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THE 1972 CONSTITUTION OF BANGLADESH AND THE LOCAL GOVERNMENT

DR. M. ERSHADUL BARI

Introduction

Local government, which is at the bottom of a pyramid of governmental institutions with the national government at the top and intermediate governments (states, regions, provinces) occupying the middle range[1], is much older than national government in many developed countries such as England, France, Italy, Spain and Germany.[2] It has now been established in almost all countries of the world as a vital component of a politico-administrative system composed of the members elected by the people of an area or locality to ensure local-level participation in the formulation, planning and implementation of development programmes and delivering prompt basic civil services (sanitation, public health, primary education, social welfare services etc.) to the local people within its jurisdiction through the better use of local knowledge, direct contact with citizens and greater ability to overcome communication problems. In England and Wales it "would be difficult nowadays to name any aspect of day-to-day life without a link with local government. There is no section of the community which it does not serve in some way and to many it ministers continuously from cradle to coffin.[3]

Local government is loosely defined, without making any reference to its financial and legal status and representative character, as "a public organization authorized to decide and administer a limited range of public policies within a relatively small territory which is a subdivision of a regional or national government."[4] It is that "part of the administration of a state or nation which deals

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1. IX Encyclopedia of Social Sciences, 451 (New York, 1968).
2. IV Encyclopedia Britannica, 644 (Chicago, 1981)
3. New Age Encyclopedia, 4 (Sydney, 1983)
4. Supra note 1, at 451

mainly with such matters as concern the inhabitants of a particular place or district, including those functions which the central government considers it desirable to be so administered. The bodies entrusted with these matters are known as local authorities and are, in the main, elective."[5] In a similar way, Justice Shahabuddin Ahmed of the Appellate Division of the Supreme Court of Bangladesh commented in 1992 on the nature of the local government in the case of Kudrat-e-Elahi Panir v. Bangladesh[6] : Local government "is meant for management of local affairs by locally elected persons. If government's officers or their henchmen are brought to run the local bodies, there is no sense in retaining them as local government bodies .... Local Government is an integral part of the democratic polity of the country."[7] In relation to local goverment, local self-government, which sometimes implies the elective nature of such institution and, in a colonial rule, the prefix 'self' means that governmental institution at the local level is composed of natives, has been described in the Report of the Indian Statutory Commission, 1930 as a representative organization responsible to a body of electors, enjoying wide powers of administration and taxation, and functioning both as a school for training and a vital link in the chain organizations that make up the government of the country. The United Nations has defined 'local self-government' as "a political sub-division of a nation or state which is constituted by law and has substantial control over local affairs, including the power to impose taxes or extract labour for prescribed purposes".[8] Thus "Local governments are not true sovereign governments. As such they possess no independent sovereign powers or authority, save those delegated to them by state institutions and laws. In brief, they remain subject to the sovereign authority of the national and state governments".[9] Thus the essential features of a local government are: (a) it is established by law; (b) it is generally an elective body

5. Supra note 3, at 3
6. 44 DLR (AD) 319
7. *Id.* at 330, 336
8. Quoted in Siddiqui, Kamal, "Local Government in Bangladesh, 4 (Dhaka, 1995)
9. Valent, William, Local Government Law 2(American Case Book Series).

composed of members elected by the people of an area or locality; (c) it has the power of administration over a designated locality and the authority to manage the specified subjects; (d) it has the power to raise fund through taxation within its area; and (e) it is ultimately accountable and subordinate to the national government. In this connection, the observations made by Justice Mustafa Kamal of the Appellate Division of the Supreme Court of Bangladesh in the case of Kudrat-e-Elahi Panir are worth-quoting: "Local government as a concept and as an institution, was already known to have possessed certain common characteristics, namely, local elections, procedure for public accountability, independent and substantial sources of income, clear areas for independent action and certainty of powers and duties and the conditions under which they would be exercised.[10] It should be stressed here that the quality and character of a local government are determined by a multiplicity of factors, for example, national and local traditions, customary deference patterns, political pressures, party influence and discipline, bureaucratic professionalism, economic resource controls, and social organization and beliefs.[11]

However, the object of this paper is to examine the provisions of the original (1972) Constitution of Bangladesh concerning local government with reference to the Judgment of the Supreme Court of Bangladesh pronounced in Kudrat-e-Elahi Panir's Case (1992). The omission of the provisions of the Constitution relating to local government in 1975 and their restoration in 1991 shall also be discussed.

