 847 at 855
7. [1978] 3 All ER 1170 at 1176; 1 QB 705; [1979] 3 WLR. 419, Queens Bench Division
8. Security for performance

The Dhaka University Studies, Part-F Vol. XVI (2) : 155—202, December 2005

CONSIDERATION IN CONTRACT: A COMPARATIVE ANALYSIS OF ENGLISH AND BANGLADESHI LAWS

Dalia Pervin

Consideration is the value that passes from one party to an agreement to the other for binding each of them to any particular promise or promises which culminates in a contract. The value may be expressed in terms of promise to do something or forbearance from doing something. E.g. A wants to sell his car for TK 100. B promises to buy the car for TK 100. The promise to pay TK 100 from B is the consideration for the promise to sell the car by A. When the parties agree to these terms, the contract becomes enforceable. The consideration is urged to be a unique common law product. The origin is thought to be evolved from either in the concept of "Quid pro quo" or in the notion of "bargains" by the parties.[1] In civil law jurisdictions enforceability of contract does not depend on the concept of consideration. The rationale for such a concept lies in the fact that in an agreement there may be numerous promises. However, consideration ascertains which promises ought to be enforced. In other words, only those promises which are supported by consideration are enforceable, others are not binding, even if the promisor intends to bind himself by the promise.[2] Consideration also evidences the existence of the contract. Authors like Simpson[3] or Atiyah[4] believes that consideration only developed as a means or reason for enforcing a promise. There may be three main reasons as to why consideration ensures enforcement of a contract. The first is the forewarning requirement - parties usually look into the pros and cons of a deal before they make a bargain. The second is the evidentiary requirement - parties are more likely to keep in mind a promise made due to a bargaining process. The third is the fact that the parties are more likely to stipulate their specific requirements when they negotiate for them. Each of these rationales ensures that contracts are not entered into through mistakes and parties are held to keep their promise. Lush J. in *Currie v Misa*[5] referred to consideration as consisting of a

---

1. Chesire however feels that the source of consideration is civil law or cannon law. Cheshire, Fifoot & Furmston's the Law of Contract, Thirteenth Edition, p 9
2. PS Atiyah, an introduction to the Law of Contract, 5th Edition 1995, p 118.
3. 1975a, Chapters IV-VII, p 321
4. 1986, Chapter VIII
5. (1875) LR 10 Exch 153

detriment to the promisee or a benefit to the promisor :

"...some right, interest, profit or benefit accruing to one party, or some forebearance, detriment, loss or responsibility given, suffered or undertaken by the other."

Two theories of consideration :

Detriment and benefit theory

A consideration in an agreement may be expressed in either some benefit conferred on the promisor or detriment suffered by the promisee. It could be both as well. The benefit to be bestowed to the promisor may consist of any interest, right, profit or benefit given to him at his instance. The detriment to be endured by the promisee may be any disadvantage, harm, forbearance, loss suffered or undertaken by the promisee (or under the Bangladesh law, by any other person) at the demand of the promisor. In many agreements, both may be found in the same contract. A buyer's promise to buy goods is supported both by a detriment to him and benefit to the seller. "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable[6]." In *North Ocean Shipping Co. Ltd* v *Hyundai Construction Co. Ltd*[7], the defendants builders agreed to build a tanker for the plaintiff owners at a price fixed in U.S. dollars to be paid by instalments. After the first installment the U.S. dollar was devalued by 10 per cent and the defendant builders insisted on further installments being increased by 10 per cent. The plaintiff owners refused and suggested arbitration, but it became apparent that the defendant builders would not continue their work without this agreement. The plaintiff owners paid the increased amount "without prejudice" to their rights. Initially the builders gave a letter of credit as security for repayment[8] in the price. The owner agreed to pay the increase demanded without protest ("without prejudice") and the builders agreed to increase the amount of the letter of credit. It was held that the agreement to carry out the contractual duty to build was no consideration, but the increase in the letter of credit was, it being additional obligation or liability to increased detriment.

---

6. House of Lords in *Dunlop v Selfridge* [1915] AC 847 at 855
7. [1978] 3 All ER 1170 at 1176; 1 QB 705; [1979] 3 WLR. 419, Queens Bench Division
8. Security for performance

A detriment to the promisee is good consideration even though there is no benefit to the promisor. In *Perumal Mudaliar* v *Sendanatha Mudaliar*[9] Aiyar and Napier JJ observed referring to *Carlill* v *Carbolic Smoke Ball* Co.[10] that *"The consideration required to support a promise may consist of any damage or any suspension or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, though no actual benefit accrues to the promise... It may also be found that the daily services has been performed by the defendant, relying on the promise of the plaintiff. The learned counsel for the respondent has stated that his client has paid interest believing that the promised subscription will come in. If that detriment has been suffered the promise of the plaintiff will be enforceable."* Alteration of position by one person for a promise on the faith of which he has so altered the position was held to constitute a good consideration in *Shailesh Chandra Guha* v *Bechari Gope.*[11] In this case Newbould and B B Ghose JJ held that *"The substance of the evidence is that Defendants 6 & 7 wanted to purchase the properties of the Defendant No.1 and they desired to do so free form the incumbrance of the mortgage bond. Defendant No.7 desired to settle the amount on payment of which the incumbrance would be discharged by Nabadwip. On receiving the information Defendant No.7 settled the price to be paid to Defendant No.1, who executed the Kobola, but when Defendant No.7 tendered the money as settled with Nabadwip, he put him off and subsequently did not accept it. Defendant No 7 says 'I would not have purchased the lands had not Nabadwip promised to accept his dues as stated above'. We have no doubt that on these facts a contract between Nabadwip and the Defendant No.7 has been established. At that time a complete title to the mortgaged property could only be obtained by Defendant no. 7 if he could get the interest of Defendant No.1 as well as that of the mortgagee. The Defendant No.7 went to the mortgagee first for ascertaining the consideration to be paid to the mortgagee in order to obtain a release of the mortgagee's interest, and both of them came to an agreement with regard to the matter. This amounted to a contract which may be said to be contingent on the Defendant No.7 purchasing the equity of redemption. The statement of the mortgagee may also be taken to be an offer made by the mortgagee which was never withdrawn and must be considered to have been accepted by the Defendant No.7 when the equity of redemption was purchased. The purchase of the property and the alteration of the position of the Defendants on the faith of the offer by the mortgagee is good consideration for the contract, and is therefore, binding on the parties."* Giving up the right to manage their own estate for

---

9. AIR 1918 Mad 311 at 312.
10. (1893) 1 QB 256
11. AIR 1925 Cal94 at 97.

agreeing to common management was sufficient consideration in *Kirtyanand v Ramanand.*[12] Wort, Ag CJ observed *"In the ordinary course of events the parties would be entitled to manage their estate or their respective interest in severalty. By this agreement they gave up that right and that in itself, in my opinion, would be sufficient consideration. There was forbearance on the part of the Plaintiff to insist upon his rights of managing his own interests and there was forbearance on the part of the defendants also to manage their interests separately;"* Promises have been also enforced where there has been no detriment to the promisee, but has secured some benefit including 'practical' benefit to the promisor.[13]

The terms 'benefit' and 'detriment' have been used by courts in two senses:

(i) act which has some value; or

(ii) such acts, the performance of which is not already legally due from the promisee.

The former stresses the factual benefit[14] (which may be even provided to a third party at the request of the promisor) or sufferance, while in the case of the latter, the factual benefit is ignored, and legal benefit or detriment is taken account of. In the latter sense, a promisee has provided the consideration only if he has done or promised to do that which 4e was not legally bound to do, irrespective of whether this confers factual benefit on the promisor.

The consideration may be of benefit to the promisor or to a third party or may be of no apparent benefit to anybody but merely a detriment to a third party. In *Midland Bank & Trust Co Ltd* v *Green* [15] in 1961, a father granted to his son, for the consideration of £1, a 10-year option to purchase his 300-acre farm for £75 per acre (i.e., £22,500). Through the default of the son's solicitors the option was not registered in the registry. Following a family dispute the father later wished to deprive his son of the option and in order to do this conveyed the farm in 1967 to his wife for £500. At this time the farm was actually worth about £40,000, and its

---

12. AIR 1936 Pat 456, 164 IC 220.

13. *Good v Cheesman* (1831) 2 B&Ad 328; *Alliance Bank Ltd v Broom* (1864) 2 Dr & 8m 289,34 LJ (Ch) 256; *De la Bere v Pearson* [1908] 1 KB 280; *Ward v Byham* [1956] 1 WLR 496, [1956] 2 All ER 318; *Chappell &. Co Ltd v Nestle' Co Ltd* [1960] AC 87, [1959] 2 All ER 701; *Williams v Roffey Brothers &. Nicholls* (Contractors) Lid. [1991] 1 QB 1, [1990] 1 All ER 512 (CA).

14. *Bolton v Madden* (1873) LR9 QB 55

15. *Midland Bank & Trust Co Ltdv Green* [1981] AC 513 at 531. [1979] 3 All ER28.

value later rose significantly. The House of Lords held that the son's estate contract was void as against the purchaser (his mother). The House of Lords refused (as the Court of Appeal had done) to imply a requirement that the purchaser must provide valuable consideration (under the particular law it decided the case). In this case detriment to third party sufficed as consideration.

Reciprocity of obligations is not of the essence of consideration and an act done or forbearance made in return for a unilateral promise is a sufficient consideration to support the promise. The 'detriment' suffered by the promisee is the essence of consideration. Where the consideration is a present performance and not a promise, the detriment may consist either in actually giving or sharing something of value, or in undertaking a legal responsibility, or in foregoing the exercise of a legal right. There need not be a total rejection or desertion of the right, or an undertaking to suspend it for a definite time. Such an undertaking, if it exists, is of course not a performance but a promise, and such a contract is formed by mutual or reciprocal promises.[16] The issue is one where the defendant has requested the plaintiff to forbear the enforcement of a claim against him offering a new promise in return, and the plaintiff has in fact forborne for an appreciable time without any express acceptance of the defendant's terms. The giving up, or forbearing to exercise, an actually existing and enforceable right is certainly a good consideration.[17] In *Vathyam Balarama Sastri* v *Vavilala Vasudeva Sastri*[18] the question was, where a suit is brought on the basis of a compromise between the parties for the settlement of outstanding disputes in relation to the estate of deceased, whether any consideration moved from the plaintiff to support an agreement of compromise depends upon whether the plaintiff had a bonafide claim to the property which was the subject of the agreement of compromise. It was held that when a bonafide claim was established, consideration moved from the plaintiff to support an agreement of compromise for the settlement of outstanding disputes in relation to the estate of deceased. An actual forbearance to exercise a right may be a good executed consideration, provided it be at the promisor's request, and a promise of forbearance may also be a good executory consideration.

---

16. Sub-section 2(t) of the Contract Act
17. *Jagadindra Nalh* v *Chandra Nalh* (1903) 31 Cat 242; *Indira Bai* v *Makarand* AIR 1931 Nag 197.
18. *Vathyam Balarama Sastri* v *Vavi/a/a Vasudeva Sastri* (1948) 1 Mad U 47, AIR 1948 PC 7.

Bargain theory

In the bargain theory the parties subjectively view the contract to be the product of an exchange or bargain. The bargain theory and the detriment-benefit theory may overlap; in standard contracts, such as a contract to buy a car, there will be both an objective benefit and detriment (the buyer experiences a benefit by acquiring the car; the seller experienced a detriment by losing a car) and the subjective experience of entering into a bargain to negotiate the price of the car and look into the quality of the car or ask for specific requirement for car accessories etc. However, it is submitted that the detriment and benefit is reciprocal as well. In the above example; while the buyers benefits by buying the car, she also loses by paying for the car. Equally, the vendor suffers detriment by losing the car but benefits from the sell by acquiring money.

English Law

Only during the second half of the 19th century different aspects of consideration took specific shape into formal legal principles. From there on the recognized principles which have developed so far in English law are described herein.

Consideration must be given

A promise is enforceable if it is supported by consideration, that is, where consideration has moved from the promisee. For example, in the case of *Tweedle* v *Atkinson*[19], John Tweddle promised William Guy that he would pay a sum of money to the child of William Guy, and likewise William Guy promised John Tweddle that he would pay a sum of money to the child of John Tweddle, upon the marriage of the two children to each other. However, William Guy failed to pay the son of John Tweddle, who then sued his executors for the amount promised to his father. It was held that the son could not enforce his wife's father's promise, as he himself had not actually given consideration for it - it was his father who had done so instead. Blackburn J in this case stated that"... *Mr. Mellish [counsel for the Plaintiff] admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says that there is an exception; namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from himself. And Dutton and Wife* v *Poole was cited for this. We cannot overrule a decision of the Exchequer Chamber; but there is a distinct ground on which the case cannot be supported. The cases*

19. (1861) 1 B & S 393; 121 ER 762, Court of Queen's Bench

Shew that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded."

Consideration must be referable to the promise

There must be some kind of connection between a promise and the consideration offered to support the promise. It is no consideration to "refrain from a course of conduct which it was never intended to pursue". In *Arrale* v. *Costain Civil Engineering Ltd*[20] the plaintiff had lost his left arm in an industrial accident in Dubai and had accepted a paltry sum in local currency, the full sum to which he was entitled under a local ordinance, "in full satisfaction and discharge of all claims in respect of personal injury whether now or hereafter to become manifest arising directly or indirectly from an accident which occurred on 3 July 1998." The issue was whether the release applied to claims for common law damages. The Master of the Rolls Denning LJ, in agreement with Stephenson LJ (Geoffrey Lane LJ dissenting), held that it did not. But he also held that if, contrary to his view, the release did cover common law claims there was no consideration for the plaintiffs promise. As he put it (at 102): "... *I would say that, if there was a true accord and satisfaction, that is to say, if Mr Dohale, with full knowledge of his rights, freely and voluntarily agreed to accept the one sum in discharge of all his claims, then he would not be permitted to pursue a claim at common law. But in this case there is no evidence of a true accord at all. No one explained to Mr Dohale that he might have a claim at common law. No one gave a thought to it. So there can have been no agreement to release. There being no true accord, he is not barred from pursuing his claim at common law."* The consideration must have been at least an inducement to enter into the promise. This test is an objective test - whether a reasobable person in the position of the promisee would perceive it as a gift as opposed to an offer. For example, the payment of BDT100 for the changing of a television channel or turning of a video is not met with consideration.

Consideration must be sufficient but need not be adequate

For consideration to be good consideration, it must be sufficient. Consideration is sufficient where it amounts to something that is capable of expression in economic terms. In *White* v *Bluett*[21], Bluett, when sued by his father's executors for an outstanding debt to his father, claimed that his father had promised to discharge him from it in return for him stopping complaining about property distribution. The Court held that the cessation of complaints was of no economic value; thus, Bluett's

20. 1976 1 Lloyd's Rep 98

21. (1853) 23 LJ. Ex 36

father had received no real consideration for the promise, and the debt was unenforceable at law. Po lock CB said in that case that *"The plea [of the son] is clearly bad. By the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts. Looking at the words merely, there is some foundation for the argument, and, following the words only, the conclusions may be arrived at. It is said, that the son had right of equal distribution of his father's property, and did not complain of his father because he had not an equal share, and said to him, I will cease to complain if you will not sue upon this note. Whereupon the father said, if you will promise me not to complain I will give up the note. If such a plea as this could be supported, the following would be binding promise: A might complain that another person used the public highway more than he ought to do, and the other might say, do not complain, and I will five you five pounds. It is ridiculous to suppose that such promises could be binding In reality, there was no consideration whatever. The son; had no right to complain, for the father night made what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration."*

However, there is no requirement that to be sufficient, consideration must be adequate, in the sense of being commensurate in economic terms to the original promise. *Chappell & Co* v *Nestle Co Ltd*[22] demonstrates that the consideration in a contract may be very, very close to non-existent at yet still be sufficient to uphold the agreement. In this case under regulations a manufacturer of records was obliged to inform the copyright owner of an intention to make records and the selling price. A record manufacturer gave notice that he intended to sell records at Is 6d each. In fact they were sold to a chocolate manufacturer for 4d each so that the chocolate manufacturer could sell them to the public for 1s 6d each. However, the chocolate manufacturer also required an intending purchaser to supply three chocolate wrappers as well. The wrappers had no value and when received were thrown away. Although the wrappers were simply thrown away, the House of Lords by a bare majority (Viscount Somervell and Lord Keith of A vonholm dissenting) held that it was sufficient consideration to support the agreement concerned the infringement of copyright. The House of Lords held that the money paid by the purchasers was not the entire consideration for the records and the notice was defective because it did not state the non-pecuniary consideration. In a passage relied upon by the Appellant, Lord Somervell said that *"My Lords, section 8 of the Copyright Act, 1956 provides for a royalty of an amount, subject to a minimum, equal to 6 1/4 per cent. of the ordinary retail selling price of the record. This necessarily implies, in my opinion, that a sale to be within the section must not only be retail, but one in which there is no other*

22. [1960] AC 87, House of Lords

consideration for the transfer of property in the record but the money price. Parliament would never have based the royalty on a percentage of a money price if the section was to cover cases in which part, possibly the main part, of the consideration was to be other than money. This is in no sense a remarkable conclusion, as in most sales money is the sole consideration. It was not argued that the transaction was not a sale.

The question then, is, whether the three wrappers were part of the consideration or, as Jenkin LJ held, a condition of making the purchase, like a ticket entitling a member to buy at a cooperative store. I think they are part of the consideration. They are so described in the offer. 'They' the wrappers, 'will help you get smash hit recordings'. They are so described in the record itself - 'all you have to do to get such new record is to send three wrappers from Nestle's 6d. milk chocolate bars, together with postal order for 1s 6d.' This is not conclusive but, however described, they are, in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestles. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throwaway the corn. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration."

Consideration must move from the promisee

The doctrine of **"privity of contract"** provides that only a party to a contract may sue of be sued under the contract. Thus, there may be a contract between A and B which will directly benefit C, as where A promises to pay B if B paints C's house. If B does not do the job, or does it badly, A may sue B for breach of contract, but C cannot. This is because C only benefits from the contract, but is not a party to it. In this example, we see that A (the "promisor") is promising to pay money to B (the "promisee") in exchange for B'S work. A court would enforce this contract, even though there is no apparent benefit to A. This is a case of consideration moving from the promisee, but not moving to the promisor. Sometimes, however, we come accross cases where A promises to pay B & C if B (or C, but not both B and C) does work for A. This is common when a person engages a member of a partnership to do a job. Suppose A promises to pay Band C if B does the work. Clearly B can sue A if A does not pay. But can C sue A, given that C did nothing to support the promise to pay? This question arose in an Australian case[23] where Arthur Coulls owned land from which O'Neil Constructions Pty Ltd wanted to extract

23. *Coulls v Bagots Executor and Trustee Co Ltd.* (1967) 40 AL JR 471

mineral products. An extraction agreement was signed, requiring the royalties to be paid jointly to Arthur Coulls and his wife. Usually, royalties are paid to the legal *ownerls* of the land. Arthur Coulls died and the royalties were paid by O'Neil Constructions to his widow as the surviving payee. The Executor Bagots Executor and Trustee Co Ltd. sought a direction from the High Court as to where the royalties should be paid, given that Arthur Coulls's widow was not supplying any consideration. It was held that in the case of joint promisees (as this was), the consideration may come from only one promisee so long as it is supplied on behalf of them both. Although consideration must move from the promisee, it does not necessarily have to move to the promisor. The promisee mal provide consideration to a third party, if this is agreed at the time the parties contracted.[24] This law must, however, be read in the light of the Contracts (Rights of Third Parties) Act 1999 which confer on third parties a limited right to enforce a term in a contract between two other parties provided that certain conditions have been satisfied. A third party who is given a right to enforce a term of the contract by the Act does not have to provide consideration in order to be able to enforce his right. The fact that the Act confers a right of action is sufficient to displace the requirement that he provide consideration.

This rule or maxim is "only another way of restating the basic requirement that a promise must be supported by consideration: it does not justify a separate maxim."[25]

Past consideration is not good consideration

A promise cannot be based upon consideration that was provided before the promise was made. In other words, if one party voluntarily performs an act, and the other party then makes a promise, the consideration for the promise is said to be in the past. The rule is that past consideration is no consideration, so it is not valid and cannot be used to sue on a contract. For example, if X promises to reward Y for an act that Y had already performed, the performance of that act, while good consideration for the promise to be rewarded for it, is past consideration and therefore not good consideration. Or, A gives B a lift home in his car. On arrival B promises to give A £5 towards the petrol. A cannot enforce this promise as his consideration, giving B a lift, is past. *Eastwood* v *Kenyon*[26], involved someone who as executor of a deceased estate had taken on himself the task of looking after the deceased's daughter until she became an adult.

24. *Bolton v Madden* (1873) LR 9 QB 55
25. Contract Law, Ewan McKendrick p 103
26. (1840) 11 Ad & E 438

In doing so he had spent a lot of money and even had had to borrow money at one stage. The daughter, when she came of age and her husband when she married, promised to reimburse the plaintiff. When he was not reimbursed he sued on this promise. The court said that the promise to reimburse was a purely moral obligation. It was not supported by consideration. This was because it was not part of an exchange. What he had done in the past could not constitute part of an exchange. This case was an important land mark because it set the seal on the consideration or exchange theory and put paid to the moral obligation theory which had achieved some success in Lord Mansfield's time.

Furthermore, where a contract exists between two parties and one party, subsequent to formation, promises to confer an additional benefit on the other party to the contract, that promise is not binding because the promisee's consideration, which is his entry into the original contract, had already been completed (or "used") at the time the next promise is made.

In *Roscorla* v *Thomas*,[27] Roscorla and Thomas contracted to buy a horse for £30. After the sale, Thomas promised Roscorla that the horse was sound; the horse turned out to be vicious. It was held that Roscorla could not enforce the promise, as the consideration given for entering into the contract to buy the horse had been completed by the time the promise was made; in a sense, the consideration was "used up". Lord Denman CJ opined that *"It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be coextensive with the consideration. In the present case the only promise that would result from the consideration, as stated and be coextensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant" imposes no other duty or obligation upon him. It is clear, therefore, that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.*

But the promise in the present case must be taken to be, as in fact it was, express and the quyuestion is, whether the fact will watrrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note (a) to Wennall v Adney (3 *Bos & PuI249), and in the case of Eastwood v Kenyon* (11 *A E* 438).

---

27. (1842) 3 QB 234

They are cases of voidable contracts subsequently 'ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law."

Thus in *Re McArdle*[28] the deed stated that payment would be made to Mrs. McArdle 'IN CONSIDERATION of your carrying out certain alterations and improvements' to some property. The evidence established that all the work had in fact been done prior to the execution of the deed and that this fact was 'well-known to everybody who signed it'. The Court of Appeal held that Mrs. McArdle could not show that she had provided consideration for the promise of payment because the 'consideration was wholly past'.

The rule that past consideration is not good consideration is subject to the exception discussed by the Privy Council in *Pau On* v *Lau Yiu Long*.[29] In that case, the plaintiffs were the owners of all the shares of a company called Shing On, while the defendants were the majority shareholders in Fu Chip, a company which went 'public' on 9 February 1973. The principal asset owned by Shing On was a building which the defendants wished to acquire. At he same time the plaintiffs wished to realize the value of the property by selling the shares in Shing On. SO the parties agreed that the plaintiffs should sell the shares in Shing On to Fu Chip, the price payable to met by the allotment to the plaintiffs of 4.2 million ordinary shares of $1 each in Fu Chip. It was agreed that the market value of each Fu Chip share was to be deemed to be $2.50, and the plaintiffs also agreed that, they would not, before the end of April 1974, sell or transfer 2.5 million of the shares so transferred. This restriction was imposed in order to prevent a depression in the value of Fu Chip shares caused by heavy selling of the shares. The difficulty which this restriction posed for the plaintiffs was that their inability to sell the shares exposed them to the risk of any drop in their value. In order to reduce this exposure, the parties entered into a subsidiary agreement in which under which the defendants agreed, on or before the April 1974, to buy back the shares at $2.50 per share. However, this agreement operated to the advantage of the defendants because they could require the plaintiffs to sell them the shares for $2.50 even if the market value of the shares had raised beyond

28. [1951] Ch 669
29. [1980] AC 614, Privy Council

$2.50. When the plaintiffs discovered this, they informed the defendants that they would not perform the main agreement unless the subsidiary agreement was cancelled and replaced by a guarantee which only came into operation only in the event of the price of the shares falling below $ 2.50. The defendants were anxious to complete the transaction so that public confidence in the newly formed company was not undermined, and so they agreed to the terms proposed by the plaintiffs and the guarantee was duly executed on 4 May 1973. The price of FU Chip shares subsequently slumped on the market and the plaintiffs sought to enforce the guarantee against the defendants. The defendants maintained that the guarantee was unenforceable because it was not supported by consideration and had been procured by duress. The Privy Council rejected the defendants argument and held that the guarantee was supported by consideration and that there had been no operative duress because the defendants could not show that their will had been coerced such as to vitiate their consent.

Lord Scarman wrote *"Their Lordships agree that the mere existence or recital of a prior request is not sufficient in itself to convert what is prima facie past consideration into sufficient consideration in law to support a promise: as they have indicated, it is only the first of three necessary preconditions. As for the second of these preconditions, whether the act done at the request of the promisor raises an implication of promised remuneration or other return is simply one f the construction of the words of the contract in the circumstances of its making. Once it is recognized, as the Board (of the Privy Council) considers it inevitably must be, that the expressed consideration includes a reference to the plaintiff's promise not to sell the shares before April 30,* 1974 *- a promise to be performed in the future, though given in the past - it is not possible to treat the defendant's promise of indemnity as independent of the plaintiff's antecedent promise, given at the first defendant's request, not to sell. The promise of indemnity was given because the time of the main agreement the parties intended that the first defendants should confer upon the plaintiffs the benefit of his protection against the fall of price. When the subsidiary agreement was cancelled, all were aware that the plaintiffs were still to have the benefit intended to be conferred in return for the promise not to sell, or as the positive bargain which fixes the benefit on the faith of which the promise was given - though where, as here, the subject is a written contrdct, the better analysis is probably that of the 'positive bargain'. Their Lordships, therefore, accept the submission that the contract itself states a valid consideration for the promise of indemnity."*

Lord Scarman here identifies the three elements that must be satisfied by a claimant to invoke an exception to the past consideration rule. The claimant must show:

1. that he perfonned the original act at the request of the promisor/ defendant;
2. that it was clearly understood or implied between the parties when the act was requested that the promisee/claimant would be rewarded for doing the act;
3. the defendant's promise of payment must have been one which, had it been made prior to or at the time at which the claimant perfonned the act in question, it would have been enforceable.

Performance of an existing contractual duty is not consideration

The rule is that the performance of an existing contractual duty owed to the promisor is not good consideration for a fresh promise of extra consideration given by the promisor. In other words, if someone promises to do something they are already bound to do under a contract, that is not valid consideration.

In *Stilk* v *Myrick*[30], an action was brought by the plaintiff, a private sailor, to recover the amount of his wages, on a voyage from London to the Baltic and back. The sum claimed was partly for monthly wages, according to articles which he had signed, and a further sum claimed under these circumstances. Two sailors, part of the crew, had deserted the ship, and the master (the defendant), not being able to supply their places at Cronstadt, promised to divide among the crew, in addition to their wages, the wages due to the two men who had deserted. Upon this being claimed, it was objected, that any engagement by the master for a larger sum than was stipulated for by the articles was void, that this engagement was made before the ship sailed on her voyage home; it was made under no coercion, from the apprehension of danger, nor extorted from the captain; but a voluntary offer on his part for extraordinary service. Lord Ellenborough ruled that the plaintiff could not recover this part of his demand. His Lordship said, that when the plaintiff entered on board the ship, he stipulated to do all the work his situation called upon him to do. Here the voyage was to the Baltic and back, not to Cronstadt only; if the voyage had then terminated, the sailors might have made what terms they pleased. If any part of the crew had died, would not the remainder have been forced to work the ship home? If that accident would have left them liable to do the whole work without any extraordinary remuneration, why should not desertion or casualty equally demand it? Verdict for the monthly Wages Only.

---

30. (1809) 2 Camp. 317 (1809) 6

Primarily, there were two exceptions to this rule:

1. The promisee has done, or has promised to do, more than fie was obliged to do under his contract. Thus in *Hanson v Royden*[31] the plaintiff did more than he was obliged to do in that he was promoted and performed additional tasks in return for the promise of extra pay.
2. Before the fresh promise was made, circumstances had arisen which would have entitled the promisee to refuse to carry out his obligations under his contract. In *Hartley v Ponsonby*[32] the sailors did more than they were contractually bound to do inthat the ship was so under-manned as a result of desertions that they would have been entitled to refuse to continue the voyage. Thus in continuing the voyage when they might lawfully have refused to do so they provided consideration for the promise of extra pay.

The determining case of *Williams v Roffey Brothers & Nicholls (Contractors) Ltd*[33] added another exception to the rule. Here, the plaintiff entered into a subcontract with the defendants, who held the main building contract, to carry out carpentry work in a block of 27 flats for an agreed price of £20,000. The plaintiff got into financial difficulty because the agreed price was too low for him to operate satisfactorily and at a profit. The main contract contained a time penalty clause and the defendants, worried lest the plaintiff did not complete the carpentry work on time, made an oral agreement to pay the pl_intiff an additional sum of £10,300 at the rate of £575 for each flat on which the carpentry work had been completed. Approximately seven weeks later, when the plaintiff had substantially completed eight more flats, the defendants had made only one further payment of £1,500 whereupon the plaintiff ceased work on the flats. The plaintiff then sued the defendants for the additional sum promised. The judge held that the agreement for payment of the additional sum was enforceable and did not fail for lack of consideration, and gave judgment for the plaintiff.

On appeal by the defendants, dismissing the appeal it was held that (1) that where a party to a contract promised to make an additional payment in return for the other party's promise to perform his existing contractual obligations and as a result secured a benefit or avoided a detriment, the advantage secured by the promise to make the additional payment was

---

31. (1867) LR 3 CP 47
32. (1857) 7 E & B 872
33. [1991] 1 QB 1, Court of Appeal

capable of constituting consideration therefor, provided that it was not secured by economic duress or fraud; that the defendants' promise to pay the plaintiff the additional sum of £10,300; in return for the plaintiffs promise to perform his existing contractual obligations on time, resulted in a commercial advantage to the defendants; that the benefit accruing to the defendants provided sufficient consideration to support the defendants' promise to pay the additional sum; and that, accordingly, the agreement for payment of the additional sum was enforceable. *Stilk v. Myrick*[34] was distinguished. And,

(2) That substantial completion on the eight flats entitled the plaintiff to be paid part of the £10,300 promised; and that in the absence of payment, he had properly ceased further work on the remaining flats.

The judges in this case discussed substantial cases laws on this point and substantial part of Glidewell LJ's judgment is quoted herein to provide a broader understanding of the issue of pre-existing contractual obligation.

Glidewell LJ

"The issues

Before us Mr. Evans for the defendants advances two arguments. His principal submission is that the defendants' admitted promise to pay an additional £10,300, at the rate of £575 per completed flat, is unenforceable since there was no consideration for it. This issue was not raised in the defence, but we are told that the argument was advanced at the trial without objection, and that there was equally no objection to it being argued before us. Mr. Evans' secondary argument is that the additional payment was only payable as each flat was completed. On the judge's findings, eight further flats had been "substantially" completed. Substantial completion was something less than completion. Thus none of the eight flats had been completed, and no further payment was yet due from the defendants. I will deal with this subsidiary argument first.

Does substantial completion entitle the plain tiff to payment?

The agreement which the judge found was made between the parties on 9 April 1986 provided for payment as follows.. "The sum of £1 0, 300 was to be paid at the rate of £5 75 per flat to be paid on the completion of each flat. " Mr. Evans argues that the agreement provided for payment on completion, not on substantial completion, of each flat. Since the judge did not find that the work in any additional flat was completed after 9 April 1986, the defendants were under no obligation to pay any part of the £10,300 before the plaintiff ceased work at the end of May.

---

34. Ibid 30

In his judgment the judge does not explain why in his view substantial completion entitled the plaintiff to payment. In support of the judgment on this issue, however, Mr. Makey for the plaintiff, refers us to the decision of this court in Hoenig v. Isaacs [1952] 2 All E.R. 176. In that case the plaintiff was engaged to decorate and furnish the defendant's flat for £750, to be paid "net cash, as the work proceeds, and balance on completion." The defendant paid £400, moved into the flat and used the new furniture, but refused to pay the balance on the ground that some of the work was defective. The official referee found that there were some defects, but that the contract had been substantially performed. The Court of Appeal held that accordingly the plaintiff was entitled to be paid the balance due, less only a deduction for the cost of making good the defects or omissions. Somervell LJ. said, at p. 179:

"The learned official referee regarded H. Dakin & Co. Ltd. v. Lee [1916] 1 KB. 566 as laying down that the price must be paid subject to set-off or counterclaim if there was a substantial compliance with the contract. I think on the facts of this case where the work was finished in the ordinary sense, though in part defective, this is right. It expresses in a convenient epithet what is put from another angle in the Sale of Chods Act 1893. The buyer cannot reject if he proves only the breach of a term collateral to the main purpose. I have, therefore, come to the conclusion that the first point of counsel for the defendant fails. "

Denning LJ. said, at pp. 180-181:

"In determining this issue the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or, alternatively, set. them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good: see Mondel v. Steel (1841) 8 M & W 858; H. Dakin & Co. Ltd. v. Lee [1916] 1 KB. 566; and the notes to Cutter v. Powell (1795) 6 Term Rep. 320 in Smith's Leading Cases, 13th ed. (1929), vol. 2, pp. 19-21. It is, of course, always open to the parties by express words to make entire performance a condition precedent. A familiar instance is when the contract

provides for progress payments to be made as the work proceeds, but for retention money to be held until completion. Then entire performance is usually a condition precedent to payment of the retention money, but not, of course, to the progress payments. The contractor is entitled to payment pro rata as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished, without defects or omissions. In the present case the contract provided for 'net cash, as the work proceeds; the balance on completion. 'If the balance could be regarded as retention money, then it might well be that the contractor ought to have done all the work correctly, without defects or omissions, in order to be entitled to the balance. But I do not think the balance should be regarded as retention money. Retention money is usually only 10 per cent., or 15 per cent., whereas this balance was more than 50 per cent. I think this contract should be regarded as an ordinary lump sum contract. It was substantially performed. The contractor is entitled, therefore, to the contract price, less a deduction for the defects. "

Romer L.J. said, at pp. 182-183:

"The defendant's only attack on the plaintiffs performance of his obligations was in relation to certain articles of furniture which the plaintiff supplied and which the defendant says were faulty and defective in various important respects. The finding of the learned official referee on this was 'that the furniture supplied constituted a substantial compliance with the contract so far as the supply of furniture was concerned. ' That is a finding of fact, and whether or not another mind might have taken a different view it appears to me impossible to say that there was no sufficient evidence on which the finding could be based. This, then, being a lump sum contract for the supply of furniture (and the carrying out of certain minor work) which was substantially complied with by the plaintiff, the question is whether the official referee was wrong in law in applying the principle of H. Dakin & Co. Ltd. v. Lee [1916] 1 KB. 566 and rejecting the defendant's submissions that the plaintiff had failed to perform a condition on the fulfilment of which his right to sue depended. In my judgment, he was quite right in applying the H. Dakin & Co. Ltd. v. Lee principle to the facts of the present case. I can see no reason why that principle should be approached with wariness and applied with caution. In certain cases it is right that the rigid rule for which the defendant contends should be applied, for example, if a man tells a contractor to build a ten foot wall for him in his garden and agrees to pay £X for it, it would not be 'right that he should be held liable for any part of the contract price if the contractor builds the wall to two feet and then renounces further performance of the contract, or builds the wall of a totally different material from that which was ordered, or builds it at the wrong end of the garden. The work contracted for has not been done and the corresponding obligation to pay consequently never arises. But when a man fully performs his contract in the sense that he supplies all that he agreed to supply but what he supplies is subject to defects of so minor

a character that he can be said to have substantially performed his promise, it is, in my judgment, far more equitable to apply the H. Dakin & Co. Ltd. v. Lee principle than to deprive him wholly of his contractual rights and relegate him to such remedy (if any) as he may have on a quantum meruit, nor, in my judgment, are we compelled to a contrary view (having regard to the nature and terms of the agreement and the official referee's finding) by any of the cases in the books. "

In my view this authority entirely supports the judge's decision on this issue.

Was there consideration for the defendants' promise made on 9 April 1986 to pay an additional price at the rate of £575 per completed flat?

The judge made the following findings of fact which are relevant on this issue. (i) The subcontract price agreed was too low to enable the plaintiff to operate satisfactorily and at a profit. Mr. Cottrell, the defendants' surveyor, agreed that this was so. (ii) Mr. Roffey (managing director of the defendants) was persuaded by Mr. Cottrell that the defendants should pay a bonus to the plaintiff. The figure agreed at the meeting on 9 April 1986 was £10,300.

The judge quoted and accepted the evidence of Mr. Cottrell to the effect that a main contractor who agrees too Iowa price with a subcontractor is acting contrary to his own interests. He will never get the job finished without paying more money. The judge therefore concluded:

"In my view where the original subcontract price is too low, and the parties subsequently agree that additional moneys shall be paid to the subcontractor, this/agreement is in the interests of both parties. This is what happened in the present case, and in my opinion the agreement of 9 April 1986 does not fail for lack of consideration."

In his address to us, Mr. Evans outlined the benefits to his clients, the defendants, which arose from their agreement to pay the additional £10,300 as: (i) seeking to ensure that the plaintiff continued work and did not stop in breach of the subcontract; (ii) avoiding the penalty for delay; and (iii) avoiding the trouble and expense of engaging other people to complete the carpentry work.

However, Mr. Evans submits that, though his clients may have derived, or hoped to derive, practical benefits from their agreement to pay the "bonus," they derived no benefit in law, since the plaintiff was promising to do no more than he was already bound to do by his subcontract, i.e., continue with the carpentry work and complete it on time. Thus there was no consideration for the agreement. Mr. Evans relies on the principle of law which, traditionally, is based on the decision in Stilk v. Myrick (1809) 2 Camp. 317. That was a decision at first instance of Lord Ellenborough CJ. On a voyage to the Baltic, two seamen deserted. The captain agreed with the rest of the crew that if they worked the ship back to London without the two seamen being replaced, he would divide between

them the pay which would have been due to the two deserters. On arrival at London this extra pay was refused, and the plaintiffs action to recover his extra pay was dismissed. Counsel for the defendant argued that such an agreement was contrary to public policy, but Lord Ellenborough CJ.'s judgment was based on lack of consideration. It reads, at pp.318-319:

"1 think Harris v. Watson (1791) Peake 102 was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month."

In North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. [1979] Q.B. 705, Mocatta J regarded the general principle of the decision in Stilk v. Myrick, 2 Camp. 317 as still being good law. He referred to two earlier decisions of this court, dealing with wholly different subjects, in which Denning LJ sought to escape from the confines of the rule, but was not accompanied in his attempt by the other members of the court. In Ward v. Byham [1956] 1 WLR. 496 the plaintiff and the defendant lived together unmarried for five years, during which time the plaintiff bore their child. After the parties ended their relationship, the defendant promised to pay the plaintiff £1 per week to maintain the child, provided that she was well looked after and happy. The defendant paid this sum for some months, but ceased to pay when the plaintiff married another man. On her suing for the amount due at £1 per week, he pleaded that there was no consideration for his agreement to pay for the plaintiff to maintain her child, since she was obliged by law to do so: see section 42 of the National Assistance Act 1948. The county court judge upheld the plaintiff mother's claim, and this court dismissed the defendant's appeal. Denning LJ said, at p. 498:

"1 approach the case, therefore, on the footing that the mother, in looking after the child, is only doing what she is legally bound to do. Even so, I think that there

was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated, he ought to honour his promise; and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child. I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for an act, a promise by the father to pay £1 a week in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contract. So long as she looked after the child, she would be entitled to £1 a week. The case seems to me to be within the decision of Hicks v. Gregory (1849) 8 C.B. 378 on which the judge relied. I would dismiss the appeal."

However, Morris LJ put it rather differently. He said, at pp. 498-499:

"Mr. Lane submits that there was a duty on the mother to support the child; that no affiliation proceedings were in prospect or were contemplated; and that the effect of the arrangement that followed the letter was that the father was merely agreeing to pay a bounty to the mother. It seems to me that the terms of the letter negative those submissions, for the husband says 'providing you can prove that she' - that is Carol - 'will be well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you.' The father goes on to say that Carol is then well and happy and looking much stronger than ever before. 'If you decide what to do let me know as soon as possible.' It seems to me, therefore, that the father was saying, in effect: Irrespective of what may be the strict legal position, what I am asking is that you shall prove that Carol will be well looked after and happy, and also that you must agree that Carol is to be allowed to decide for herself whether or not she wishes to come and live with you. If those conditions were fulfilled the father was agreeable to pay. Upon those terms, which in fact became operative, the father agreed to pay £1 a week. In my judgment, there was ample consideration there to be found for his promise, which I think was binding."

Parker L.J agreed. As I read the judgment of Morris L.J, he and Parker L.J held that, though in maintaining the child the plaintiff was doing no more than she was obliged to do by law, nevertheless her promise that the child would be well looked after and happy was a practical benefit to the father which amounted to consideration for his promise.

In Williams v. Williams [1957] 1 WL.R. 148, a wife left her husband, and he promised to make her a weekly payment for her maintenance. On his failing to honour his promise, the wife claimed the arrears of payment, but her husband pleaded that, since the wife was guilty of desertion she was bound to maintain

herself, and thus there was no consideration for his promise. Denning L.J, at p. 151, reiterated his view that:

"a promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest."

However, the other members of the court (Hodson and Morris L.JJ) declined to agree with this expression of view, though agreeing with Denning L.J in finding that there was consideration because the wife's desertion might not have been permanent, and thus . there was a benefit to the husband.

It was suggested to us in argument that, since the development of the doctrine of promissory estoppel, it may well be possible for a person to whom a promise has been made, on which he has relied, to make an additional payment for services which he is in any event bound to render under an existing contract or by operation of law, to show that the promisor is estopped from claiming that there was no consideration for his promise. However, the application of the doctrine of promissory estoppel to facts such as those of the present case has not yet been fully developed: see e.g. the judgment of Lloyd J in Syros Shipping Co. SA v. Elaghill Trading Co.[1980J 2 Lloyd's Rep. 390, 392. Moreover, this point was not argued in the court below, nor was it more than adumbrated before us. Interesting though it is, no reliance can in my view be placed on this concept in the present case.

There is, however, another legal concept of relatively recent development which is relevant, namely, that of economic duress. Clearly if a subcontractor has agreed to undertake work at a fixed price, and before he has completed the work declines to continue with it unless the contractor agrees to pay an increased price, the subcontractor may be held guilty of securing the contractor's promise by taking unfair advantage of the difficulties he will cause if he does not complete the work. In such a case an agreement to pay an increased price may well be voidable because it was entered into under duress. Thus this concept may provide another answer in law to the question of policy which has troubled the courts since before Stilk v. Myrick, 2 Camp. 317, and no doubt led at the date of that decision to a rigid adherence to the doctrine of consideration.

This possible application of the concept of economic duress was referred to by Lord Scarman, delivering the judgment of the Judicial Committee of the Privy Council in Pao On v. Lau YiuLong [1980J A.C 614. *He said, atp.* 632:

"Their Lordships do not doubt that a promise to perform, or the performance of, a preexisting contractual obligation to a third party can be valid consideration. In New Zealand Shipping Co. Ltd. v. A.M Satterthwaite & Co. Ltd. (The Eurymedon) [1975J A. C 154, 168 the rule and the reason for the rule were stated: 'An agreement to do an act which the promisor is under an existing

obligation to a third party to do, may quite well amount to valid consideration... the promisee obtains the benefit of a direct obligation.... This proposition is illustrated and supported by Scotson v. Pegg (1861) 6 H. & N 295 which their Lordships consider to be good law.' Unless, therefore, the guarantee was void as having been made for an illegal consideration or voidable on the ground of economic duress, the extrinsic evidence establishes that it was supported by valid consideration. Mr. Leggatt for the defendants submits that the consideration is illegal as being against public policy. He submits that to secure a party's promise by a threat of repudiation of a pre-existing contractual obligation owed to another can be, and in the circumstances of this case was, an abuse of a dominant bargaining position and so contrary to public policy.... This submission found favour with the majority in the Court of Appeal. Their Lordships, however, considered it misconceived."

Lord Scarman then referred to Stilk v. Myrick, 2 Camp. 317, and its predecessor Harris v. Watson (1791) Peake 102, and to Williams v. Williams [1957] 1 WLR. 148, before turning to the development of this branch of the law in the United States of America. He then said, at pp. 634-635:

"Their Lordships' knowledge of this developing branch of American law is necessarily limited. In their judgment it would be carrying audacity to the point of foolhardiness for them to attempt to extract from the American case law a principle to provide an answer to the question now under consideration. That question, their Lordships repeat, is whether, in a case where duress is not established, public policy may nevertheless invalidate the consideration if there has been a threat to repudiate a pre-existing contractual obligation or an unfair use of a dominating bargaining position. Their Lordships' conclusion is that where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy. It would also create unacceptable anomaly. It is unnecessary because justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If a promise is induced by coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he chooses and acts in time, can avoid the contract. If there is no coercion, there can be no reason for avoiding the contract where there is shown to be a real consideration which is otherwise legal. Such a rule of public policy as is now being considered would be unhelpful because it would render the law uncertain. It would become a question of fact and degree to determine in each case whether there had been, short of duress, an unfair use of a strong bargaining position. It would create anomaly because, if public policy invalidates the consideration, the effect is to make the contract void. But unless the facts are such as to support a plea of 'non est factum,' which is not suggested in this case, duress does no more than confer upon the victim the opportunity, if taken in time, to avoid the contract. It would

be strange if conduct less than duress could render a contract void, whereas duress does no more than render a contract voidable. Indeed, it is the defendants' case in this appeal that such an anomaly is the correct result. Their case is that the plaintiffs, having lost by cancellation the safeguard of the subsidiary agreement, are without the safeguard of the guarantee because its consideration is contrary to public policy, and that they are debarred from restoration to their position under the subsidiary agreement because the guarantee is void, not voidable. The logical consequence of Mr. Leggatt's submission is that the safeguard which all were at all times agreed the plaintiffs should have - the safeguard against fall in value of the shares - has been lost by the application of a rule of public policy. The law is not, in their Lordships 'judgment, reduced to countenancing such stark injustice: nor is it necessary, when one bears in mind the protection offered otherwise by the law to one who contracts in ignorance of what he is doing or under duress. Accordingly, the submission that the additional consideration established by the extrinsic evidence is invalid on the ground of public policy is rejected.

It is true that Pao On is a case of a tripartite relationship that is, a promise by A to perform a pre-existing contractual obligation owed to B, in return for a promise of payment by C. But Lord Scarman's words, at pp. 634-635, seem to me to be of general application, equally applicable to a promise made by one of the original two parties to a contract.

Accordingly, following the view of the majority in Ward v. Byham [J956] 1 WL.R. 496 and of the whole court in Williams v. Williams [1957] 1 WL.R. 148 and that of the Privy Council in Pao On [1980] A.c. 614 the present state of the law on this subject can be expressed in the. following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to. B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

As I have said, Mr. Evans accepts that in the present case by promising to pay the extra £10,300 his client secured benefits. There is no finding, and no suggestion, that in this case the promise was given as a result of fraud or duress. If it be objected that the propositions above contravene the principle in Stilk v. Myrick, 2 Camp. 317, I answer that in my view they do not; they refine, and limit the application of that principle, but they leave the principle unscathed e.g. where

B secures no benefit by his promise. It is not in my view surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day. It is therefore my opinion that on his findings of fact in the present case, the judge was entitled to hold, as he did, that the defendants' promise to pay the extra £10,300 was supported by valuable consideration, and thus constituted an enforceable agreement.

As a subsidiary argument, Mr. Evans submits that on the facts of the present case the consideration, even if otherWise good, did not "move from the promisee. "This submission is based on the principle illustrated in the decision in Tweddle v. Atkinson (1861) 1 B. & S. 393. My understanding of the meaning of the requirement that "consideration must move from the promisee" is that such consideration must be provided by the promisee, or arise out of his contractual relationship with the promisor. It is consideration provided by somebody else, not a party to the contract, which does not "move from the promisee. "This was the situation in Tweddle v. Atkinson, but it is, of course, not the situation in the present case. Here the benefits to the defendants arose out of their agreement of 9 April 1986 with the plaintiff, the promisee. In this respect I would adopt the following passage from Chitty on Contracts, 26th ed. (1989), p. 126, para. 183, and refer to the authorities there cited:

"The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him e.g. where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in fact suffering any detriment."

That is the situation in this case. I repeat, therefore, my opinion that the judge was, as a matter of law, entitled to hold that there was valid consideration to support the agreement under which the defendants promised to pay an additional £10,300 at the rate of £575 per flat. For these reasons I would dismiss this appeal."

Therefore, performance of an existing contractual obligation will be good consideration if:

1. The original contract is one for goods and services; and
2. A doubted that B would perform his obligations under the contract; so
3. A promised to pay B an extra amount in return for a promise from B that he would in fact fulfill his obligations under the contract; and
4. As a result, A received (or was set to receive) a practical benefit or averted a non benefit; but

5. A did not make the promise to pay more under duress from B.

The following, as per the Court of Appeal in *Williams v Roffey*, is probably to constitute a practical benefit:

1. Avoiding the breach of a contract with a third party;
2. Avoiding the trouble and expense of engaging a third party to carry out the work; and/or
3. Avoiding a penalty clause incorporated into a contract with a third party.

Some commentators argue that practical benefit can amount to anything capable of expression in economic terms. This is the leading modem case in Which the doctrine of consideration was tested.

There are few cases where it is cited uncontroversially, as representing settled law[35]. In *Re C (A Debtor*[36] and *Re Selectmove Ltd*[37] it was distinguished as inapplicable to money payments. And *South Caribbean v. Trafigura Beheer*[38] met with an in effective dissent in terms that *"But for the fact that* Williams v. Roffey Bros. *was a decision of the Court of Appeal, I would not have followed it."* The issue before the court was whether or not an agreement to vary the date at which oil was to be delivered was valid and binding. On the facts Colman J found that there was consideration to support the variation of the original agreement. After concluding that there was consideration to support the variation, Colman J then turned to consider whether the seller's promise (SCT were the sellers) to release the cargo to the buyers (Tafigura) constituted consideration for the buyer's promise to accept delivery at a later point in time than that set out in the contract. On this issue Colman J stated as follows:

"Had it been necessary to base the question of consideration exclusively on the promise to release the cargo, I should have held that this alone was insufficient to supply consideration. It was SCT's obligation to make delivery under contract 3053b. In promising to do so they were promising to perform an existing obligation. The authorities on this issue starting with Stilk v Mvrick. (1809) 2 Camp 317 and developing more recently in Svros Shippinf! Co. SA. v Elaf!hill

---

35. *Gribbon v. Lutton* [2001] EWCA Civ 1956; *Joiner v. George* (Chancery Division 31 January 2000); *Simon Container v. EMBA Machinery* [1998] 2 Lloyd's Rep 429; *European Consulting v. Refco Overseas* (Commercial Court 12 April 1995); *Lee v. GEC Plessey* [1993] IRLR 383;
36. (Court of Appeal 11 May 1994)
37. [1995] 2 All ER 531 and the distinguishing reasons are discussed below
38. [2004] EWHC 2676 (Comm)

Tradinf! Co. Ltd. (The Proodos C) [1980] 2 Lloyds Rep 390 and Atlas Express Ltd. v Kafco (Importers and Distributors) Ltd. [1989] 1 QB 833 indicate a firmly established rule of law that a promise to perform an enforceable obligation under a pre-existing contract between the same parties is incapable of amounting to sufficient consideration. The decision of the Court of Appeal in Williams v. Roffey Bros. & Nicholls (Contractors) Ltd. [1991] 1 QB 1 appears to have introduced some amelioration to the rigidity of this rule in cases where there has been refusal to perform not amounting to economic duress by the party who might otherwise be in breach of any existing contract and where the other party will derive a practical benefit from such performance.

But for the fact that Williams v Roffey Bros. was a decision of the Court of Appeal, I would not have followed it. That decision is inconsistent with the long-standing rule that consideration, being the price of the promise sued upon, must move from the promisee. The judgment of Lord Justice Glidewell was substantially based on Pao On v Lau Yiu Long [1980] A. C. 614 in which the Judicial Committee of the Privy Council had held a promise by A to B to perform a contractual obligation owed by A to X could be sufficient consideration as against B. At p. 15 Lord Justice Glidewell regarded Lord Scarman's reasoning in relation to such tripartite relationship as applicable in principle to a bipartite relationship. But in the former case by the addW/mal promise to B, consideration has moved from A because he has made himself liable to an additional party, whereas in the latter case he has not undertaken anything that he was not already obliged to do for the benefit of the same party. Lord Justice Glidewell substituted for the established rule as to consideration moving from the promisee a completely different principle - that the promisor must by his promise have conferred a benefit on the other party. Lord Justice Purchas at pp. 22-23 clearly saw the non sequitur but was comforted by observations from Lord Hailsham, L. C. in Woodhouse A. C. Israel Cocoa Ltd. v Nigerian Product Marketing Co. Ltd. [1972] AC 741 at pp. 757-758. Investigation of the correspondence referred to in those observations shows that the latter are not authority for the proposition advanced with some hesitation by Lord Justice Purchas.109. However, seeing that Williams v Roffey Bros. has not yet been held by the House of Lords to have been wrongly decided, and approaching the validity of consideration on the basis of mutuality of benefit, I would hold that SCT's threat of non-compliance with its delivery obligation under contract 3053b precluded its reliance on the benefit that its performance by effecting delivery would confer on Tafigura. This threat was analogous to economic duress as contemplated in Williams v Roffey Bros. supra because it was not based on any argument that SCT was discharged from its delivery obligation..."

Part payment of a debt is not good consideration

If one person owes a sum of money to another and agrees to pay part of

this in full settlement, the rule at common law is that fart-payment of a debt is not good consideration for a promise to forgo the balance[39]. Thus, if A owes B £50 and B accepts £25 in full satisfaction on the due date, there is nothing to prevent B from claiming the balance at a latef date, since there is no consideration proceeding from A to enforce the promise of B to accept part-payment. This is because he is already bound to pay the full amount, an agreement based on the same principle as *Stilk v Myrick*[40]. It also protects a creditor from the economic duress of his debtor.

In *Pinnel's Case*[41], Cole owed Pinnel £8-lOs-0d (£8.50) which was due on 11 November. At Pinnel's request, Cole paid £5-2s-2d (£5.11) on 1 October, which Pinnel accepted in full settlement of the debt. Pinnel sued Cole for the amount owed. It was held that partpayment in itself was not consideration. However, it was held that the agreement to accept part-payment would be binding if the debtor, at the creditor's request, provided some fresh consideration. Consideration might be provided if the creditor agrees to accept:

(i) part-payment on an earlier date than the due date (ie, as in Pinnel's Case itself); or

(ii) chattel instead of money (a "horse, hawk or robe" may be more beneficial than money); or

(iii) part-payment in a different place to that originally specified.

Despite its harshness the rule in *Pinnel's Case* was affirmed by the House of Lords and still represents the law:

In *Foakes v Beer*[42], Mrs. Beer had obtained judgment for a debt against Dr Foakes, who subsequently asked for time to pay. She agreed that she would take no further action in the matter provided that Foakes paid £500 immediately and the rest by half-yearly installments of £150. Foakes duly kept to his side of the agreement. Judgment debts, however, carry interest. The House of Lords held that Mrs. Beer was entitled to the £360 interest which had accrued. Foakes had not "bought" her promise to take no further action on the judgment. He had not provided any consideration.

In *Re Selectmove*[43], Selectmove owed arrears of tax to the Inland Revenue. The IR was in a position to put Selectmove into liquidation because it was

---

39. *Pinnel's Case* (1602) 5 CoRep 117a
40. Ibid 13
41. Ibid 18
42. (1884) 9 App Cas 605
43. [1995] 2 All ER 531

unable to meet its liabilities. There was a meeting at which Selectmove proposed to pay all future tax as and when it fell due and that it would payoff the arrears at the rate of £1,000 a month commencing the following February. The Collector of Taxes informed Selectmove that this proposal would need approval of his superiors; and that he would get back to them if it was not acceptable. Sometime later the IR commenced liquidation proceedings which Selectmove resisted, relying upon the agreement made at the meeting in July. The Court of Appeal held (1) that a promise to pay a sum which the debtor was already bound to pay was not good consideration; (2) any promise made by the Collector of Taxes was made without actual or ostensible authority. Selectmove's attempt to use the notion in *Williams v Roffey*[44] failed as it was held that it was applicable only where the existing obligation which is pre-promised is one to supply goods or services, not where it is an obligation to pay money.

EXCEPTIONS TO THE RULE

Apart from the exceptions to the rule mentioned in *Pinnel's Case* itself, there are two others at common law and one exception in equity for the rule that part payment of a debt is not good consideration.

a)Part-payment of the debt by a third party

A promise to accept a smaller sum in full satisfaction will be binding on a creditor where the part-payment is made by a third party on condition that the debtor is released from the obligation to pay the full amount. See:

In *Hirachand Punamchand v Temple*[45] a father paid a smaller sum to a money lender to pay his son's debts, which the money lender accepted in full settlement. Later the money lender sued for the balance. It was held that the part-payment was valid consideration, and that to allow the moneylender's claim would be a fraud on the father.

b) Composition agreements

The rule does not apply to composition agreements. This is an agreement between a debtor and a group of creditors, under which the creditors agree to accept a percentage of their debts (e.g. 50p in the pound) in full settlement. Despite the absence of consideration, the courts will not allow an individual creditor to sue the debtor for the balance. The reason usually advanced for this rule is that to allow an individual creditor to claim the balance would amount to a fraud on the other creditors who had all agreed to the percentage [46].

---

44. Ibid 16
45. [1911] 2 KB 330
46. *Wood v Roberts* (1818) 2 Stark. 417; Cooky Lister (1863) 13 C.B.(N.S.) 543, 595

c) The doctrine of promissory estoppel

A further exception to the rule in *Pinnel's Case* is to be found in the equitable doctrine of promissory estoppel. The doctrine provides a means of making a promise binding, in certain circumstances, in the absence of consideration. The principle is that if someone (the promisor) makes a promise, which another person acts on, the promisor is estopped from going back on the promise, even though the other person did not provide consideration (in so far as is it is inequitable to do so).

Develo12ment of the doctrine

The modem doctrine is largely based on dicta of Denning J in *Central London Property Trust Ltd v High Trees House Ltd*[47] and on the decision of the House of Lords in *Tool Metal Manufacturing Co Ltd* v *Tungsten Electric Co Lta*[48] and can find reference as early as in *Hughes* v *Metropolitan Railway Company*[49].

(a) *Hughes Case* -In October a landlord gave his tenant six months notice to repair and in the event of a failure to repair, the lease would be forfeited. In November the landlord opened negotiations for the sale of the premises, but these ended in December without agreement. Meanwhile the tenant had not done the repairs and when the six months period was up, the landlord sought possession. The House of Lords held that the landlord could not do so. The landlord had, by his conduct, led the tenant to suppose that as long as negotiations went on, the landlord would not enforce the notice. He could not subsequently take advantage of the tenant relying on this. Therefore, the notice did not run during the period of negotiations. However, the six month period would begin to run again from the date of the breakdown of negotiations. In the words of Lord Cairns, LC *"My Lords, I repeat that I attribute to the Appellant no intention here to take advantage of, to lay trap for, or to lull into false security those with whom hw was dealing but it appears to me hat both parties by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months datinlg from the month of October should afterwards be measured out as against the Respondents as the period during which the repairs must be executed".*

---

47. [1947] 1 KB 130
48. [1955] 1 WLR 761
49. (1877) 2 App Cas 439.

(b) *High Trees* - In 1937 the Ps granted a 99 year lease on a block of flats in London to the Ds at an annual rent of £2500. Because of the outbreak of war in 1939, the Ds could not get enough tenants and in 1940 the Ps agreed in writing to reduce the rent to £1250. After the war in 1945 all the flats were occupied and the Ps sued to recover the arrears of rent as fixed by the 1937 agreement for the last two quarters of 1945. Denning J held that they were entitled to recover this money as their promise to accept only half was intended to apply during war conditions. This is the ratio decidendi of the case. He stated obiter, that if the Ps sued for the arrears from 1940-45, the 1940 agreement would have defeated their claim. Even though the Ds did not provide consideration for the PS' promise to accept half rent, this promise was intended to be binding and was acted on by the Ds. Therefore the Ps were estopped from going back on their promise and could not claim the full rent for 1940-45.

(c) *Tool Metal Case* - Patent owners promised to suspend periodic payments of compensation due to them from manufacturers from the outbreak of war. It was held by the House of Lords that the promise was binding during the period of suspension, but the owners could, on giving reasonable notice to the other party, revert to their legal entitlement to receive the compensation payments.

Thus if a person promises that he will not insist on his strict legal rights, and the promise is acted upon, then the law will require the promise to be honored even though it is not supported by consideration.

Requirements for application of the doctrine

The exact scope of the doctrine of promissory estoppel is a matter of debate but it is clear that certain requirements must be satisfied before the doctrine can come into play:

(a) Contractual/legal relationship

In *Durham Fancy Goods v Michael Jackson (Fancy Goods)*[50] Donaldson J said that "a pre-existing legal relationship which could, in certain circumstances, give rise to liabilities and penalties" is necessary to avail the doctrine of promissory estoppel although the relationship need not be strictly contractual.

(b) Promise

There must be a clear and unambiguous statement by the promisor that his strict legal rights will not be enforced, i.e. one party must make a

50. [1968] 2 QB 839

promise which is intended to be binding. However, it can be implied or made by conduct as in the *Hughes Case*[51].

(c) Reliance on the promise must be had

The promisee must have acted in reliance on the promise. There is some uncertainty as to whether the promisee (i) should have relied on the promise by changing his position to their detriment (i.e., so that he is put in a worse position if the promise is revoked). In *Ajayi v Briscoe*[52] very firmly states that the party to whom the promise is being made must have shown that he or she has restructured his or her affairs in reliance on the promise or (ii) whether they should have merely altered their position in some way, not necessarily for the worse.

However, in *Alan Co Ltd v El Nasr Export & Import CO*[53], Lord Denning himself disclaimed detriment as an element of promissory estoppel, saying it was sufficient if the debtor acted on the promise by paying the lower sum. He said that "he must have been led to act differently from what he otherwise would have done". In *Brikom Investments Ltd v Carr*[54], Lord Denning again said that it was only necessary to show that the promissee has behaved in such a manner which indicates that he or she has relied upon the promise.

(d) The doctrine to be used as a shield and not as a sword

At one point it was said in *Coombe v Coombe*[55] that the doctrine may only be raised as a defense: "as a shield and not a sword". It was held that the doctrine cannot be raised as a cause of action. This means that the doctrine only operates as a defense to a claim and cannot be used as the basis for a case. However, this requirement that estoppel cannot create a cause of action may need some refinement. It is possible the estoppel can be used by a party seeking to enforce a claim based upon a recognized cause of action to defeat the defense or counter claim of the other party.

---

51. Ibid 28
52. [1964] 3 All ER 556 (PC, on appeal from the Federal Supreme Court of Nigeria
53. [1972] 2 QB 189
54. [1979] QB 467. To determine that an undertaking/representation was relied upon it may be a reasonable way to refer to Lord Denning's independent bystander test which he applied in among other cases *Oscar Chess Ltd v Williams* [1957] 1 All ER 325 (C of A). This test basically asks the question: would the independent bystander observing the interaction between the parties form the opinion that the promisor intended the promise to be relied upon (with the result that the promisee did so rely)?
55. [1951] 2 KB 215

Estoppel can also be used by a party seeking to enforce a claim to prove one element of recognized cause of action[56]. Estoppel can also be used by a party seeking to enforce a claim to prove all the elements of a recognized cause of action.

(e) Inequitable to revert

It must be inequitable for the promisor to go back on his promise and revert to his strict legal rights. If the promisor's promise has been extracted by improper pressure it will not be inequitable for the promisor to go back on his promise. In *D & C Builders v Rees*[57] The Ps, a small building company, had completed some work for Mrt Rees for which he owed the company £482. For months the company which was in severe financial difficulties pressed for payment. Eventually, Mrs. Rees, who had become aware of the company's problems, contacted the company and offered £300 in full settlement. She added that if the company refused this offer they would get nothing. The company reluctantly accepted a cheque for £300 "in completion of the account" and later sued for the balance. The Court of Appeal held that the company was entitled to succeed. Lord Denning was of the view that it was not inequitable for the creditors to go back on their word and claim the balance as the debtor had acted inequitably by exerting improper pressure.

(f) Extinguishes or suspends rights?

Another question raised by this doctrine is whether it extinguishes rights or merely suspends them. The prevalent authorities are in favor of it merely suspending rights, which can be revived by giving reasonable notice or by conditions changing.

(i) Where the debtor's contractual obligation is to make periodic payments, the creditor's right to receive payments during the period of suspension may be permanently extinguished, but the creditor may revert to their strict contractual rights either upon giving reasonable notice, or where the circumstances which gave rise to the promise have changed as in *High Trees* or the *Tool Metal* Case[58].

(ii) It is not settled law that there can be no such resumption of payments in relation to a promise to forgo a single sum. In *D & C Builders*, which concerned liability for a single lump sum, Lord

---

56. *Robertson v Minister of Pensions* [1949] 1 K.B. 227
57. [1965] 2 QB 617.
58. Ibid 26 and 27.

> Denning expressed obiter that the court would not permit the promisor to revert to his strict legal right and that the estoppel would be final and pennanent if the promise was intended and understood to be pennanent in effect.

It is probably best to look at the nature of the promise: if as in *High Trees* and *Tool Metal,* it is intended to be temporary in application and to reserve to the promisor the right subsequently to reassert his strict legal rights, the effect will be suspensive only i.e. the rights would be suspended till triggered; and if on the other hand, it is intended to be pennanent (as envisaged in *D & C Builders),* then there is no reason why in principle or authority the promise should not be given its full effect so as to extinguish the promisor's right. The Court of Appeal, in *Re Selectmove Ltc*[59] stated that the *practical benefit doctrine* arising from *Williams* v *Roffey* cannot be used as an additional exception to the rule. In that case, it was held that the doctrine only applies where the original promise was a promise to pay extra and not to pay less. In that case the Inland Revenue were attempting to wind up (i.e. dissolve) Selectmove Ltd on the grounds that the company owed money to the Revenue. The company's defense was, inter alia, that it had agreed with the Revenue to payoff the arrears in installments. The company's defense required that the promise to pay the installments of the money it owed was sufficient consideration by providing a benefit to the revenue. The Court of Appeal held that the agreement was not supported by sufficient consideration and the company failed. This case further confinns the existing principle that an offer to fulfill an existing contractual obligation cannot be seen as consideration to support a new agreement. The Court of Appeal applied the ruling in *Foakes* v *Beer* (1884) and not the decision in *Williams* v *Roffey* Bros (1991).

Performance of a public law duty is not good consideration

If the promisee provides what he was required by public law to do in any event in return for a promise, this is not good consideration. In *Collins* v *Godfrey*[60], Godfrey promised to pay Collins, an attorney, for his giving of evidence. He brought a claim for payment alleging that he had been promised a guinea a day for his attendance. It was held that Collins could not enforce the promise as he was under a statutory duty to give evidence in any event. Lord Tenterden CL stated that *"if it be a duty imposed by law upon a party regularly subpoenaed, to attend from time to time to give evidence, then a promise to give him any remuneration for loss of time incurred in such*

59. [1995] lW.L.R. 474
60. (1831) 1 B & Ad 950

attendance is a promise without consideration. We think that such a duty is imposed by law; and on consideration of the Statute of Elizabeth, and on the cases which have been decided on this subject, we are all of opinion that a party cannot maintain an action for compensation for loss of time in attending a trial as a witness. We are aware of the practice which has prevailed in certain cases, of allowing, as costs between the party and party, so much per day for the attendance of professional men; but the practice cannot alter the law. What the effect of out decision may be, is not for our consideration. We think on principle, that an action does not lie for a compensation to a witness for loss of time in attendance under a subpoena[61]".

However, if the promisee provides more than what public duty imposes on him, then this is good consideration. In *Ward v Byham*[62] the father of an illegitimate child agreed to pay the mother a sum of money for maintenance, provided that the child be well looked after and happy, and that the mother offer the child the choice of which parent to live with when she was old enough to understand. The father made payments until the child's mother married, and then he refused. The mother sued for breach of contract. The father's defense was that there was no consideration to the agreement, as the mother was legally obligated to care for the child. The Court of Appeal ruled that the mother had exceeded her statutory duty by bringing up the child in a particular way, and in accordance with the wishes of the father, and this was sufficient consideration. This approach is clearer in the judgment of Moris LJ who states that *"It seems to me ... that the father was saying, in effect: irrespective of what may be the strict legal position, what I am asking is that you shall prove that Carol [the child) will be well looked after and happy, and also that you must agree that Carol is to be allowed to decide for herself whether hr not she wishes to come and live with you. If those conditions were fulfilled the father was agreeable to pay. Upon those terms, which in fact became operative, the father agreed to pay* 1 *(pound sterling) a week. In my judgment, there was ample consideration there to be found for his promise, which I think was binding."* Denning LJ took a much more liberal and straight forward view and stated *"I approach the case, therefore, on the footing that, in looking after the child, the mother is only doing what she is legally bound to do. Even so, I think that there was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it,*

---

61. This part is quoted with the object to bring attention of the readers to the fact of application of the mind of judges and their approach with regard to principles and facts. It would be seen in the later cases that judges are now far from abstaining to apply their mind as to the consequences of their decisions.

62. [1956] IWLR496

should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbor. If he gats the benefit for which he stipulated, he ought to honor his promise, and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child.

I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for an act, a promise by the father to pay 1 *(pound sterling) a week in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contact. So long as she looked after the child, she would be entitled to* 1 *(pound sterling) a week...* "

Third party obligation is good consideration

Consideration for a promise can be the performance of a contractual duty owed to someone other than the promisor. In *Shadwell v Shadwel*[63] an uncle promised his nephew an annual sum of money if he married one Ellen Nicholl. The nephew duly married Ellen Nicholl and the money was paid for some time. The uncle died and his executor refused to pay the money. It was argued that this could not be a contractual obligation. What was the consideration provided by the nephew? Did he provide a benefit to his uncle or did he suffer a detriment? It does not seem so. Yet the court was prepared to say that when young Lancey - for that was the nephew's name - actually married Ellen Nicholl he was providing a consideration which made the uncle's promise binding. It was said that the nephew had either incurred a detriment by marrying Ellen Nicholl or had conferred a benefit on his uncle. What benefit? It was thought that the uncle must have wanted his nephew to marry Ellen Nicholl and that therefore it was a benefit to him when Lancey married her. It was held that Shadwell marrying was good consideration, notwithstanding that he was obliged by a contract with a third party to marry in any event.; confirmed by *The Eurymedon)*

A promise to perform a pre-existing contractual duty owed to a third party (as opposed to the performance of that duty) may also amount to consideration *rau On* v *Lau Yiu Long).*

Bangladesh Law

Although commonly known, for the purpose of future reference it is clarified here that our origin of contract law is based on the English Law principles and the Contract Act of 1872 actually codified the English principles of Contract. However, it must be noted that certain aspects of

63. (1860) 9 CB (NS) 159; 142 ER 62

the Contract Act of 1872 and English principles do differ and depart from the English principles, although at a minimal level.

The Contract Act 1872 defines consideration as under:

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for promise".

This definition does encompass all the English principles enunciated above. However, as case law has developed in Bangladesh, India and Pakistan (which were under the same law till 1947), we can identify departure from the English principles in the following aspects:

(i) Consideration must move from the promisee - *but not necessarily to the promisor or* any other person;

(ii) Consideration must be current - *it cannot be past is not always the case under Bangladesh law;*

(iii) With respect to part payment of a contract

Consideration must move from the promisee or any other person;

There must be consideration to the promisor (or at his request to some other person) by the person enforcing the contract[64] (under the English law), or by the promisee or other person (under the Bangladesh law). The Contract Act allows consideration to be passed from the promisee or any other person. This is a migration from the English law under which consideration must move from the promisee, i.e., the party who wishes to enforce a contract must furnish or have furnished consideration for the promise of the other party, the whole consideration or in part (namely even if provided partly by agent, partner or co-promisee).

The result of the provision in the Act has resulted in restoring the doctrine of earlier English decisions no longer of authority in England. In *Dutton v Poole*[65], a son persuaded his father not to disfigure a land to which he [the son] was heir by cutting down the oaks. The father had wanted to cut down the trees to raise a dowry for his daughter who was to be married to Sir Ralph Dutton. In consideration of the father not cutting the oaks, the son promised to pay to his sibling £1 000 after her marriage. After her. Atarriage, the father died and the son failed to pay

---

64. *Dunlop Pneumatic Tyre Co Ltd* v *Selfridge & Co Lid.* [1915] AC 847. [1914-15] All ER

65. *Dutton* v *Poole* (1688) 2 Lev 210 approved by Lord Mansfield in *Martyn* v *Hind* (1776) 2

the promised sum to his sister. His sister and her husband brought an action in assumpsit in their own name as beneficiary for non-payment of the sum. An objection was leveled against this on the ground that the sister was neither privy to nor interested in the consideration, and that the promise had been made to her father and not her. Scroggs CJ, in allowing the claim, said: *"There was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children."* Wilde J is reported in 1 Freem. 471 to have said that the sister's marriage could be seen as a *"meritorious act"* given for her brother's promise. Ventris' report of the case at 1 Vent. 318 states that the case was decided on the ground that the *"nearness of relation between Father and Chilr!'* justified the vicarious extension that Scroggs CJ spoke of. Levinz report at 2 Lev. 211 explains that the court's decision was based on actual benefit and detriment, *"and so judgment was given for the plaintiff, for the son hath the Benefit by having the Wood; and the daughter hath lost her portion by this means."* *Dutton v. Poole* (1678) 2 Lev 210, therefore, is a case where natural love and affection was sufficient consideration to ground an assumpsit on a use established through such consideration. Although natural love and affection was, in the earlier cases such as *Sharrington v. Strotton*[66] and *Collard v. Collar*[67], sufficient to raise a use, it was prior to *Dutton v. Poole*, insufficient to ground an action in assumpsit. Thus, a stranger to the consideration could, by construction of law, be regarded as a party to it, if he was closely related to the person from whom the consideration actually proceeded.

Present day authors, such as G.H. Treitel and Andrew Phang Boon Leong, credit *Tweddle v. Atkinson*[68] as the case that establishes the doctrine that only parties to a contract can enforce it. P.S. Atiyah, however, states that this conclusion is misconceived and blames, in no small measure, the legal profession for this misconception. The learned author wrote:

"As has often happened in the law, the case became important, not for what the judges said, but for what the legal profession came to believe the case stood for. And what they believed that Tweddle v. Atkinson stood for was the proposition that it is somehow contrary to the inherent nature of a contract that it should be capable of conferring enforceable rights upon third parties.

In the 19th century, the rule of consideration had become an essential pre-requisite for a plaintiff to enforce a contract at common law. The early cases of

66. (1565) Plowden 298
67. (1594) Popham 47
68. (1861) 121 ER 762

Bourne v. Mason (1669) 1 Vent. 6 and Crow v. Rogers (1724) 1 Strange 592 laid down the requirement that the plaintiff must not be a stranger to the consideration. The 19th century case of Price v. Easton (1833) 4 B. & Ad. 433 picked up on this and Denham J ru/_d that the plaintiff must show "consideration for the promise moving from the plaintiff to the defendant. " Sir John Comyns' Digest similarly states that "the legal interest in the simple contract resides with the party from whom its consideration moves." When Tweddle v. Atkinson (1861) 121 ER 762 was decided, Crompton J reiterated this rule when he said, "the promisee cannot bring an action unless the consideration moved from him." The statements in these cases are a reflection of the consideration rule and had nothing whatsoever to do with the rule that only parties to a contract could enforce it.

In order to fully appreciate the judgments in the case of *Tweddle v. Atkinson,* it must be noted that the 17th century rule of pleading in the case of *Starkey v. Mylne* (1651) Cremer Ms. 105 was still in force in the 19th century. That rule of pleading was that the plaintiff had to allege that he was the promisee even though in reality he was not. In *Starkey v. Mylne* (1651) Cremer Ms. 105 the plaintiffs declaration made it appear as though the plaintiff was a party or co-promisee in a tripartite contract. Essentially, where X receives a promise from Y for Z's benefit, and the consideration for Y's promise moves from Z and not X, Z had to file a declaration as if he had received the promise directly from Y. This requirement implied the common law judges' belief that the consideration draws the promise to the person who provided it.

The understanding that the promise follows the consideration or that the consideration draws or pulls to it the promise and the use of such phraseology was not uncommon at that time. In *Edmundson v. Penny* (1845) 1 Pa. St. 335, Gibson C.J. said that:

The plaintiff must unite in his person both the promise and the consideration of it; and if the action, in such case, cannot be sustained on the foundation of the consideration by drawing the promise to it, it cannot be sustained at all."

This requirement illustrates that the rule that only a party to a contract can enforce it had not yet become a rule of contract law. Contemporary writers assert that *Tweddle v Atkinson* decided in the 19th century brought about the shift to the rule that only a party to a contract can enforce it. In that case, the plaintiffs father and father-in-law executed a written postnuptial agreement whereby they each undertook to pay to the plaintiff a certain sum by a certain date. The agreement provided:

Memorandum of an agreement made this day between William Guy... and John Tweddle .., Whereas it is mutually agreed that the said William Guy shall pay the sum of £200 to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay £100 to the said

William Tweddle, each and severally the said sums on or before the 21st day of August, 1855. And it is hereby further agreed ... that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified.

The plaintiffs father-in-law, William Guy, died before paying the sqm of £200, which he undertook to pay in the agreement. There was no evidence, since4 the action was upon declaration and demurrer without evidence being taken, that the plaintiffs father had paid his portion. The plaintiff brought a declaration in assumpsit against his father-in-Iaw's executor. The plaintiff failed in his action, the Court of Queen's Bench having held that the action could not be maintained. Crompton J. in his opinion said that, *"the promisee cannot bring an action unless the consideration moved from him."* Blackburn J. said that, *"no action can be maintained upon a promise unless the consideration moves from the party to whom it is made."* These two statements are reflective that *Tweddle v. Atkinson*[69] can be considered the origin of the contemporary rule that consideration for a contract must move from the promisee. Wightman J.'s opinion was that, *"it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."*

The judges of the Courts of Queen's Bench were also concerned with the principle that there must be mutuality of consideration. The plaintiff was attempting to enforce a promise made in postnuptial agreement. In order to succeed, he had to establish consideration for the promise. The fact that he had married William Guy's daughter could not be deemed as consideration for the promise since the marriage had taken place prior to the agreement. The marriage was, consequently, past consideration, and that was not recognised as valid consideration under English contract law. The plaintiff, in order to establish consideration for the father-in-law's promise, relied on the principle of near relation or otherwise known as natural love and affection which had been used in *Dutton v. Poole* (1678) 2 Lev. 210.

The judges in *Tweddle v. Atkinson* were of one mind that *Dutton v. Poole* was no longer good law. The judges were also all concerned that permitting an action on the basis of near relation would upset general tenets of the law of contracts because of the lack of mutuality between the plaintiff and the defendant. This concern is evident in their response to the argument of counsel George Mellish that:

...an exception exists in the case where a father is making a provision for his children, the nearness of the relationship giving them the benefit of the consideration; and, in truth, justice is in favour of the exception.

Crompton J., in response to this argument said, *"There must be mutuality;"*

---

69. (1861) 121 ER 762

and asked Mellish whether he was saying, "... *that the plaintiff is liable to be sued, as well as competent to sue?"* Wightman J. added that, *"That is the great difficulty; there is no mutuality or reciprocity."* That the judges would be loath to permit an action on a promise that lacked mutuality is brought out in Crompton J.'s statement that, *"It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued."*

The court's concern was that if the plaintiff was allowed to sue William Guy for his promise but could not be sued by William Guy for the plaintiffs father's promise, then William Guy would be deprived of the right to raise the defense that there had been a failure of consideration on account of the fact that John Tweddle had not performed his promise under the postnuptial agreement.

In *Chinnaya* v *Ramayya*[70], A made over certain property by a gift-deed to her daughter with a direction that the daughter should pay an annuity to A's brother, as had been done by A. Paragraph 12 of the deed run as follows *"I have been till now giving annually Rs.* 653 *to my brothers as I pleased. You also should therefore, until you give them a village which can yield the said income exclusive of 'peshkash', be paying them and their descendants".* On the same day, the daughter executed a writing in favour of the brother agreeing to pay the annuity. The daughter declined to fulfill her promise, and the brother sued the daughter to recover the amount due under the agreement. The daughter contended that no consideration proceeded from the brother, and that he, being a stranger to the consideration, had no right to sue. It was held following *Dutton* v *Poole,* that the consideration had indirectly moved from the brother to the daughter, and that he was therefore entitled to maintain the suit. *Tweddle* v *Atkinson* was distinguished on the ground that no consideration had proceeded in *Tweddle* either directly or indirectly from the husband. Innes J stated, *"The distinction between this and the preceding case(s) is obvious. The plaintiff did not lose anything by the arrangement between the two parents. Not was he worse off from the non-fulfillment of the promises than he would have been if they had not been made, nor fid the promises result in any present benefit to the persons promising to the detriment of the plaintiff; so that there was no consideration moving directly or indirectly from him to the defendants. It cannot be doubted in the present case that the document A was executed by the defendant in pursuance of the donation deed B, and with a view that the defendant might take the benefit of that deed."* Kindersley J in *Chinnayya* v *Ramayya,* rested his judgment upon the terms in which this section defines 'consideration'. In his words" *It appears to me that the deed of gift in favour of the defendant and the contemporaneous agreement between the plaintiffs and the defendant may be regarded as one transaction, and that there was sufficient consideration*

70. *Chinnaya v Ramayya* (1882) 4 ILR Mad 137.

for the defendant's promise within the meaning of the Contract Act." In a later case *Samuel v Ananthanatha*[71], the administratrix of the estate of deceased person agreed to pay one of the heirs of the deceased his full share of the estate if the heir gave a promissory note for a proportionate part of a barred debt due to a creditor to the estate. The heir executed a promissory note in favour of the creditor, gave it to the administratrix, and received his full share in the estate. The note was subsequently handed over by the administratrix to the creditor. In a suit by the creditor against the heir on the note, it was held that the act of the administratrix in handing over to the heir his share of the estate, without deducting any portion of the debt, constituted consideration for the heir's promise to the creditors, and that the creditor could recover upon the note. Kernan J observed, " *The absence of consideration between the plaintiff and the defendant is not material under the circumstances, as the defendant received consideration from the administratrix. It was stated in argument that plaintiff was not present when the note was made, and that the note was given to the administratrix to be, and that it was handed by her to the plaintiff of account of the sum of Rs. 700. Even if the defendant had not received such consideration from the administratrix or the plaintiff, yet if the promissory note was made payable to the plaintiff at the request of the administratrix for her accommodation, and it was delivered to her to be, and if it was handed over by her to the plaintiff if discharge of part of his debt, the want of consideration to the defendant would be immaterial, and the defendant could not plead nudum pactum in this action, as the plaintiff and the defendant would not then be the immediate parties."* In both the mentioned cases above, consideration had proceeded from a third party, and therefore the suit would not have been maintainable according to the modem English law, unless a trust was established.

This principle that the consideration for a promise need not necessarily move from the promisee, has been followed later in a number of cases.[72] In *Fazaladdin Mandai v Panchanan Das*[73] on 26-05-1943 the plaintiff and his brothers a potta granting a maurashi lease of the land to the defendant on the receipt of a salami and the defendant executed a kabuliat undertaking to pay rent to the plaintiff and his brothers. On the same day, the defendant also executed an "Ekrarnama" undertaking to convey and release the defendant's interest in the property to the plaintiff on payment of Rs.- 50 by the plaintiff within 6 years. The plaintiff offered to pay the sum of Rs. - within 6 years from 26-05-1943. The defendant

---

71. *Samuel Pillai v Ananthanatha Pillai* (1882) ILR 6 Mad 351

72. *Budhavaram Narasflimhulu Chetti v Noota lbbundrum Nagaravaru* AIR 1923 Mad 434 at 435; *Wahidan v Nasir Khan* AIR 1930 All 434 at. 436; *Raja Shiba Prasad Singh v Tincouri Banerji* AIR 1939 Pat 477 at p 485; *Daw Po v U Po Hmyin* AIR 1940 Rang 91. 187 IC 875; *Marayee Ammlal v Minor Nalluswamy* (1965) 2 Mad U 329.

73. *Fazaladdin Mandai v Panchanan Das* AIR 1957 Ca192. per Bachawat J at 95.

refused to accept the payment. He now contends that the undertaking to convey is without consideration and cannot be enforced. Bachawat J's held that *"It is celar that the Ekrarnama is not a bilateral agreement. It is a unilateral promise by the defendant to convey on payment of Rs. 50 by the plaintiff. There is no reciprocal promise by the plaintiff and there is no reciprocity of obligations. There is no promise by the plaintiff to buy or to pay the price. Reciprocity of obligations, however, is not of the essence of consideration. Consideration is the price of a promise, a return or quid pro que, something of value received by the promisee as inducement of the promise. An act done or forbearance made in return for a unilateral promise is a suffuicient consideration to support the promise. The evidence on the record clearly shows that there was consideration for the Ekrarnama. The potta was executed and accepted as inducement of the Ekrarnama and the Kabuliat and conversely that the Ekrarnama and the Kabuliat were executed and accepted as inducement of the potta. It is beyond doubt that the plaintiff and his brothers would not have executed the potta had not the defendant agreed by the Ekrarnama to convey the property. The potta was executed at the desire of the defendant in return for the Ekrarnama and the Kabuliat and is in no sense past consideration. A single consideration may support more than one promise and may move from the promise or any other person."*. A family arrangement was upheld even though the consideration moved from a third party.[74]

It may be mentioned however that *Chinnaya v. Ramaya* would not have been maintainable in England as modem English law, which is based on *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd*[75], does not recognise contracts where the consideration was furnished by a third party. For any such contract to be enforceable in England, it must come within the established common law or statutory exceptions to the doctrine. Nonetheless, in Bangladesh, with the Contract Act as the law, the courts are partially free from the shackles of *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd.* Jenkins C.J. expressed this view in *Debnarayan Dutt v. Chunilal Ghose*[76] when he said, *"In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience"*.

But just because Section 2(d) of the Act provides that a third party can give consideration for a contract, it does not follow that a third party can sue on the contract. As Rankin c.J. in *Krishna Lal Sadhu v. Pramila Bala Dasi*[77], when dealing with Section 2(d) of the Indian Contracts Act, pointed out:

---

74. *Sundar Sahu Gountia v Chamra Sahu Gaunlia* AIR 1954 Ori 80 at 84.
75. (1915) AC 847
76. (1914) 41 Cal137
77. (1928) 55 Call315

"Clause (d) of section 2 of the Contract Act widens the definition of 'consideration' so as to enable a party to a contract to enforce the same in India in certain cases in which the English law would regard the party as the recipient of a purely voluntary-promise and would refuse to him a right of action on the ground of nudum pactum. Not only, however, is there nothing in s. 2 *to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rigidly excluded by the definition of promisor' and promise* ".

Consideration must be current - it cannot be past is not always the case under Bangladesh law;

The provisions with regard to the maxim that past consideration is no consideration under English law have been discussed above. The distinguishing feature of the Bangladesh law is enunciated herein:

Bangladesh law

The words 'has done or abstained from doing' in the definition given in the Act provide that an act done by X at the request ofY, without any simultaneous promise from Y, may be a consideration for a subsequent promise from Y to X. Consideration may consist in performance which is known as executed consideration. An executed consideration consists in an act already done by one as consideration for a promise of the other, and the liability is outstanding on one side only. In *Fazaladdin Mandal's* case it was held that *"In a very large number of contracts, no doubt, a promise of one parr is a consideration for the promise of the other party but that by no means is the only kind of consideration known to law. A consideration may also consist in performance. Such a consideration is known as executed consideration and is within the definition of consideration in* S 2(d)[78]."[of the contract Act]. This is present, as opposed to future consideration as was held in *Union of India* v *Chaman Lal Laona & Co* [79]. S.K. Das J held that, *"The distinction between the two classes of contracts where the consideration is either executed or executory is that, an executed consideration consists of an act for a promise. It is the act which forms the consideration. No contract is formed unless and until the act is performed, e.g. the payment for a railway ticket, but the act stipulated for exhausts the consideration, so that any subsequent promise, without further consideration, is merely a nudum pactum. In an executed consideration the liability is outstanding on one side only; it is a present as opposed to a future consideration. In an executory consideration, the liability is outstanding on both sides. It is in fact a promise for a promise, one promise is bought by the other. The contract is concluded as soon as the promises are exchanged. In mercantile contracts this is by the most common variety. In other words a contract becomes binding on the exchange of valid promises, one being the consideration for the other. It is clear, therefore, that there is nothing to prevent one of the parties from*

---

78. Per K.C. Das Gupta J in *Faza!addin Manda! v Panchanan Das* AIR 1957 Ca192.
79. AIR 1957 SC 652 at 655.

carrying out his promise at once, i.e., performing his part of the contract whereas the other party who provides the consideration for the act of or determined to the first may not 'carry out his part of the bargain simultaneously with the first party."

The use ofthe perfect tense in the clause 'has done or promised to do...' embodies in the law of Bangladesh the exception to the general rule laid down in *Lampleigh* v *Brathwait*[80] Brathwait killed a man, and asked Lampleigh to use his endeavours to obtain a Royal pardon. Lampleigh rode to Royston and obtained a pardon from the King, and Brathwait later promised to pay him £100 for his efforts, a very large sum in those days. Brathwait did not pay and Lampleigh sued him in assumpsit, the 17th century predecessor of contract. The Court held that a voluntary service could not be consideration, but if the service was given at the request of the defendant, the subsequent promise of payment, though it follows the service, "is not naked but couples itself' with the previous request. The explanation of this case seems to be that when Brathwait requested Lampleigh to perform the service, it was understood by both of them that Brathwait would pay whatever the service was worth. Brathwait's promise to pay £100 can then be regarded as evidence of what the service was worth. By suing for the £100, and not some larger sum, Lampleigh seemed to accept Brathwait's valuation ofthe service. Thus a service rendered without any agreement for reward at the time will not support a subsequent promise of reward- *"a mere voluntary courtesy will not have a consideration to uphold an assumpsit"* - but it was said that if the service was *"moved by a suit or request"* of the promisor, the promise *"coupies itself with the suit before,"* or as we should now say, is held to relate back to the original request, and accordingly is deemed to be made on good consideration. The judges said in that case that *"First...a meer voluntary courtesie will not have a consideration to uphold an assumpsit. But if that courtesie were moved by a suit or request of the party that gives the assumpsit, it will bind, for the promise, though it follows, yet it is not naked, but couple_ it self with the suit before, ant the merits of the party procured by that suit, which is the difference."* In re *Casey's Patenti*[81] Bowen LJ observed that *"Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now, the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally*

---

80. Hobart 105, 1 Sm LC 148

81. *Ibid* 12

rendered. So that here for past services there is ample justification for the promise to give the third share."

Old debts also form good consideration for mortgage or transfer of property as was held in *Kunj Behari* v *Madhsodan Lal*[82]. In *Board of Revenue Madras* v *Annamalai & Co Pvt. Ltd.* the question was whether a power of attorney given by a company to a bank enabling it to sell the properties with the bank was for good consideration in relation to the loan advanced earlier by the bank or not[83], M Anantanaryanan CJ held that *"...in the present case on part of the Bank there is an executed promise in the form of a loan advances. But the reciprocal consideration proceeding from the respondent for this promise was executory. As long as the reciprocal promise remained executory the respondents can take successive steps towards discharging the liability thereunder, and for each successive step so taken, the loan advances earlier by the Bank or such part of it as remains undischarged or may be realizable under the power can operate as consideration. The execution of the present irrevocable power of attorney constitutes such a step in the ;discharge of the obligation. It appears to us that it will be perfectly legal to construe that, the consideration therefore was relatable to the loan advances earlier by the bank (whether it be the entire loan or the part remaining undischarged) and that consequently the power of attorney was executable for valuable consideration".* A promissory note executed as security for repayment of a loan already received by the debtor was also held to be good consideration[84]; or *"where a promissory note was executed for services performed by the person in whose favour it is executed for the executant, the promissory note is for consideration"*[85].

Services previously rendered at the desire of a promisor are good consideration. In *Sindha v Abraham*[86] the plaintiff rendered services to the defendant at his desire expressed during his minority, and continued those services at the same request after his majority. The question arose whether such services constituted consideration for a subsequent express promise by the defendant to pay an annuity to the plaintiff. The agreement was one to compensate for past services, and it was held that it could be enforced, as the services formed a *"good consideration for subsequent express promise by the minor in favor of the person who rendered the services. By section 2(d) of the Contract Act, services already rendered at the desire of the promisor are placed on the same footing with such services to be rendered, and*

---

82. AIR 1919 All 348.
83. AIR 1968 Mad 50 at 52, (1967) 2 Mad LJ 515 (FB).
84. *Central Bank of India v Tarseema Compress Wood Mfg Co* AIR 1997 Born 225.
85. *Dungarmull Kissenlal v Sambhu Charon* Pandey & another AIR 1951 Cal 55 at 59 per Harries CJ.
86. *Sindha Shri Ganpalsingji v Abraham* (1895) 20 Born 755.

constitute good consideration for a definite agreement.[87]" The court was of the opinion that the services were *"intended to be recompensed, though the nature and the extent of the proposed recompense were not fixed until the agreement sued upon was executed by the defendant"* [88]. If so, there was a contract for reasonable recompense when the services were rendered, and the decision might have been put on that ground alone. But where mortgage bonds were executed without authority of the collector, and after his regime, fresh bonds executed in lieu of earlier bonds, these were not without consideration[89].

Mutual Promises

These words 'or promises to do or to abstain from doing something' in the definition, read together with Section 2(e) [which stipulates that "every promise and every set of promises, forming the consideration for each other, is an agreement"] and section 2(t) [which provides that "promises which form the consideration or part of the consideration, for each other are called reciprocal promises"] convey the proposition that a contract may be formed by the exchange of mutual promises, each promise being the consideration for the other. These mutual promises gain their contractual values from each other and jointly as opposed to their singular value. "The proposal to give a promise for a promise is accepted by giving the promise asked for. Thereafter, the two parties are both bound, each being both promisor and promisee. It is not really necessary or useful or even true to say that the promise of the party who accepts has ever been a proposal, though the language of sub-s 2(b) does not seem to recognize the existence of promises which have not passed through that stage. Still it is true that, but for the counter-promise or 'reciprocal promise'; neither party's signification of willingness could become a promise within the definition of the Act. In this sense, one can say that the acceptance of an offered promise by giving the reciprocal undertaking asked for, has itself the nature of a proposal, though it becomes a promise in the act of utterance, and there is no moment at which it exists merely as a proposal".[90]

A single consideration may support more than one promise. For example, where a tenant gave several undertakings by the rent note, they were held to have collectively formed one consideration for the landlord assenting to continuing the tenant in possession and enjoyment of the

---

87. Ibid Per Farran CJ and Parsons J 20 ILR (1896) 755 at 758
88. ibid
89. *Lala Babu Ram v Ganga Devi* AIR 1959 All 788 at 789.
90. Mulla, Indian Contract and Specific Relief Acts, Twelfth Edition, page 81

premises. Every clause of the rent note was supported by consideration and no clause could be singled out and repudiated on the ground that it was, without consideration[91]. In *State of Orissa* v *Narain Prasad*[92] it was held by the Indian Supreme Court that *"rental and excise duty ...together constitute the consideration for the grant of license"* in addition to the obligation to purchase the minimum guaranteed quantity.

Payment for antecedent debt

The existence of an existing debt is sufficient consideration for a later promise to pay that debt[93]; and there will be good consideration if there has been forbearance on the part of the creditors[94].

Part payment of a consideration

Section 63 of the Contract Act provides that "every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit." This is indeed a departure from the English principles where part payment is only acceptable in executory contract. For an executed contract to allow part payment as full consideration, recourse must be had to the exception to the rule vide a release under the seal.

Thus, there is very little difference in terms of the elements of consideration under English law and the Bangladesh law. What rather appears to the author is that the exception principles in English law have been enunciated as the general principles of consideration under our law.[95]

---

91. *Kothari Revashankar Amulakh v Gauriben layoshankar* Vyas AIR 1954 Sau 8.
92. (1996) 5 SCC 740 per B.p. Jeevan Reddy J.
93. *Slade's case* (1602) 4 Co Rep 91a.
94. *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 at 297.
95. It is to be noted that the author kept the discussion within the definition of consideration under section 2(d) of the Contract Act 1872. The provisions of sections 23, 24 and 25 of the Contract Act 1872 are not discussed in this article. It must also be confessed that, the author was not able to find a single decision from the Bangladeshi courts under section 2(d) of the Contract Act 1872.

The Dhaka University Studies, Part-F Vol. XVI (2) : 203—246 December 2005

THE DEVELOPMENT OF LAND LAWS AND LAND ADMINISTRATION IN BANGLADESH: ANCIENT PERIOD TO MODERN TIMES

Mohammad Towhidul Islam

1. Introduction to Land Law

The expression 'Land law' in typical sense denotes the law of real property meaning estates and interests in land. It relates to land, rights in and over land and the processes whereby those rights and interests are created, transferred and extinguished.[1] So land law is nothing but the law concerned with land.

People can differentiate land law from other subjects of law as most of its language is at first unknown and a bit different in the second place but different does not necessarily mean complicated. Similarly, there is a widespread conviction that land law is boring, not fascinating or unpopular. Compared to other legal disciplines, this belief is too mislaid as land law, for its importance and relevancy, remains in the heart of every legal system and is the only law that highly concerns our everyday lives both at home and work.

Land law is a subject based on principles of ownership of land,[2] extinction of land,[3] acquisition and requisition of land,[4] compensation,[5] alluvion and diluvion of land,[6] easement and prescription,[7] settlement of *khas*

---

1. Dixon, Martin, *Principles of Land Law*, Cavendish Publishing Limited, Fourth Edition, London, 2002, pp 1-4
2. Articles 13, 42, 143 and 144 of the Constitution of the People's Republic of Bangladesh, Section 92 of the State Acquisition and Tenancy Act 1950 (Act No. XVIII of 1951), commonly known as the SAT Act 1950.
3. Section 92 of the SAT Act 1950.
4. The SAT Act 1950 and the Acquisition and Requisition of Immovable Property Ordinance (Ordinance No. II of 1982.
5. Sections 37 and 39 of SAT Act 1950, the Land Reform Ordinance (Ordinance No. X of 1984) and the Acquisition and Requisition of Immovable Property Ordinance 1982.
6. Sections 86 and 87 of the SAT Act 1950.
7. Section 26 of the Limitation Act (Act No. IX of 1908) and the Easement Act (Act No. V of 1882).

land,[8] sub-letting,[9] *waqf* or trust,[10] transfer of land,[11] pre-emption,[12] registration of land,[13] mutation,[14] preparation and revision of the Record-of-Rights (*Khatiyan*),[15] abandoned and enemy property,[16] land taxes, certificates etc.[17] These issues in land law can be as demanding as any that any other subject of law has to offer.

In a developing country like ours land distribution system is often alleged to foster inequality which goes against the fundamental right ensuring equality and fundamental principles of the State policies stated in the Constitution promising to establish economic and social justice. Here some people are having hundreds of *bighas* of land and some haven't got any. Again some people have been occupying lands for ages illegally or without due compliance of any procedure; using the lacunae of the existing land law, some people have been selling the same land to different persons. To make the system effective, the task of land reform has to be undertaken, *khas* lands have to be identified and settled properly, existing flawed laws have to be amended or new laws have to be enacted, land administration and land revenue system have to be updated keeping pace with time. Without having profound knowledge in land law, nothing can be achieved.

---

8. Section 76 of the SAT Act 1950 and the Non-Agricultural *Khas* Lands Management and Settlement Policy 1995 and the Agricultural *Khas* Lands Management and Settlement Policy 1997.
9. Sections 75A, 93 and 81A of the SAT Act 1950.
10. The *Waqfs* Ordinance (Ordinance No I of 1962) and the Trust Act (Act No. II of 1882).
11. Sections 88, 89, 90, 96 and 97 of the SAT Act 1950 and the Transfer of Property Act (Act No. IV of 1882) commonly known as the TP Act 1882.
12. Section 96 of the SAT Act 1950, Section 24 of the Non-Agricultural Tenancy Act (Act No. XXIII of 1949) commonly known as the NAT Act 1950, Section 4 of the Partition Act (Act No. IV of 1893), Section 13 of the Land Reform Ordinance 1984, Section 27 of the Restoration of Vested Properties Act (Act No. XVI of 2001), Section 53D of the of the TP Act 1882.
13. The Registration Act (Act No. XVI of 1908).
14. Section 143 of the SAT Act 1950.
15. Sections 145, 17-19 of the SAT Act 1950.
16. The Abandoned Property (Control, Management and Disposal) Order (Order No. XVI of 1972), the Enemy Property (Continuance of Emergency Provisions) (Repeal) (Amendment) Ordinance (Ordinance No. XCIII of 1976) and the Restoration of Vested Property Act of 2001.
17. The SAT Act 1950, the Land Development Tax Ordinance (Ordinance No. XLII of 1976) and the Public Demands Recovery Act (Act No. III of 1913).

It is open secret that almost eighty percent of the civil or criminal litigations in the country relate to land.[18] So the study of land law is required not only to flourish one's business, but also to help the legislature or the policy-makers in enacting proper laws or formulating policies with the aim of making awareness among the people regarding land and other land related issues. This endeavour can create fewer grievances among people over land issues.

To understand land law, it seems necessary to know what the term 'land' means. Land has been defined in the Osborn's Concise Law Dictionary as any ground, soil or earth whatsoever. It legally includes also all castles, houses and other buildings; also water. It includes land of any tenure, mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson and a rent and other incorporeal hereditaments and an easement, right, privilege or benefit in, or over or derived from land; but not an undivided share in land.[19] This definition is extensive and has included anything, which is connected with land. It can be simplified in the words of Blackstone that the term 'land' includes both 'corporeal hereditaments i.e. physical and tangible characteristics of land (substantial and permanent objects) affecting the senses and incorporeal hereditaments i.e. intangible rights enjoyed over or in respect of land'.[20] The definition of land provided in Section 2(16) of State Acquisition and Tenancy Act 1950 has got the same signification with the dual characteristics of corporeal and incorporeal hereditaments when it says: 'land means land which is cultivated, uncultivated or covered with water, at any time of the year and includes benefit to arise of land, houses of buildings and also things attached to the earth or permanently fastened to anything attached to the earth.' Here in the definition 'corporeal hereditaments' is meant land, which is cultivated, uncultivated or covered with water, at any time of the year and 'incorporeal hereditaments' is meant benefit to arise of land, houses or buildings.' To exemplify the expression 'benefit to arise of land, houses or buildings' some judicial decisions can be taken into consideration in this regard. Firstly, in 1959 the High Court held that the right of fishery in navigable

---

18. Hoque, Kazi Ebadul, *Gradual Development of Land L... ...Land Administration*, Bangla Academy, Dhaka, 2000, pp 255.
19. Bird, Roger, *Osborn's Concise Law Dictionary*, (ed.), Universal Law Publishing Co. Pvt. Ltd, Seventh Edition, Delhi, 1983, p 195.
20. Gray, Kevin, *Elements of Land Law*, Butterworths, Second Edition, London, 1993, p 1.

river is not acquirable within the meaning of Sections 20 and 39 where no compensation was mentioned to be payable for the acquisition and as such it is not a benefit arising out of land.[21] By Ordinance No. XII of 1960, Section 20 (2a) was inserted in the SAT Act 1950 where right to fishery in water irrespective of its being several or territorial other any fishery constructed solely in the process of excavation was made acquirable and consequently this decision has been made inoperative when it says that the definition of land includes all fisheries, several or territorial.[22] Secondly, in another decision in 1961 the High Court held that the right to collect rent or profits from a hat is acquirable for compensation as it is a benefit arising out of land.[23] So what can be acquired or transferred for consideration or compensation can be termed as land.

Nowhere in the statute land is classified. For the purpose of land law, land can be divided into Agricultural land and Non-Agricultural land. Agricultural land can be defined as land, which is used for purposes connected with agriculture or horticulture. Section 2(4) of the Non-Agricultural Tenancy Act 1949 (commonly known as the NAT Act) defines non-agricultural land as land which is used for purposes not connected with agriculture or horticulture and includes any land which is held on lease for purposes not connected with horticulture irrespective of whether it is used for any such purposes or not and a parcel of agricultural land converted into a tenancy by the order of the Collector[24] to which the NAT Act applies and but does not include-

(a) a homestead to which the provisions of Section 182 of the Bengal Tenancy Act 1885 (commonly known as the BT Act) apply,

(b) land which was originally leased for agriculture or horticultural purposes but is being used for purposes not connected with agriculture or horticulture without the consent either express or implied of the landlord, if the period for which such land has been so used is less than twelve years, and

(c) land which held for purposes connected with cultivation or manufacture of tea.

With the introduction of the SAT Act, of which Section 80 has repealed the BT Act 1885 and equalled the status of the *raiyats* as *maliks*, homestead

---

21. *Tozammel Hossain v. Province of East Pakistan* 11 DLR 145.

22. Section 16(a) of the SAT Act 1950.

23. *Abdul Aziz v. Province of East Pakistan* 13 DLR 873.

24. Kabir, Lutful, *Land Laws of Bangladesh*, Vol. IV, Law House, Dhaka, 1982, pp 38-47.

of a *malik* is now governed by the SAT Act and excluded from the operation of the NAT Act 1949.

Non-agricultural land does not include lease of structures with land but the cases of tenants of non-agricultural land, who have erected structures thereon, are governed by the provisions of the NAT Act 1949.

In 1970 the Supreme Court held in a decision[25] that 'A non-agricultural lease, according to the provisions of the Act is a lease in respect of non-agricultural land alone, but does not include any building or hut occupied by a tenant if such building or hut has been erected or is owned by the lessor. A non-agricultural lease in respect of both land and huts standing thereon is clearly outside the ambit of the Act.' If this decision is read with an earlier decision[26] given by the High Court by in 1960 it can be said that a user can play very important role in determining whether a land will be identified as non-agricultural land or not. Moreover, under Sections 5(c)(ii) and 85 of the NAT Act, non-agricultural land does not include the lands held for the exercise of rights over forests or rights over fisheries or rights to minerals.

2. Ownership of Land

Who owns the land? Is it the Government (as in England the Crown i.e. King or Queen[27]) or the people? This question poses controversy not only in the Sub-Continent but also in the other parts of the world. Modern writers appear inclined to take sides, sometimes rather forcibly; on the question whether the King or the peasant owned the land. Some regard the king as the sole proprietor of lands as happened in ancient period, while others look upon the whole village collectively or individual cultivator as the real owner.

There are three types of opinions given by the jurists regarding ownership of land in Bengal[28]:

a) First category of viewers says that land ownership belonged to the King and they got support from the writings of Manu, Kautilya and others. *Arthashastra* says: 'The King is the lord of the land and water in his kingdom'. Daodoras says: 'the people pay a land tribute to the King, because all India is the property of the Crown. ...No private

---

25. *Abdul Mutaleb v. Mst. Rezia Begum* 22 DLR (SC) 134.
26. *Moulana Hafez Athar Ali v. Abdul Taher Bhuiyan* 12 DLR 758.
27. Burn, E. H., *Maudsley and Burn's Land Law*, (ed) Butterworths, Seventh Edition, London, 1998, p 3.
28. Islam, Kabedul, *The Land System of Bangladesh*, Mowla Brothers, Dhaka, 2002, pp 17-102.

individual is permitted to own it.' Fa-Hien and Yuan-Chuang wrote: 'land was the property of the King.'[29]

b) The second category of viewers amongst whom Sir Henry Maine is the prominent say: 'the village-corporations were practically the absolute proprietors of the village lands, including the fresh clearings and were responsible for the total amount of rent to the Government. In case the owner of a plot of land failed to pay his share it became the property of the corporation, which had a right to dispose of it to realise the dues. ...The ownership in land was regarded as vested in the whole community. ...The ownership of the cultivable land vested in private individuals or families, and not in the State'.[30]

c) The third category of viewers say: 'in Bengal proper the land belonged without dispute to the original cultivators, and even when village communities found it necessary to strengthen their organisation for the sake of protection against outsiders, all that community, as distinct from the individuals it governed could do, was to take a part of the produce from each family cultivating land for the maintenance of the village officials and the cost of administration.' John Stuart Mill says: ' land throughout India is generally private property, subject to the payment of revenue, the mode and system of assessment differing materially in various parts.' The Report of the Indian Taxation Enquiry Committee says: 'private ownership of land was an established institution among the Indo-Aryans in the most ancient times to which their society can be traced.'[31]

Though it can not be said quite undoubtedly which category of views prevailed in the ancient Bengal, from the information received and documents discovered relating to land sale or land administration, so far it is apparent that from the 5th century to 13th century the King was the whole proprietor and real owner of the land. Though some writers wrote about the second category, writers like Baden Powell and Dr. Bikram Sarkar said that in Bengal there was no community or joint holdings in villages. They may have been subject to overlord tenures, with their connected fiefs and subordinate holdings. There the land belongs to the original cultivators. In other words, the village was based on individual tenure of land. It meant tenure by a family rather than an individual. One village was aggregate of families called *Kula*. Again, some writings of

---

29. Ibid.
30. Ibid.
31. Ibid.

Manu showed reliance of the third category when it says that the land belonged to the person who cleared the jungles and brought it under cultivation as like as the wild deer of the forests become the property of the man who first pierces them with arrows. Some commentators find support in favour of the third category from practise prevailing in Hindu and Muslim period which continued till later part of the 18th century.[32]

However, it needs to be examined now whether the private ownership exists in land in the modern period in Bengal, currently in the country of Bangladesh. The answer must be in the negative when we look closely at Section 92 of the State Acquisition and Tenancy Act, 1950 read together with Rule 6 of the Tenancy Rules 1954, as the Section speaks of the extinguishment of interest of the *raiyats* in the land in the following ways-

(a) when he dies intestate leaving no heir entitled to inherit under the law of inheritance to which he is subject;

(b) when he surrenders his holding at the end of any agricultural year by giving notice in the prescribed form and in the prescribed manner and within the prescribed period to the Revenue Officer,

(c) when he voluntarily abandons his residence without making any arrangement for payment of the rent as it falls due and ceases to cultivate his holding either by himself or by members of his family or by, or with the aid of, servants or labourer with the aid of partners or *bargadars* for a period of three years; or

(d) when such interest has devolved by inheritance, under the law of inheritance to which such *raiyat* is subject, on a person who is not a *bona fide* cultivator and such person has not cultivated the land comprised in the holding either by himself or by members of his family or by, or with the aid of, servants or labourer with the aid of partners or *bargadars* during the period of five years from the date on which such interest has so devolved on him and there is no sufficient cause why he has not so cultivated the land.

That means in Bangladesh, even in the modern period the *raiyat* is not the real owner of the land within the spirit of the SAT Act 1950, as he cannot leave his land at will and is thus getting deprived of his right of leaving the land at will in the fear that his right to land will extinguish. Even if, he does not pay rent to the land, his right to land will extinguish as well.

Again, under the provisions of Sections 75A, 93 and 81A of the SAT, sub-letting (also known as sub-lease) has been prohibited keeping in mind

---

32. Ibid.

that if it was allowed, it could have created sub-tenancy further and hampered the object of the SAT Act 1950. It can be inferred from these provisions that as the *raiyats* though they are called *maliks* now[33], are tenants of the State, they are debarred from creating another tenancy under them.

Again, when we look at the constitutional provision contained in Article 13 we find the principles of ownership when it says that the people shall own or control the instruments and means of production and distribution, and with this end in view ownership shall assume the following forms-

(a) state ownership, that is ownership by the State on behalf of the people through the creation of an efficient and dynamic nationalised public sector embracing the key sectors of the economy;

(b) co-operative ownership, that is ownership by co-operatives on behalf of their members within such limits as may be prescribed by law; and

(c) private ownership, that is ownership by individuals within such limits as may be prescribed by law.

That means three types of ownership is recognised in a way that the individuals can own property alike the cooperative or the State but they have to pay rent and other taxes as the State ensures security and protection to the individuals.

If we look at Article 42, we find that each and every citizen can exercise his right to property within some qualified ambit, when it says that -

(1) subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law.

(2) a law made under clause (1) shall provide for the acquisition, nationalisation requisition with compensation and shall either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any Court on the ground that any provision in respect of such compensation is adequate.

(3) nothing in this Article shall affect the operation of any law made before the commencement of the Proclamations (Amendment) Order (Proclamations Order No. 1 of 1977), in so far as it relates to

---

33. Section 82(8) of the SAT Act 1950.

the acquisition, nationalisation and requisition of any property without compensation.

That means that the citizen can exercise his right to property but this right is not unfettered as he got to conform to certain guidelines framed by the State from time to time.

When we look at Article 143, we find the list of the property of the Republic, when it says that -

(1) there shall vest in the Republic, in addition to any other land or property lawfully vested-

   (a) all minerals and other things of value underlying any land of Bangladesh;

   (b) all lands, minerals and other things of value underlying the ocean within the territorial waters, or the ocean over the continental shelf, of Bangladesh; and

   (c) any property located in Bangladesh that has no rightful owner.

(2) the Parliament may from time to time by law provide for the determination of the boundaries of the territory of Bangladesh and of the territorial waters and the continental shelf of Bangladesh.

That means a citizen can own and enjoy his property but if there is anything underlying his property, he does not own or enjoy it; it belongs to the State.

When we look at Article 144, we find that the Executive Authority can interfere in relation to property, trade etc. of the citizen, when it says that the executive authority of the Republic shall extend to the acquisition, sale, transfer, mortgage and disposal of property, the carrying on of any trade or business and the making of any contract.

That means the Executive Authority if it feels necessary for public purposes or public interests, can make interference with the ownership or enjoyment of the property of the citizen by exercising *eminens dominium* meaning States' power of taking or interfering private property without the consent of its owner.[34]

Where no individual is entitled to own, the State owns the property by its prior right for providing security and protection of the property.

So the debate as to the ownership of land can be concluded with the saying that property can be owned by the individual, the cooperative

---

34. Munim, F. K. M. A., *Rights of the Citizens under the Constitution and Law*, 1st Edition, BILIA, Dhaka, 1975, p 320.

and the State but the individual and the cooperative got to pay taxes or perform other duties to the State as the State is providing security and protection of the property. Again, though the State can make interference with the ownership or enjoyment of the property of the private individual or cooperative, it does not mean that the State owns the private property. It can interfere by way of acquisition or requisition, only when it provides compensation to the individual or the cooperative.

3. Land Administration in Bengal during Ancient Period

Land law as a subject is rooted in history. Many of the most fundamental concepts and principles of land law emerged from the economic and social changes that began earlier in the society. This also applies in the case of the Sub-Continent, particularly Bengal, Bihar and Orissa.[35]

The most ancient land laws i.e. the land laws prevailing in Hindu period in Bangladesh can be traced to the practices of aboriginal communities involving payment of a share of the produce of the land to the head of the *panchayet* (clan) named as the *grampradhans* (village heads), the right of the family to cultivate the land in its possession, and the power of the head of a clan to distribute land of the community to its families, and to settle land disputes. This system of land administration has been referred to as clan system in the community. Though this clan system of administration of the community in course of time gave rise to the kingship system, the laws regarding land did not change very much except in the payment of the share of the produce to the king or his representatives and the king's right to distribute unused lands to others without disturbing the existing possessions of cultivators. Both Kautilya in his *Arthashastra* and Manu, the lawgiver of the Aryans in his Code, note that whoever clears the jungles and makes them fit for cultivation, acquires the right to own the same, subject to payment of rent or revenue to the king.

There has been controversy in the writings of the ancient writers as to the payment of the share of the produce to the king or his representatives. Manu states that a king took a sixth or an eighth or a twelfth part of the crops depending on the obligations shared to each other. But other *Dharmasutrakars* such as Baudhayana, Yagnavalka, Apasthamba, Vasishtha, and Vishnu lays down the king's share as annual tax from his subjects to the tune of a sixth of the produce of the land. Kautilya, however, writes that the land revenue could be assessed at one-third or one-fourth of the produce, depending on the facilities provided for irrigation. But where there was no arrangement for irrigation, land

35. *Land Reform in Bangladesh*, Ministry of Land, Dhaka, 1989, pp 1-13.

revenue was assessed as one-sixth of the produce and this is the mostly agreed view by the jurists.

Majority in the jurists' opinions follow that land was the common property of the community and belonged to settlers of the villages, who cultivated the land. In course of time, they divided the land equally amongst the families. Hereditary cultivators could not be evicted from their land if they cultivated it and paid revenue. The right to partition the common land of the family amongst the members was recognised in course of time. A settler family could transfer its land but the transfer of its land to any outsider without the consent of other permanent co-settlers or their heirs was not possible. This means that transfer of land to a stranger was subject to what is called pre-emption.[36] After defeating the non-Aryan or aboriginal people of this country, Aryans appropriated their land. The aboriginal men who surrendered to Aryans were engaged in domestic and agricultural work as slaves (*shudras*). In course of time, the right of the *shudras* in the land was recognised and they were allowed to cultivate the land under the system of *barga* by sharing half of the crop produced in such land and giving the other half to the owners of the land.

5. Land Administration in Bengal during Middle Period

Middle period in terms of land administration in Bengal, which may be termed as Muslim period as well, commenced when Bakhtiar Khilji conquered Bengal at the beginning of the 13th century i.e. in 1204.[37] Then the rulers merely changed the rate of land revenue from one-sixth to one-fifth or one fourth of the produce, payable either in cash or by the delivery of the produce. The customary rights of landowners to transfer the land in any manner they liked were not interfered with in case of those tenants who used to pay rent in cash. The land of those tenants was heritable by the heirs of such tenants. Such tenants were personally liable for the same and could be sued for the recovery of arrears of dues but could not be evicted from their land for non-payment of revenue. But those who paid a share of the produce of the land cultivated by them as rent or revenue had no such right to transfer the land. However, such land was heritable by the heirs of such tenants and could be cultivated by such heirs on the same terms and conditions as their predecessors enjoyed. Such tenants could be evicted from their land for non-payment

---

36. Pre-emption means purchasing property before or in preference to other persons.

37. Op. cit., Hoque, (2000), pp 24-57.

of revenue. Only wastelands were given as *ayma*[38] to religious and royal officers in lieu of their salary and *jagir*[39] to learned persons engaged in teaching for their maintenance. Whoever brought under cultivation any wasteland became owner of the same, subject to payment of rent or revenue assessed.[40]

In course of time, when the power of the *granpradhans* (village heads) was substantially curtailed, many of them were turned into local *talukdars*. These *talukdars* used to collect revenue from the cultivators at the rate assessed by the Government and paid the same to superior landlords known as *zamindars*, although they got a share of the collection as their remuneration. The Government could lease out the *khas* lands (lands recorded in the *Khatiyan* No. 1 and remaining under direct and exclusive control and management of the Government) on fixed revenue to others. The lessees of such lands could themselves cultivate the same or get the same cultivated through *bargadars* (sharecroppers) who had no rights to the land beyond getting half of the produce. The Government lessees such as *jagirdars* (learned persons engaged in teaching) and *aymadars* (religious and royal officers) could, in their turn, also lease out their land to others on a rental basis.[41]

During Mughal rule, the land revenue system got systematised and consolidated when the land revenue of the entire country was assessed at the rate of one-third of the produce. The Government officers known as *amins* then assessed revenue and also settled land disputes. *Kanungo*, who knew the customs and regulations regarding land used to help such officers to assess revenue. *Karkuns* preserved records regarding land surveys and land revenue assessment and *chowdhurys* represented the inhabitants of the *pargana*, also called *mahal* or *mukaddam*. *Patwaris* or village accountants and other survey officers surveyed each and every plot of land on the basis of average production and market price of the produce for the previous ten years.[42]

Cultivators known as *raiyats* could pay revenue either in cash or by delivery of produce but cash payment was preferred. *Zamindars*, *jagirdars*

38. Special grant at reduced rate. See Chowdhury, Obaidul Haque, 'Glossary of Certain Settlement and Vernacular Terms in Common Use', *The State Acquisition and Tenancy Act*, DLR, 2001, p 381.

39. Special grant at reduced rate. See Islam Kabedul, *Glossary of Land and Land Revenue Affairs*, Mowla Brothers, Dhaka, 2003, p 65.

40. Op. cit., Hoque, (2000), pp 24-57.

41. Ibid.

42. Ibid.

or Government rent collectors such as *amils, sikdars, amalguzars* or *crories* were prohibited from realising any additional amount known as *abwab* other than the assessed revenue from the *raiyats*. *Zamindars, jagirdars* (lessee) or Government rent collectors such as *amils, sikdars, amalguzars* or *crories* and *aymadars*, could neither evict the *raiyats* from their land nor bring the land to their *khas* possession or let it out to others. Only when *raiyats* went elsewhere leaving their land, or when there was no male person in the family to cultivate the land, could the land be settled with others. *Zamindars, jagirdars* or *aymadars* were not proprietors of the land under their control. They could only collect revenue from the cultivating *raiyats* at the Government assessed rates. *Zamindari* right was hereditary and transferable but *ijaradari, jagirdari* or *aymadari* rights were neither hereditary nor transferable. Later, *aymadari* was made heritable. *Zamindars* or *ijaradars* got a share of their collection of land revenue as their remuneration and collection cost.[43]

Permanent settlers of villages who themselves cultivated lands of their own village or through others were known as *khudkast raiyats*. They had to pay revenue at the customary rate of their *pargana* called *nirikh*, or at the rate mentioned in the *patta* or lease deed executed in their favour. If they paid the revenue fixed for their land, they could not be evicted from their land and could possess their lands from generation to generation. They also could not abandon their land at their sweet will. Those who cultivated the land of the village where they did not live were known as *paikast raiyats* and could pay rent on a contract basis. But they had no right to continue in possession and were merely tenants-at-will, and they could be denied the right to cultivate the land any time after harvesting was over. Such *raiyats* could also abandon such land at their sweet will.

Zamindars, jagirdars, chowdhuries and *talukdars* could cultivate land in their *khas* possession through *bargadars* or agricultural labourers who had no rights on such land except to get a half share of the produce or wages for their labour.[44]

6. Land Administration in Bengal during Modern Period

Modern period in terms of land administration in Bengal, which includes British, Pakistan and Bangladesh period commenced on 12 August 1765, when the East India Company was granted *diwani* rights by the titular Mughal Emperor Shah Alam of Delhi for only RS 26 *lakhs* to collect

---

43. Ibid.
44. Ibid.

revenue from Bengal, Bihar and Orissa.[45] The company did not initially disturb the system of revenue collection prevalent in the country because of their inexperience in revenue administration and because of there having no system of written rules and plain principles in the country, by which they could learn the revenue administration by careful application.[46] Gradually it started to concrete the right of collection of revenue to the highest bidders under the Quinquennial Settlement Regulation,[47] which continued for years from 1772-1777 and the Annual Settlement Regulation[48] which continued for years from 1777-1790, leaving the old *zamindars* and *talukdars* only with the task of the collection of the higher revenue.[49]

Under quinquennial and annual settlements neither the *raiyat*s nor the *zamindars* nor the *talukdars* had any inducement to improve the lands as any increase in their value had only the effect of increasing the Government assessment. Subsequently the Company came to realise that such settlements were injurious to the landholders and their tenants as it did not encourage any improvement in agriculture and consequently these settlements were proved to be disadvantageous to the general prosperity of the country.

Moreover, the *zamindars* and *talukdars* were given the task of the collecting the higher revenue despite the *raiyat*s having been affected with famine, drought or floods. The property in the soil was never formally declared to be vested in them. They were not allowed to transfer such rights and could not raise money upon the credit of their tenure without the prior sanction of the Government. Again, the rate of the collection of revenue was liable to frequent variation at the discretion of the Government. Refusal to pay the sum required of him was followed by his removal from the management of his lands.

Given the situation many of the existing *zaminders* were ousted and afterwards they drew attention of the Home Authorities by making complaints to the House of Commons. Consequently in 1784, the Pitt's India Act was passed in the House of Commons ordering an enquiry into

---

45. Hussain, T., *Land Rights in Bangladesh*, University Press Limited, Dhaka, 1995, p 15.
46. Kabir, Lutful, *Land Laws in East Pakistan*, Vol. II, Law House, Dhaka, 1969, pp 1-18.
47. Fixing the revenue for five years. See Islam Kabedul (2003), p 99.
48. Fixing the revenue for one year after one year. See Islam Kabedul, (2003), p 65.
49. Op. cit., Hossain, (1995), pp 16-17.

the complaints of the dispossessed *zaminders*.[50] The Company was also directed to enquire into the conditions of landholders and for the establishment of permanent rules for the collection of revenue based on local laws and usages of the country. In accordance with the directions, the Company restructured the land administration in 1786 keeping the hierarchy from bottom to top as *Naeb* (*Tahshildar*) charged with task of collecting revenue, Assistant Collector (currently known as Assistant Commissioner-Land) charged with settling disputes, Collector charged with settling disputes and hearing appeals, Divisional Collector charged with hearing appeals, Board of Revenue, the highest authority in terms of collecting revenue and the Company Government burdened with the overall land and revenue administration. Then came the experimental Decennial Settlement Regulation[51], which continued for years from 1790-1793 leaving the old *zamindars* and *talukdars* again with the task of the collection of the higher revenue. This settlement fixed the revenue for ten years and was made with the aim of turning it as permanent on its success.[52]

On 22 March 1793, Lord Charles Cornwallis, Governor General of the East India Company, declared the decennial settlement as the permanent settlement by Permanent Settlement Regulation (Regulation No. I of 1793), which made *zamindars* and *talukdars* permanent proprietors of the land under their respective control. As a result, Government revenue agents turned into landowners overnight. Landlords were allowed to own their property subject to regular payment of revenue to the Government, for the default of which their right was liable to be sold in auction. Their right was made both heritable and transferable. No restraint was imposed on the landlords on the increase of the rent of the *raiyat*s. The customary right of the *raiyat*s to pay rent at *pargana* rate was denied. Instead, an increased rent was demanded from them, in spite of the provision of the Regulation No.VIII of 1793, which directed landlords not to increase rent of *raiyat*s paying fixed rent for more than 12 years and to grant *patta* to other tenants at *pargana* rates.

The Regulation No. XVII of 1793 provided that on the failure of the *raiyat*s to pay increased rent, all their movables, including standing crops were made liable to attachment and sale by the landlords without the intervention of the Court. Refusal of the *raiyat*s to pay increased rent and

---

50. Op. cit., Hussain, (1995), p 16.

51. There were several Decennial Settlement Regulations and the last one was the Bengal Decennial Settlement Regulation (Regulation VIII of 1793), see the Bengal Code, vol. I, pp 29-39 and Op. cit., Kabir, vol. I, pp 34-43.

52. Ibid, p 1.

their organised resistance to attachment and sale compelled the Government to make Regulation No. VII of 1799, which authorised landlords to arrest recalcitrant *raiyats* refusing to pay rent and also to attach and sell their properties. Regulation No.V of 1812 amended that black law, by taking away the power of landlords to arrest the *raiyats*. It also entrusted the *raiyats* with the right of getting *patta* (undertaking with favourable conditions or rent).

By Bengal *Patni Taluk* Regulation (Regulation No.VIII of 1793) the *patni taluk* meaning a dependent tenure settled in perpetuity at the fixed rate got a new dimension especially in the case of the *patni taluks* of Hoogly, Burdwan, Bankura, Nadia and Purnea. This Regulation afforded means to the *zaminders* of recovering arrears of rent from their *patnidars* (persons holding dependent tenure) almost identical with those by which the demands of the Government were enforced against themselves.

Revenue-free lands known as *lakhiraj* were partly recognised under *Badshahi* and Non-*Badshahi Lakhiraj* Regulations of 1793 (Regulations No.XXXVII and XIX of 1793). Most of such lands were either assessed to revenue or resumed by the Government. The Government reserved the right to settle lands treated as *khas* mahal outside the area of permanent settlement.

Under the provisions of Regulation No. XIV of 1793 defaulting *zamindars* could be arrested and imprisoned and *amins* could be appointed to realise rent or revenue from their *zamindaris*. But Regulation No. III of 1794 abolished such power of arrest and detention. Provision was now made to sell on auction the *zamindari* for realisation of arrears of revenue with interest.

By Regulation No.V of 1796, provision was made to auction a *zamindari* in parts for realisation of arrears of revenue. By Regulation No.V of 1812, the Board of Revenue was authorised to give permission to sell an entire *zamindari*. Regulation No. XI of 1822 authorised the Board of Revenue to set aside auction sale of any *zamindari* for irregularity or any other reasonable ground. Act No. XII of 1841 provided for sale of *zamindari* if the *zamindar* failed to pay arrears of revenue before the sunset of the day previous to the day fixed for auction in the proclamation for auction sale. The auction purchaser was also debarred from evicting certain types of *raiyats* having permanent right in their land and from increasing their rent. Act No. I of 1845 was enacted by amending and re-enacting the provisions of the aforesaid laws including the Act No. XII of 1841, which was known as the revenue sale law (Sunset Law).[53]

---

53. Op. cit., Hoque, (2000), pp 81-84.

By Regulation No. VII of 1799 when the *zamindari* right of the landlord was sold in auction, the auction purchaser could evict *khudkast raiyats* and also lease out their lands to others at an increased rent. Through Regulation No. XI of 1822 such auction purchasers were prohibited from evicting the class of *khudkast raiyats* known as *kayemi* (permanent) *raiyats* but the power of such auction purchasers to evict other kinds of *raiyats* particularly the *paikast raiyats* for arrears of rent continued.

Several Regulations were also implemented for regulating the work of village *patwaris* and *pargana kanungos* who were paid salaries. The rent-free land enjoyed by them previously in lieu of salary was assessed to revenue. On the other hand, by Bengal *Patwaris* Regulation (Regulation No .XII of 1817) *patwaris* were allowed rent-free land or allowances.

By the provisions of Bengal Alluvion and Diluvion Regulation (Regulation No. XI of 1825) the land gained by the gradual accession from the recess of the river or sea was to be considered an increment to the tenure of the person to whose estate it might be annexed and again the land suddenly cut off by the river or sea, without any gradual encroachment and joined to another estate without its identity being destroyed was to remain the property of the original owner. This reappeared land has been termed as the reformation-in-situ in the celebrated case of *Lopez v. Madan Mohan Thakur*[54]. The right of fishery in non-navigable rivers depends on the ownership of the adjacent soil. The right of fishery in navigable rivers is granted by the Government and will not be extinguished even though the river may change its course. This principle has been evolved in the distinguished case of *Srinath v. Dinbandhu Sen*[55] basing on the truth in the saying: 'The fish follows the river and the fisherman follows the fish'.

Since the East India Company failed to take adequate measures for protecting the interest of the Indian *raiyats*, after assuming power of the British India in 1858, the British Government enacted the Rent Act (Act No. X of 1859) and the Bengal Land Revenue Sales Act (Act No. XI of 1859) for ameliorating the conditions of the Indian *raiyats*.

Act No. XI of 1859 was contained the following provisions-

I) affording reasonable security to persons especially the mortgagee who have liens upon estates and who pay the money necessary to protect such estates from sale for arrears of revenue;

---

54. 13 MIA 467.

55. 42 Cal. 489 PC.

II) affording sharers in estates, who duly pay their proportion of the revenue, easy means of protecting their estates from sale by reason of the default of their co-sharers;

III) affording landholders, particularly the absentees, facilities in guarding against the accidental sale of their estates by reason of the neglect or fraud of their agents and

IV) protecting the holders of under-tenures created since the settlement, who voluntarily registered their tenures.[56]

Act No. X of 1859 obliterated the difference between *khudkast* and *paikast raiyats*. It provided that a *raiyat* possessing any land continuously for 12 years or more shall acquire occupancy right in that land and shall not be evicted therefrom if he paid the rent for that land. But that provision was not applicable to annual or *thika* tenants cultivating *khas* lands of *zamindars*, *talukdars* and occupancy *raiyats*. It further provided that rent of *raiyats* possessing land at a fixed rent should not be increased. But there was no bar on increasing the rent of other classes of *raiyats*. The Collector had the power to decide all suits between landlord and tenants under provisions of that Act.

Some *zamindars* were allowed to enter into agreements with their tenants contrary to other provisions of the Rent Act of 1859, which made other statutory provisions nugatory and encouraged other *zamindars* to force the *raiyats* to enter into agreements against their own interest and to increase rent and avoid acquiring occupancy rights over the land.

The Bengal Rent Act (Act No. VI of 1862) provided for allowing tenants to deposit rent with the Collector on the refusal of the landlord to amicably accept the same and empowered the Collector to decree compensation up to 25% of the claim of the rent suit against tenants or landlords found to have failed to pay or accept rent without any reasonable cause. Provision was made in the said Act allowing landlords to measure and survey the land of tenants. The Rent Act (Act No. VIII of 1869) re-enacted almost identical provisions of the Rent Act of 1859 and for the first time recognised the limited customary right of occupancy tenants to transfer their lands. The Act also empowered Civil Courts to dispose of all suits between the landlords and the tenants instead of the Collector.

By Permanent Settlement Regulation and other Regulations followed thereafter the conditions of the Government and of *zaminders* stood firm as it made the Government income secured and permanent and made

56. Op. cit., Kabir, Vol. I, (1961), pp 102-146.

the *zaminders* permanent owners of land and helped them to collect revenue indiscreetly so as to turn them landed aristocrat in Bengal.

In spite of the provisions contained in Rent Acts of 1859, 1862 and 1869 that the *raiyats* who were in possession of a tenancy for twelve or more years and paid revenue regularly would not be liable to eviction and increased rate of revenue by the landlords and that the disputes between landlords and tenants regarding rent would be disposed of by the Civil Courts, not by the Collector, the *raiyats* were made liable to eviction and increased rate of revenue by the landlords. In order to redress the *raiyats*, the Survey Act (Act No. V of 1875) was enacted to determine the boundary of a village and to prepare a *mouza* or village map showing therein every plot of land with its area and to record the name of the tenant and the superior landlord, the nature of tenancy, share, possession, revenue, or rent payable for the same.[57] This Act was not made in effect by making surveys till the enactment of Bengal Tenancy Act (Act No. VIII of 1885). The BT Act, which was subsequently repealed by the SAT Act 1950 (Act No. XXVIII of 1951) containing provisions for the preparation and revision of the Record-of-Rights (*Khatiyan*)[58] has made the Survey Act operative. Rent Assessment Settlement Act (Act No. VIII of 1879) authorised the Settlement Officer to assess increased rents for occupancy on the grounds that the previous assessment was based on facts, which improved since then, or the previous assessment was wrong. If any *raiyat* got aggrieved of the assessment made by the Settlement Officer, he could challenge it to the Civil Court and pay revenue at the rate fixed by the Court.

Seen in the context, the Government of British India was trying to improve the conditions of the *raiyats* on the one hand and at the same time, it was trying to expedite the process of revenue collection on the other hand, through which they claimed, the conditions of the *raiyats* would be ameliorated. In fact, the Government depends mostly on the revenue to carry on the business of the country. Now if the decision of the Revenue Authorities in matters relating to the collection of public revenue were to be referred to regular litigation in the Civil Court, the Government will be put acute hardship. So in most countries the Government has reserved to itself a special, speedy and peculiar procedure

---

57. Malek, Abdul, *Law on Khatiyan*, published by Mrs. Khohitur Nahar Rozy, Chittagong, 1996, pp 83-84.

58. The Record-of-Rights records on a piece of paper the rights and liabilities of the *raiyat*. It bears its own number i.e. *khatiyan* number, plot numbers, area, *mouza*, *touzi*, J.L. number i.e. jurisdiction list number, names and shares of the possessors, description of their rights and superior interest etc.

to enforce its own demands, instead of resorting to time-consuming Civil Court unless any question as to the right of recovery of dues arises. Keeping this in view, the Public Demands Recovery Act (Act No. III of 1913) was introduced with provisions as to the definition of public demands and how they are to be realised through the intervention of the Settlement Officer, instead of the Civil Court.

By the provisions of the Public Demands Recovery Act (Act No. III of 1913) public demand is meant any arrear or money payable to the Collector by a person holding any interest in the land[59]: e.g.

1. any arrear of revenue which remains due by operation of the Bengal Land-Revenue Sales Act (Act No. XI of 1859) or the Bengal Land-Revenue Sales Act (Act No. VII of 1868) or any other law for the time being in force or
2. any arrear of revenue which is due from a farmer on account of an estate held by him in farm and is not paid on the latest day of payment fixed under Section 3 of the Act No. XI of 1859 or
3. any money which is declared by any law for the time being in force to be recoverable or realizable as an arrear of revenue or
4. any money which is declared by any enactment for the time being in force to be a demand or a public demand or
5. any money due from the sureties of a farmer in respect of an estate held by him or
6. any money awarded as fees or costs by a revenue authority or
7. any demand payable to the Collector by a person holding any interest in land, pasturage, forest-rights, fisheries or the like.[60]

By the provisions of the Easement Act (Act V of 1882) for recovering the conditions of the Indian *raiyats*, the owner or occupier of certain land was vested with the right of easement, which authorised him to take benefits either by way of doing something (including the taking of profits e.g. right of way over the land of another person) or by preventing something being done in or upon or in respect of certain other land, not his own.

---

59. Ahmad, Sultan and Malik Syed Ahmad, *The Public Demands Recovery Act, 1913*, Anupam Gyan Bhandar, Second Edition, Dhaka, 1991, p 392.
60. Islam, Serajul, *Public Demands Recovery Acts*, S. C. Sarkar & Sons, Seventh Edition, Calcutta, 1989, pp 11-18.

The term 'easement' in its wide and literal sense means a definite right acquired for the ease, conveniences or accommodation of the person entitled to exercise the same.[61]

Each and every person has got certain rights (natural and legal) over his own land. In addition to these rights, he may acquire certain other rights over his neighbour's land for the beneficial enjoyment of his land by virtue of the ownership of his own land. These rights may be termed as easement.[62]

Section 4 of the Act No. V of 1882 has defined an easement as 'a right which the owner or occupier of certain land possesses as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon or in respect of certain other land, not his own'.

The Section has also termed the land for the beneficial enjoyment of which the right exists as the dominant heritage, the owner or occupier thereof as the dominant owner, the land on which the liability is imposed as the servient heritage and the owner or occupier thereof as the servient owner.

The easement is thus a benefit to the dominant heritage and a burden to the servient heritage.

Easements are of different kinds:

1. Affirmative and Negative Easement- Affirmative easement is an easement in which the dominant owner has got the right to make some active use of the servient heritage e.g. the right of way, right of water. This is also termed as Positive easement. Negative easement which also termed as Private easement is an easement in which the dominant owner has got the right to restrain the servient owner from exercising full rights of ownership over his land e.g. rights of air and light.[63]
2. Easement for Limited time or on Condition- An easement may be permanent or for a term of years or other limited period or subject to periodical interruption or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose,

---

61. Ahmed, Mozaharuddin, *Land Laws of East Bengal*, published by the author, Dhaka, 1963, pp 69-79.
62. Ashraf, Hamid, *Land Laws of East Pakistan*, published by Mr. Salman Usmani, Dhaka, pp 75-120.
63. Section 7 of the Easement Act (Act No. V of 1882).

or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act e.g. right to sullage water, fetched for irrigation from Municipal Corporation, through channel over land owned by the servient owner.[64]

3. Principal and Accessory easement-The primary right of the dominant owner over the servient heritage is called Principal easement. It may be termed as Primary easement e.g. right of A to support from B's wall. The right of the dominant owner to do certain acts necessary for enjoyment of the easement proper is called accessory or secondary easement e.g. the right of A to enter B's land to repair the wall of A when it is out of order.
4. Apparent and Non-apparent easement- Apparent easements are those, the existence of which is shown by some visible sign or external work e.g. a window, sewer or a drain. In Non-apparent easement there is no visible sign e.g. the right to prevent the servient owner from building above a certain height.[65]
5. Continuous and Discontinuous easement- In Continuous easement the enjoyment is continual without any interference of another e.g. rights of air and light. In Discontinuous easement the enjoyment is occasioned by a fresh act on each occasion e.g. right of way, which requires for its enjoyment the exercise of locomotion.[66]
6. Easement of Necessity and Quasi-easement- Severance of two or more properties gives rise to Easement of Necessity. A man may, by general right of property make one part of his property dependant to another and grants it with this dependence to another person. Where property is conveyed which is so situated relatively to that from which it has been severed so that it cannot at all be enjoyed without a particular privilege in or over the land of the grantor, the privilege is called an Easement of Necessity and the grant is implied and passes without any express words. When the owner of two adjoining properties sells one and retains the other, he is considered to have impliedly granted also with the sale all those continuous easements over the land he has retained which are necessary for the convenient and advantageous use and enjoyment of the land sold. These easements are termed as Quasi-Easements.[67]

---

64. Section 6, ibid.
65. Section 5, ibid.
66. Ibid.
67. Section 13, ibid.

The following are modes of acquiring easement-

1. By Express Grant- This grant is made by the servient owner in favour of the dominant heritage. It may be either *inter vivos* or by testament.
2. By Implied Grant- Easements of necessity or Quasi easements are presumed to have been granted by the servient owner.
3. By Local Custom- An easement may be acquired by virtue of a local custom.
4. By Estoppel- If a person without any title, professes to impose, an easement in favour of another and subsequently acquires title to the servient heritage, he will be estopped from denying the right of the dominant owner to such easement.
5. By Prescription- Easements are acquired by long continued enjoyment for this statutory period of 20 years or 60 years in the case of Government property.[68]

The Limitation Act (Act No. IX of 1908) has contained only one mode of acquisition of easement *viz* acquisition of easement right by prescription under Section 26. Given the modes of acquiring easement discussed earlier it can be said that the provision of the Limitation Act relating to the mode of acquisition is not exhaustive.[69]

Section 26 provides that the right to access and use of light or air, way, watercourse, use of water, or other easement shall be absolute-

a) where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption and for twenty years; or

b) where any way or watercourse or the use of any water, or any other easement (whether affirmative or negative), has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption and for twenty years;

The following requirements have to be fulfilled for the acquisition of the right to easement:

a) in the case of the access and use of light or air to and for any building; that they have been enjoyed therewith-
    1. peaceably,
    2. as an easement,

---

68. Section 15, ibid.
69. Khan, Raja Said Akbar, *The Limitation Act*, PLD Publishers, Lahore, pp 47-49.

3. as of right,
4. without interruption and
5. for twenty years or in the case of Government property 60 years.

b) in the case of any way or watercourse or the use of any water, or any other easement (whether affirmative or negative); that it has been enjoyed therewith-

1. peaceably,
2. openly,
3. by any person claiming title thereto,
4. as an easement,
5. as of right,
6. without interruption and
7. for twenty years or in the case of Government property 60 years.

By the provisions of the Specific Relief Act (Act No. I of 1877) the owner or occupier of the property was vested with the right of claiming specific relief as opposed to ordinary relief if his right to property is denied by any person[70] e.g. relief for recovering possession if dispossessed or declaration of title etc.[71]

By the provisions of the Trust Act (Act No. II of 1882) the owner of the property was vested with the right of making trust of his property for private purposes i.e. for the benefit of persons only.[72]

By the provisions of the Transfer of Property Act (Act No. IV of 1882) the owner of the property was vested with the right of making transfer of his property to himself or to one or more living persons e.g. transfer of property by way of sale, mortgage, lease, gift, will or exchange to any living persons including the artificial persons having legal entity.[73]

---

70. Khan, Raja Said Akbar, *The Specific Relief Act*, PLD Publishers, Lahore, pp 87-96.
71. Sections 9 and 42 of the Specific Relief Act (Act No. I of 1877).
72. Khan, Sardar Muhammad Iqbal, *The Trusts Act, 1882*, All Pakistan Legal Decisions, Lahore, pp I-X.
73. Shukla, S. N., *Transfer of Property Act*, Allahabad Law Agency, 12th Edition, Allahabad, 1991, pp 1-4.

The provisions of the Partition Act (Act No. IV of 1893) vested the owners of the undivided property with the right of making partition of the property among the members of the joint family and in the case of transfer to an outsider, the members of the family can apply for pre-emption.[74]

By the provisions of the Registration Act (Act No. XVI of 1908) if the owner of the property exercised the right of making transfer of his property including the transfer made through partition, he is burdened with task of getting it registered.[75]

Though the Government in British India was trying to change the condition of the Indian *raiyats* with certain enactments aiming at curtailing the oppressive powers of *zaminders*, bridging the gap between *zaminders* and the *raiysts* and entrusting the *raiyats* with some rights, in most cases those efforts proved to be unworkable. The period from 1870 onwards had been marked, on the one hand, by incessant attempts of *zamindars* to increase rent of the *raiyats* and illegal *abwabs* and on the other hand, by a determined oppositions of the tenants to fight against the demands which they considered unjust.

In addition to these, short measurements, illegal cesses, the forced delivery of agreements to pay enhanced rents fuelled them to make resistance and consequently the Peasant Revolt of Pabna took place in 1873. To meet emergencies caused by agrarian revolt the Agrarian Disputes Act 1876 was passed on temporary basis designed to be supplemented later by a permanent legislation. But it came across several bargains, which at last led to the constitution of the Rent Law Commission in April 1879. The Commission submitted its report in May 1880. After consideration of the report a bill for enacting the Bengal Tenancy Act was placed before the Legislative Council on 2 March 1883. The Council passed the bill after amendments. After assent of the Governor, it became the law on 14 March 1885 entitled as the Bengal Tenancy Act (Act No. VIII of 1885) and it came into operation since 1 November 1885. This law made detailed provisions about the title, rights and liabilities of *zamindars*, *talukdars*, rent receivers and *mokarrari raiyats* (*raiyats* paying fixed rents), occupancy *raiyats* (having possession for twelve or more years), settled *raiyats*, non-occupancy *raiyats*, and under *raiyats*.

---

74. *Law on Partition*, Third Edition, DLR, Dhaka, 1986, pp 1-38.

75. Dhamija, D. R., *Registration Act*, Third Edition, The Law Book Company (P) Ltd, Allahabad, 1988, pp 1-62.

The following are the main features of the Bengal Tenancy Act –

1. initially, this law did not recognise the tenant's right to transfer other than to *kayemi* (permanent) *talukdars* and *mokarrari raiyats*, unless allowed by local custom or usage,
2. also it did not abolish the provision for attachment and sale of standing crops of the tenants for recovery of arrears of rents and such provision was retained.
3. this law empowered revenue officers to assess just and equitable rent at the time of preparation and revision of Records-of-Rights (*khatiyans*)[76] by measurement of land by actual field survey.[77]
4. by this law landlords could not increase rents except on certain grounds such as improvement of land or increase of area.
5. tenants were allowed right to reduction of rents on some grounds such as decrease of area or the failure of landlords to maintain irrigation facilities.
6. under this law once rent was increased, it could not be increased again in the next fifteen years.
7. *kayemi talukdars, mokarrari raiyats* and occupancy *raiyats* could not be evicted for arrears of rent but they could be evicted from their land in execution of a decree for arrears of rent through the Civil Court. *Bekayemi* (non-permanent) *talukdars*, non-occupancy *raiyats* and under *raiyats* could be evicted from their lands if they failed to pay rent falling into arrears at the appointed time.

By Act No. I amendments were made in the Act of 1894 substituting the provision regarding preparation of *khatiyans* by survey operation and assessment of rent.

Then by Act No. III of 1898 provisions regarding increase of rent, preparation of *khatiyan*, and assessment of rent were substantially altered.

By Act No. I of 1907 and Act No. I of 1908 the said Act was further amended -

a) providing for presuming the entries in the finally published *khatiyans* to be correct unless the contrary was proved, and

---

76. The C.S. Record-of-Rights (*Khatiyan*) was prepared basing on the Cadastral Survey conducted under the provisions of Section 101 of the Bengal Tenancy Act 1885 and the R.S. Record-of-Rights (*Khatiyan*) was prepared basing on the Revisional Survey conducted under the provisions of Section 101 of the SAT Act 1950.

77. Section 101 of the Bengal Tenancy Act 1885.

b) containing provisions to file *khatiyan* in a Court in a suit for recovery of arrears of rent to prove the claim,

c) authorising revenue officers to reduce the rent increased more than that recorded in the *khatiyan*, and

d) containing provisions to file certificate cases for realisation of arrears of rent by the landlords to local revenue officers.

By Act No. IV of 1928, the Bengal Tenancy Act was drastically amended-

a) to allow occupancy *raiyats* to transfer their land on condition of payment of one fourth of the price as premium to his superior landlord,

b) to allow exercising the right of pre-emption of such land by the landlord,[78]

c) not to recognise *bargadar* as a tenant unless he was so recognised by the landowner under whom he was a *bargadar* or declared to enjoy occupancy right if he acquired the same under any custom or law;

d) to abolish the provisions for attachment and sale of standing crop and moveable properties of the tenants.

e) to allow occupancy tenants to plant trees in their lands, enjoy their products, fell the same and use and sell timber, and

f) to allow the occupancy *raiyats* and under *raiyats* to give usufructuary mortgage of their land for fifteen years.

By Act No. VI of 1938 the said Act was further amended -

a) deleting the provision for payment of premiums to landlords by occupancy tenants for transfer of their lands,

b) taking away the right of landlords to pre-empt such land,

c) giving such right of pre-emption to the other co-sharers of the transferor or occupancy *raiyats* if the transfer was made to a stranger or strangers,

d) containing provisions for treating mortgage of occupancy land as usufructuary mortgage for fifteen years and for recovery of possession of the same through a Court.

e) allowing *talukdars* and under *raiyats* to surrender their rights in favour of their superior landlords.

Act No. XIII of 1939 amended the provisions of Section 52 of the said Act and prohibited the Court from passing any decree for increasing the rent

---

78. Section 26F, ibid.

of the tenant even if on measurement the area of land in possession of the tenant was found to be more than the area settled with him.

Act No. XXXVIII of 1940 further amended the provisions of Section 26 of the said Act and provided for treating all mortgages of occupancy lands including mortgage by conditional sale as usufructuary mortgage for fifteen years and for recovery of possession of such land through a Court. Moreover, the Act prohibited sale of any property of the tenant other than a *taluk*, or holding in execution of a decree or certificate for arrears of rent of such a *taluk* or holding. The amended provisions of the Bengal Tenancy Act restored almost all the rights of the tenants taken away from them by the Permanent Settlement Regulation of 1773. For that reason the Bengal Tenancy Act is termed as the Magna Carta of tenant rights in Bengal.

The Bengal Tenancy Act applied in the provincial territory of Bengal, not in the territory of Assam. As Sylhet comprised in Assam, the Bengal Tenancy Act did not apply in Sylhet. Afterwards Sylhet was included in the provincial territory of Bengal and there passed a separate tenancy legislation named the Sylhet Tenancy Act (Act No. XI of 1936) for Sylhet containing the same sort of provisions as found in the Bengal Tenancy Act such as preparation and revision of the Record-of-Rights[79], sub-letting etc[80].

Since a demand for abolition of the *zamindari* system was raised during the later part of the British rule in 1939, the Land Revenue Commission was formed with Sir Francis Floud as its chairman. It submitted its report in 1940 recommending acquisition by the Government of all rent receiving interests.[81] Its recommendations led to the passage of the East Bengal State Acquisition and Tenancy Act 1950 (Act No. XXVIII of 1951). It got assent of the Governor on 16 May 1951 and came into effect on 2 April 1956. The main features of the Act are -

1. The Act provided for acquisition of all rent receiving interests in land, acquisition of *khas* lands in excess of 100 *bighas* from each family, acquisition of hats, *bazars*, fisheries, minerals and other

---

79. The C.S. Record-of-Rights (*Khatiyan*) was prepared basing on the Cadastral Survey conducted under the provisions of Section 117 of the Sylhet Tenancy Act 1936 (Act No. XI of 1936). But no C.S. Record-of-Rights was prepared in Sylhet.

80. Sub-letting, in general sense means giving part of a contract, e.g. for building a factory to somebody else on rent and in another sense it means leasing to another person. See Sections 40 and 68 of the Sylhet Tenancy Act 1936.

81. Op. cit., Hussain (1995), p 18.

rights. Thus, after 163 years of the permanent settlement all rent-receiving interests were again placed directly under the Covernment by abolishing the *zamindari* system.[82]

2. The Act contains provisions for payment of compensation for the acquisition on the basis of the total income from rent receiving interest or other interest in land.[83]

3. The Act contains provisions for preparation and revision of *khatiyan*s, reassessment of rent of land of tenants including lands held under service tenures. After completion of the above processes and acquisition of all rent receiving and other interests and final publication of *khatiyan*s and compensation assessment rolls, notifications were published bringing into operation the provisions of Part V of the said Act regarding tenancy laws mentioning rights and liabilities of tenants at first in Patuakhali district in 1954 and lastly in Faridpur district in 1965.[84]

4. With the coming into force of Part V containing tenancy laws in any area, all unrepealed provisions of 14 Acts, including the Bengal Tenancy Act and the Sylhet Tenancy Act and 27 Regulations, including the Permanent Settlement Regulation,[85] which were related either with the summary process of acquisition ordering return of particulars of rent receiving interests and certain other interests in land from 443 *zaminders* or wholesale process of acquisition ordering preparation of Record-of-Rights, stood repealed and only one class of holders of agricultural lands called *maliks* remained. Their rights and liabilities were to be regulated under the provisions of Part V of the Act of 1950. Such *maliks* have no right to minerals and other underground interests. If the Government leased out any land for any fixed period then rights and liabilities under such lease would be regulated by the terms and conditions of such lease.[86]

5. Section 81A of the SAT Act says that if the rights and liabilities of the tenants of non-agricultural land were regulated under the provisions of the Non-Agricultural Tenancy Act of 1949 before the acquisition of rent receiving interest of land whether agricultural or non-agricultural by the SAT Act, such tenants would be regulated by the

---

82. Sections 3 and 20 of the SAT Act 1950.
83. Sections 37 and 39, ibid.
84. Op. cit., Chowdhury Obaidul Haque (2001), p 216.
85. See the Schedule of the SAT Act 1950.
86. Sections 79 and 80, ibid.

provisions of the NAT Act after acquisition of such interest by the Government unless there was anything contrary to the same in Part V. Except assessment of rent, increment and reduction of the same rights and liabilities of other non-agricultural tenants would be regulated by the terms and conditions of the lease deed and provisions of the Transfer of Property Act of 1882.

6. Sub-lease (popularly known as sub-letting) of any agricultural and non-agricultural land as opposed to sub-letting of houses[87], would be void and such land would stand forfeited and vested in the Government.[88]

7. No agricultural or non-agricultural tenancy right would be created in any Government *khas* land by mere payment of any premium or rent unless a lease deed is executed by any authority empowered for the purpose and the same is registered.[89]

8. A *bona fide* cultivator means a person who himself or through members of his family or servants or agricultural or other labourers or partner or *bargadar* cultivates his land.[90]

9. A *raiyat* may use and possess his land in any manner he likes and if he dies intestate, the same is inherited by his heirs in accordance with the provisions of the law of succession applicable to him and he may transfer his land. Such transfer is to be made by a registered instrument.[91] But no one can acquire any land by inheritance or transfer if the same added with other land belonging to members of his family exceeds the limit of land entitled to be held by a family, such excess land vests in the Government.[92] Initially the land ceiling was 100 *bighas* and in exceptional cases it was more than that.[93] By the Ordinance No. XV of 1961, it was increased to 375 *bighas* and again by the Order XCVIII of 1972 it was decreased to 100 *bighas*. By the Land reform Ordinance 1984 it was lowered to 60 *bighas* in case of agricultural land.

---

87. For sub-letting of houses, the provisions of the Premises Rent Control Act (Act No. III of 1991) will come into play.
88. Sections 75A, 93 and 81A, ibid.
89. Sections 76 and 81B, ibid.
90. Sections 2 and 82, ibid.
91. Section 89 of the SAT Act 1950 read with Sections 17 and 18 the Registration Act 1908 and Section 59 of the TP Act 1882.
92. Sections 83-97 of the SAT Act 1950.
93. Section 20, ibid.

10. Transfer of any land by a *raiyat* is liable to pre-emption by his co-sharer or the contiguous *raiyat* of such land subject to certain conditions.[94]
11. No *raiyat* can mortgage his land except by way of usufructuary mortgage for a period of 7years.[95]
12. No aboriginal can transfer his land to any person other than an aboriginal without the permission of the Revenue Officer. Such transfer in violation of the same is illegal and such transferee may be evicted from such land by the Revenue Officer and such land may be restored to the transferor or his heirs.[96] This provision was believed to be made to maintain the difference of the aboriginal.
13. The Act contains provisions for increase or reduction of rents, sub-division and consolidation of holdings and distribution of rents among commercial sharers and for realisation of rents amicably or by issuing certificates and auction sales of holdings.[97]
14. The Act contains provisions for settlement of lands vested in the Government as *khas* lands[98] under the rules and policies framed therein.[99]
15. The Act contains provisions for preparation[100], revision[101] and maintenance i.e. updating (popularly known as mutation i.e. exclusion and inclusion of names of the owner on the ground of transfer either by way of sale, lease, inheritance, gift or will)[102] of *khatiyan*s, leasing out of land acquired by the Government, and abandonment of diluvion or acquisition of holdings. Every entry in

---

94. Section 96, ibid.
95. Section 95 as amended up to date, ibid.
96. Section 97, ibid.
97. Sections 116-134A, ibid.
98. Barkat Abul, et el, *The Political Economy of Khas Land In Bangladesh*, (ed), ALRD, Dhaka, 2001, pp 19-83.
99. Section 76 of the SAT Act 1950.
100. The S.A. Record-of-Rights (*Khatiyan*) was prepared basing on the State Acquisition Survey conducted under the provisions of Section 17 of the SAT Act 1950.
101. The B.S. Record-of-Rights (*Khatiyan*), which may be termed as R.S. Record-of-Rights is being prepared basing on the Bangladesh Survey conducted under the provisions of Section 144 of the SAT Act 1950.
102. Section 143, ibid.

the *khatiyan* prepared and revised under the provisions of sections 144 of the Act is presumed to be correct unless other evidence e.g. deed or rent receipt (*dakhila*) etc. proves the contrary.[103]

16. The Act contains the provisions for appeal, revision or review. An against an order of a Revenue Officer lies with the Collector under whom he works, against an order of a Collector to the Divisional Commissioner of the division in which the district is situated, and against any order of the Divisional Commissioner to the Board of Revenue. Any Revenue Officer may review and change his or his predecessor's order.[104]
17. By the State Acquisition and Tenancy (Amendment) Act 2004, Section 145A-I has been inserted in the SAT Act 1950 under which the order of a Settlement Officer (Revenue Officer) made during survey and settlement of land in an area is made challengable in the Land Survey Tribunal and an appeal can be preferred up to the Appellate Division of the Supreme Court.

As there was no provision in the Bengal Tenancy Act about the rights and obligations of the non-agricultural tenants, they were regulated by the provisions of the Contract Act (Act IX of 1872) and the Transfer of Property Act (Act IV of 1882). As a result, non-agricultural tenants could be evicted after the expiry of the period of their lease and landlords could also arbitrarily increase their rents at the time of renewal of the lease. The Non-agricultural Land Rent Assessment Act of 1936, being applicable only in respect of temporarily settled and Government *khas mahal* lands, could not relieve the miseries of a large number of non-agricultural tenants under the private landlords. In 1938, the Non-agricultural Land Enquiry Committee, popularly known as Chandina Committee, was constituted. When landlords started evicting non-agricultural tenants after the formation of this committee, the Bengal Non-agricultural Tenancy (Temporary Provision) Act 1940 was enacted by the Government as a temporary measure to prevent such evictions.

On the basis of the recommendations of this committee, the East Bengal Non-agricultural Tenancy Act (Act XXIII of 1949) was enacted to give relief to non-agricultural tenants.

1. According to this law, any land used for purposes other than agriculture or horticulture was non-agricultural.

---

103. Section 144A, ibid.
104. Sections 146-151, ibid.

2. Non-agricultural tenants were of two classes: tenants and under tenants.
3. Non-agricultural tenants having possession for 12 years or more had rights similar to those of perpetual tenants and could not be evicted. But other tenants and under tenants had no such rights and could be evicted under the provisions of the said Act.
4. Rights of non-agricultural tenants or under tenants could be inherited by their heirs after their intestate death and was also transferable by registered instruments.
5. The immediate superior landlords of such tenants or their co-sharers had right of pre-emption under certain circumstances.
6. The Government could direct preparation of *khatiyans* and assessment of rents of non-agricultural lands by Revenue Officers.
7. The rents of non-agricultural tenants could not be increased within 15 years and that of under tenants within 5 years of such assessment, except on the ground of improvement of the land, or increase of the area of the holding.
8. Non-agricultural tenants could deposit rents in Court on the refusal of landlords to amicably accept the same.
9. Landlords could recover arrears of rents by filing suits in Civil Courts and could sell in auction non-agricultural land of defaulting tenants in execution of a decree for arrears of rent.
10. Under certain circumstances landlords could evict non-agricultural tenants or under tenants in execution by filing suits in Civil Courts.
11. The provisions of the Act were and still are not applicable in respect of land held by any port, railway or local authority, or land leased out for gathering forest, or mineral products, or for exercise of fishery right, or land acquired by the Government for use by any of its departments, or any *waqf* or trust land.

Since final publication of *khatiyans* prepared or revised and compensation assessment rolls and payment of compensation to the rent receivers after acquisition of their interests in non-agricultural land and imposition of prohibition of sub-lease of non-agricultural land and repeal of many provisions of the Act by the Ordinance No. IX of 1967, the said Act has lost its importance. Except exercising right of pre-emption by a co-sharer of non-agricultural land after transfer of share by another co-sharer in such land, other unrepealed provisions of the Act have virtually become inoperative.

Under the provisions of the Land Acquisition Act (Act No. I of 1894) and the (Emergency) Requisition of Property Act (Act No. XIII of 1948), the Government could acquire or requisition any house or land for public purpose or in public interest. After repealing the Land Acquisition Act (Act No. I of 1894) and the (Emergency) Requisition of Property Act (Act XIII of 1948), the Requisition and Acquisition of Immovable Property Ordinance (Ordinance No. II of 1982) was promulgated, re-enacting with necessary modifications the provisions of the repealed laws and providing for releasing unused requisitioned lands to the previous owners or their heirs. But in the case of unused acquired lands the Government is not bound to restore them.[105] The Emergency Requisition of Property Act (Act No. IX of 1989) provided for requisition of property to meet any emergency created by flood, diluvion etc.

The Bangladesh Government and Local Authority Lands and Buildings Ordinance (Ordinance No. XXIV of 1970) was promulgated to evict unauthorised occupiers from the land and buildings of the Government and local authorities.

The Hats and *Bazars* (Establishment and Acquisition) Ordinance (Ordinance No. XIX of 1959) provided for establishment of hats and *bazars* with prior licence from the Collector by the person in any land in his possession, and for forfeiting the land on which such hat and *bazar* is established without such licence, and also to acquire any hat and bazaar established after final publication of compensation assessment rolls and payment of compensation by publication of notice in the Official Gazette.

The *Waqfs* Ordinance (Ordinance No. I of 1962) was promulgated for the administration and management of *waqf* properties meaning properties permanently dedicated by a Muslim for any purpose recognised by Muslim Law as pious, religious or charitable and including any other endowment or grant for the aforesaid purposes after repealing the Bengal *Waqf* Act (Act No. XIII of 1934).[106]

When the ceiling of land to be retained by a family was increased from 100 *bighas* to 375 *bighas* during the Martial Law rule of Pakistan in 1961 by the Ordinance No. XV of 1961, landholding per family substantially went down amongst average peasant families, and the number of landless peasants increased.

By the provisions of the State Acquisition and Tenancy (Third Amendment) Order (President's Order No.96 of 1972) the Government

---

105. *Abul Bashar v. Bangladesh* 50 DLR (AD) 11.

106. Section 2(10) and (12) of the *Waqfs* Ordinance (Ordinance No. I of 1962).

of Bangladesh exempted peasants from paying rent of agricultural lands up to 25 *bighas* per family.

The Bangladesh Land Holding (Limitation) Order (President's Order No. XCVIII of 1972) reduced the ceiling of land per family again up to 100 *bighas*, and provided for vesting the excess land in the Government for distribution along with other Government *khas* lands to landless peasants.

By the State Acquisition and Tenancy (Fourth Amendment) Order (President's Order No.CXXXV of 1972) the provision of reduction of rent of the tenants of the diluviated land was retained, but the right of such tenants to re-enter such land after their reappearance was taken away, giving only preferential claim to such tenants or their heirs to get settlement of those lands under the Government policy for settlement of Government *khas* lands. Similarly, by the State Acquisition and Tenancy (Amendment) Order (President's Order No.LXXII of 1972) the right of a tenant to own accreted land contiguous to his land was taken away, vesting the same in the Government.

By the State Acquisition and Tenancy (Second Amendment) Order (President's Order No. XXIV of 1973) and the State Acquisition and Tenancy (Second Amendment) Order (President's Order No. LXXXVIII of 1972) the definition of usufructuary mortgage was extended to include land transferred with a contemporaneous agreement to repurchase the same within a fixed time. The period of possessing mortgaged land by the mortgagee was reduced to 7 years and the mortgagor was given the right to get back possession of such land through the Revenue Officer along with the Civil Court.[107]

The Bangladesh Laws (Repealing and Amending) Order (President's Order No. XII of 1973) abolished the Board of Revenue, which was constituted in 1786 by the East India Company to control, manage and supervise the land administration. The power of control, management and supervision of all Revenue Officers was vested in the Government. The power to hear appeals from the decision of the Divisional Commissioner was given to the Government in place of the abolished Board of Revenue.

To relieve the Secretary of the Ministry of Land from performing the functions of control, management and supervision of all Revenue Officers and from hearing appeals and revisions against decisions of the Divisional Commissioner on behalf of the Government since the abolition of the Board of Revenue, the Board of Land Administration was constituted in

---

107. Sections 2(6), 95 and 95A of the SAT Act 1950.

1980 with a chairman and at least two members by the Board of Land Administration Act (Act No. XIII of 1981).

By the Land Reform Board Act (Act No. XXIII of 1989) and the Land Appeal Board Act (Act No. XXIV of 1989) the Board of Land Administration was bifurcated in 1989, into-

1. the Land Reforms Board entrusted with the supervision and control of all other Revenue Officers and
2. the Land Appeal Board with the function of deciding quasi-judicial matters. The Act also contains provisions for preferring appeal to the Government against the decision of the Land Appeal Board by an aggrieved person.

Now the hierarchy of the land administration stands from bottom to top such as the Office of *Tahshildar*[108], the Office of Assistant Commissioner (Land), District Collectorate, Collectorate of Divisional Commissioner, the Board of Land administration consisting of the Land Reform Board and the Land Appeal Board and the Ministry of Land.[109] During survey and settlement of land in any area, the work of the Revenue Officer who is designated with the additional duty of Settlement Officer, gets under the control of the Directorate of Land Records and Surveys.[110]

The *Tahshildar* is burdened with the following duties[111]

1. Collection of current and arrear taxes from the land owners
2. Maintaining record of the collected taxes and depositing them with the District treasury
3. Checking annual demand, preparing return and producing, preparing particulars for relief and reduction of taxes and producing, enlisting defaulters
4. Taking possession of *khas* lands, maintaining records and its distribution
5. Maintaining procedural records of the collection of taxes and the demands
6. Instituting certificate cases and other suits as per the defaulters' list
7. Inspection of *khas* lands and taking possession of accreted lands

---

108. Rule 9 of the Government Estate Manual 1958.
109. Siddiqui, Kamal, *Land Management in South Asia: A Comparative Study*, University Press Limited, Dhaka, 1997, p 386.
110. Rule 14 of the Tenancy Rules 1955.
111. Chapter VI of the Tenancy Rules 1955.

8. Sending proposal for mutation and striking off names in accordance with the list
9. Acquiring of lands in cases of void transfer, pre-emption, forfeitures, extinction and voluntary leaving of ownership
10. Regular inspection of Hat Bazaars and other *sairat mahals* and their protection.

Depending on the nature of work performed, the Assistant Commissioner (Land) is sometimes termed as Revenue Officer, Settlement Officer, Circle Officer etc. Basically an A/C (Land) is charged with the duties[112]

1. Maintaining and updating land records of rights[113],
2. Fixation of Land Development Tax etc.,
3. Collecting Land Revenue with the help of *tahshildars,*
4. Mutation and separation of record of rights and updating of records with the transfer of ownership of lands,
5. Settlement of *khas* lands, Reclaimed lands and maintenance of update records,
6. Disposal of rent certificates cases, collection of unrecovered Government revenue and Government dues by instituting certificate cases against the defaulters,
7. Reviewing its decision etc.[114]

The DC is entrusted with the following duties-

1. Maintaining and updating land records of rights,[115]
2. Hearing revenue appeals[116], revisions,[117]
3. Taking necessary steps in recovering khas lands,
4. Settlement of *khas* lands and *sairat mahal,*
5. Fixation of rents, remission and condonation,
6. Interference on illegal transfer, transfer by inheritance and transfer of title,
7. Management of waqf and debotter properties,
8. Management of abandoned and vested properties,

---

112. ibid.
113. Sections 143 and 144 of the SAT Act 1950.
114. Section 150, ibid.
115. Sections 143 and 144, ibid.
116. Sections 147 and 148, ibid.
117. Section 149, ibid.

9. Management of tea gardens and leasing,
10. Management of acquired and requisitioned properties,
11. Ordering Eviction,
12. Cancellation of settlement order,
13. Admitting *Kabuliat*.[118]

The Divisional Commissioner is entrusted with the duties-

1. Departmental,
2. Hearing appeals[119] and revisions,[120]
3. Inspection.[121]

The Land Reform Board performs such duties, which are conferred on them, regarding land reform and land administration and such other duties, which are entrusted with them by other laws.

The Land Appeal Board performs such duties which are conferred on them regarding land administration and such other duties which are entrusted with them by other laws. Normally it hears appeals and revision preferred against the decision of the Divisional Commissioner.[122] Besides, the Land Appeal Board has got the authority of reviewing its own decision if an application is made within 60 days and during the pending of the review application, its earlier decision gets stayed.[123]

The Ministry of Land is the final authority in the land administration. An appeal lies to the Ministry of Land from the decision of the Land Appeal Board within 60 days and until the appeal is disposed of, the decision of the Land Appeal Board gets stayed.[124] Its decision in appeal is final and conclusive.[125]

By the land Appeal Board (Amandment) Act 1990 the Ministry of Land is relieved of its duty to hear appeals preferred against the dicision of the Land Appeal Board.

---

118. Debnath, Narayan Chandra, *Bangladesher Bhumi Bybosthapona, Sahitya Prokash*, Dhaka, 1999, pp 24, 37, 38 and 41.
119. Sections 147 and 148 of the SAT Act 1950.
120. Section 149, ibid.
121. Chowdhury Faikuzzaman, *A Book on the Day to Day Procedure of the Land Administration*, vol.II, published by the author, 2nd Edition, Dhaka, 2003, pp 1461-1596.
122. Sections 147, 148 and 149 of the SAT Act 1950.
123. Section 2 of the Land Appeal Board (Amendment) Act 1990.
124. Section 6 of the Land Appeal Board Act 1989.
125. Rahman, Gazi Shamsur Rahman, *Land Laws of Bangladesh*, Kamrul Book House, Dhaka, 2000, p 670.

Though the Government exempted tenants from payment of rent or land revenue up to 25 *bighas* of land per family, payment of development and relief tax and other taxes including primary education cess were not exempted. The Land Development Tax Ordinance (Ordinance No. XLII of 1976) redesigned the rate of revenue and certain other schemes[126]

1. it abolished all the taxes such as development and relief tax and other taxes including primary education cess
2. it imposed graduated rate of land development tax payable annually
   a) at the minimum rate of three *paisa* per decimal of agricultural land held by a family holding up to two acres of land subject to the payment of a minimum tax of TK 1,
   b) at the maximum rate of TK 6 for two acres plus 15 paisa per decimal of agricultural land per family holding land beyond two acres but not exceeding five acres,
   c) at the maximum rate of TK 51 for more than five acres plus 36 paisa per decimal of agricultural land per family holding land beyond five acres but not exceeding ten acres,
   d) at the maximum rate of TK 231 for more than ten acres plus 60 paisa per decimal of agricultural land per family holding land beyond 10 acres but not exceeding fifteen acres,
   e) at the maximum rate of TK 531 for more than fifteen acres plus 95 paisa per decimal of agricultural land per family holding land beyond 15 acres but not exceeding twenty five acres,
   f) at the maximum rate of TK 1481 for twenty five acres plus 1.45 per decimal of agricultural land per family holding land beyond twenty-five acres,
   g) at the rate of TK 60 per decimal of non-agricultural lands in city, or large industrial areas used for commercial or industrial purposes, and at the rate of TK 12 per decimal if used for residential or other purposes.
   h) at the rate or TK 10 per decimal of lands situated at district headquarters or *pourashava* (municipality) area if used for commercial or industrial purposes and at the rate of TK 4 per decimal of land if used for residential or other purposes.[127]

---

126. Section 3 of The Land Development Tax Ordinance (Ordinance No.XLII of 1976).
127. Ibid.

In 1985, the rate of land development tax for non-agricultural land and in 1987 that for agricultural land was increased.

In 1991, the Government exempted agriculturist families holding up to 25 *bighas* of agricultural land from payment of the said tax with effect from the first day of the Bengali year 1398.[128]

In 1993, the rate of the land development tax for lands beyond 25 *bighas* was further increased.

The Land Reforms Ordinance (Ordinance No. X of 1984) has put through drastic reform in the land law and revenue system in the following way:

1. It provides for limitation on acquisition of more than sixty *bighas* of agricultural land whether by way of transfer, inheritance, gift, will or other means and it also provides for its being vested in the Government in excess. But this provision will not affect a person who has already got more than the ceiling herein mentioned before this provision came into effect.
2. It provides for equally sharing cost of seeds, irrigation, manure etc by the owner of the land and the *bargadar,* to equally share the produce of the land cultivated by the labour of the *bargadar.* Otherwise, it provides for giving two-thirds of the produce to the *bargadar* if the owner of the land failed to pay his share of such costs.
3. This law also provides for entering into a written contract between the owner of the land and his *bargadar* and prohibited evicting the *bargadar* without valid reasons.
4. It also provides for self-cultivation of the land by the owner and also allowed heirs of the deceased *bargadar* to *barga* cultivate the land within the *barga* period of such land.
5. This law also prohibits purchasing of agricultural land by any person in *benami* i.e., in the name of another person and provided for treating the apparent transferee of the land as the real owner.
6. This law also provides for exercising the right of pre-emption by the *bargadar* when the owner of the *barga* land transfers it to somebody else.[129]
7. This law also debars the Court or any other authority from attaching, forfeiting or selling any homestead land of an agriculturist and from dispossessing or evicting him from such land.

---

128. No corresponding English date is Available in the Act.
129. Section 13 of the Land Reform Ordinance 1984.

The Land *Khatiyan* (Chittagong Hill Tracts) Ordinance 1984 (Ordinance No. II of 1985) provided for the first time for survey and preparation of *khatiyans* in the name of the owners of land in Chittagong Hill Tracts.

The Bangladesh Debt Settlement Act (Act No. XV of 1989) provided for constituting a Debt Settlement Board in each *thana* for giving relief to the poor peasants who are compelled to transfer their lands to the creditors under different modes including sale up to one acre of land at a price up to TK 30,000 and to restore possession of such land to the transferor treating the same as mortgage or declaring the same as void.

By the provisions of the Bangladesh Abandoned Property (Control, Management and Disposal) Order (Order No. XVI of 1972) the Government is charged with the control, management and disposal of the abandoned property meaning any property owned by any person whether natural or legal, who is not present in Bangladesh or whose whereabouts are not known or who has ceased to occupy, supervise or manage in person his property, including any property owned by any person who is a citizen of a State, which was at war with Bangladesh after 25 March 1971 or any property taken over by the Bangladesh (Taking over of Control and Management of Industrial and Commercial Concerns) (Acting President's Order No.1 of 1972) but excluding any property whose owner is residing outside Bangladesh for any purpose not prejudicial to the interest of Bangladesh or any property which is in possession of the Government under any law for the time being in force.[130]

By the provisions of the Defence of Pakistan Ordinance (Ordinance No. XXIII of 1965) read with the Defence of Pakistan Rules 1965 enemy property has been defined as any property for the time being belonging to or held or managed on behalf of an enemy or any person resident in enemy territory.[131] The enemy property was taken under the control of the Government during the emergency proclaimed in Pakistan but it continued to remain there even after the emergency was lifted under the veil of the Enemy Property (Continuance of Emergency Provisions) Ordinance (Ordinance No. I of 1969). This enemy property law of Pakistan succeeded in Bangladesh, which got its independence through waging war, in the name of the Enemy Property (Continuance of Emergency Provisions) (Repeal) Ordinance (Ordinance No. IV of 1974). Later on it was named as the Enemy Property (Continuance of Emergency

130. Section 2(1) of the Bangladesh (Control, Management and Disposal) Order (Order No. XVI of 1972).

131. Rules 161 and 169 of the Defence of Pakistan Rules 1965.

Provisions) (Repeal) (Amendment) Ordinance (Ordinance No. XCIII of 1976), commonly known as vested property since the property got vested in the Government for its control, management and disposal. This law does not suit to the conditions of Bangladesh-

1. As an enemy property declared in Pakistan as the offspring of the war between Pakistan and India in accordance with its enemy property laws, cannot be an enemy property in Bangladesh in accordance with the enemy property laws of Pakistan since there was no war between Bangladesh and India.[132]
2. Certain rights and obligations of one State automatically succeed to another if the later State succeeds to former State.[133] As Bangladesh was not a successor State to Pakistan, rather it achieved its liberation by waging an all out war against Pakistan, the enemy property laws of Pakistan cannot succeed to Bangladesh.[134]
3. Bangladesh achieved its liberation by waging an all out war against Pakistan with the assistance of India. Again, there was a friendship treaty between Bangladesh and India and as such an Indian property cannot be treated an enemy property in Bangladesh by adopting the Pakistani enemy property laws.[135]
4. The Government of Bangladesh by virtue of the Proclamation of Independence and the Bangladesh Vesting of Property and Assets Order (Order No. XXIX of 1972) continues to retain properties of persons who left for India either being Indians or Pakistanis, getting them vested in the Custodian, later in itself. Sometimes, even the co-sharers of the properties left by persons either being Indians or Pakistanis, were divested of their possession and their properties are declared as vested or enemy properties. Rashed Khan Menon, a veteran politician has said that the divesting of their possession took place, only because of their being minorities, nothing else.[136]

---

132. Rakshit, M. K., *The Law of Vested Properties in Bangladesh*, published by Sree M. K. Rakshit, Chittagong, 1983, pp 1-32.
133. See in details, Starke, J. G., 'Succession to rights and obligations' *Introduction to International Law*, 10th Edition, Aditya Books Private Limited, New,Delhi, 1994, p 321.
134. Bhattacharya, D. C., *Enemy (Vested) Property Laws in Bangladesh*, published by Ms. Chitra Bhattacharya, Dhaka, 1991, pp 1-14.
135. Ibid.
136. Barkat Abul, *An Enquiry into Causes and Consequences of Deprivation of Hindu Minorities in Bangladesh through the Vested Property Act*, (ed.), Prip Trust, Dhaka, 2000, p 2.

Taking those into consideration, the Restoration of Vested Properties Act (Act No. XVI of 2001) was passed to return the properties vested in the Government to the rightful owners or their Bangladeshi successor-in-interest by making lists of restorable properties[137] and causing them to be published.[138]

It is quite interesting to note that the war between Pakistan and India gave rise to the enemy (vested) property law and the war between Bangladesh and Pakistan paved way for the abandoned property. Though those two were termed in two different names, they got the same background and by those laws the properties, abandoned or enemy got vested in the Government for its disposal.[139]

7. Conclusion

Most of the Bangladeshis are predominantly dependent on land for their daily living. Proper management of land can protect the interests of the *bona fide* cultivators and make their lives happier and healthier. To this end in view, the importance of reshuffling and introducing reform in the land management and land administration by making amendment to this existing laws or enacting laws where necessary cannot be exaggerated.

The following suggestions can be tried to fix the weakness remaining in the existing land laws and land administration:

1. The satellite survey can be introduced in the place of ancient, time consuming and nasty corruption leading cadastral survey.[140]
2. The Record-of-Rights can be preserved in computer database namely LIS (Land Information System) and the holders of Record-of-Rights can be given land ownership certificate, which can help detecting fabricated documents and preventing multiplicity of suits.[141]
3. The Office of Sub-Registrar and the Office of the Assistant Commissioner (Land) can be set up in the same place or the same office can be given the works of registering documents for transfer of land and its mutation.[142]

---

137. Section 9 of Restoration of Vested Properties Act (Act XVI of 2001).
138. *Land Administration Manual*, vol. II, Ministry of Land, Dhaka, 2003, pp 323-348.
139. Farooqui, M. I., *Law of Abandoned Property*, published by Mrs. Sultana Suraiya Akhtar, Dhaka, 2000, pp 34-35.
140. Op. cit., Hoque, (2000), p 253.
141. Ibid. pp 253-254.
142. Ibid. pp 254-255.

4. The Revenue Officer can be given power to dispose of suits relating to partition, possession, demarcation of boundary, authenticity of the deed, pre-emption etc. so that the litigants can save their time and money and can thus help taking the burden of the Civil Courts off.[143]
5. Alternative Land Dispute Resolution can be introduced for disposing of suits relating to partition, demarcation of boundary etc. by enabling and empowering Village Courts.[144]
6. Like the taxation cadre, the A C (Land) cadre in the Bangladesh Civil Service can be confined to land issues freeing the Assistant Commissioners from performing other duties. They can be equipped with proper training and logistics so that they can handle the land administration efficiently.[145]
7. To make settlement of *khas* lands, laws can be enacted defining *khas* lands, the landless, who are capable of getting settlement, prohibiting transfer of lands settled in the landless etc.[146]
8. The Land Reform Ordinance 1984 can be amended inserting provisions alike the 'operation *barga*' in West Bengal for making *khatiyan* in the name of the *bargadar* so as to protect the interests of the *bargadar*.[147]
9. Legislation can be enacted for ensuring proper plan and use of land so that agricultural land cannot be used for non-agricultural purposes or vice versa.[148]
10. Laws can be amended squeezing the scope of exercising the right of pre-emption e.g. the owner of the contiguous land can be removed from the list of persons capable of exercising the right of pre-emption or the provision for time limit for exercising the right of pre-emption can be specifically mentioned so that time limit starts from the date of transfer, not from the date of registration.[149]

---

143. Ibid. pp 255-257.
144. Ibid. p 261.
145. Ibid. pp 257-258.
146. Ibid. pp 258-260.
147. Op. cit., Hussain, (2000), p 108.
148. Op. cit., Hoque, (2000), pp 268-269.
149. Ibid. pp 269-270.