The Provisions of the Original Constitution of Bangladesh Concerning Local Government.

The 1972 Constitution of Bangladesh, which was adopted on 4 November 1972 and given into effect on 16 December 1972,

10. Supra note 6, at 341-342
11. Supra note 1, at 451

declares Bangladesh as a unitary state. Although the original Constitution did not define the term 'Local Government', it contained a full chapter (i.e. Chapter III) in Part IV which provided for the composition and powers of local government institutions to be established in Bangladesh by an Act of Parliament. There were two Articles, 59 and 60, in the Chapter which laid down a framework concerning local government bodies. Article 59 provided that:

> "Art. 59 (1). Local government in every administrative unit of the Republic shall be entrusted to bodies, composed of persons elected in accordance with law.
>
> (2) Every body such as is referred to in clause (1) shall, subject to this Constitution and any other law, perform within the appropriate administrative unit such functions as shall be prescribed by Act of Parliament, which may include functions relating to
>
> (a) administration and the work of public officers;
>
> (b) the maintenance of public order;
>
> (c) the preparation and implementation of plans relating to public servces and economic development."

Thus in order to be a local government an institution was required to fulfil under Article 59 of the Constitution two conditions: it was to be constituted in an administrative unit and was to be entrusted to a body composed of elected persons. An 'administrative unit' has been defined in Article 152 (1) of the Constitution as a "district or other area designated by law for the purposes of Article 59." Thus in the case of a district, a designation by law is not necessary, but it is necessary for other area to become an 'administrative unit.'[12]

However, the original Article 60 of the Constitution stipulated that:

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12. This was done in the case of unions and municipalities by the Parliament through the enactment of Bangladesh Local Government Union Parishad and Paurashava (Amendment) Act, 1973. Section 2C of the Act provided that "the unions and municipalities shall be administrative units within their respective areas for the purposes of Article 59 of the Constitution of the People's Republic of Bangladesh." It was given retrospective effect from 22 March, 1973 and incorporated in P.O. No. 22 of 1973 as Article 2C.

> "Art. 60. For the purpose of giving full effect to the provisions of article 59 Parliament shall by law, confer powers on the local government bodies referred to in that article, including power to impose taxes for local purposes, to prepare their budgets and to maintain funds."

Apart from these two Articles, which placed limitations on the power of the Parliament to make law regarding local government, original Article 11 of the Constitution provided as a Fundamental Principle of State Policy (which is not judicially enforceable) that "The Republic shall be a democracy in which .... effective participation by the people through their elected representatives in administration at all levels shall be ensured."

The provisions of Articles 11, 59 and 60 of the Constitution of Bangladesh concerning local government led Justice Mustafa Kamal of the Appellate Division of the Supreme Court to observe in the Kudrat-e-Elahi's case that:

> "..... the constitutional provisions on local government namely Articles .... 11, 59 and 60 mark out the Constitution of Bangladesh as clearly distinctive from other Constitutions of the world. No Constitution contains any definitive provision on local government. In England the local government units, unlike the central government, are not products of constitutional design, but of historical development. Same is the case in the USA and India. In this sub-continent too local government developed along historical lines without following any constitutional pattern. It is the Constitution of Bangladesh which for the first time devised an integrated scheme of local government within a constitutional pattern. This is a most distinctive and unique feature of the Constitution of Bangladesh."[13]

Although the learned Justice has maintained that "no Constitution contains any definitive provision on local government," and it "is the Constitution of Bangladesh [adopted in 1972] which for the first time devised an integrated scheme of local government,"

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13. Supra note 6, at 341

detailed and comprehensive provisions concerning local government are to be found in the Constitutions of certain European Countries (i.e. France, Italy and Germany) adopted in the 1940s. For example, the Constitution of the French Republic, adopted by the National Constituent Assembly on 28 December 1946, contains exhaustive provisions regarding local government. The entire Part (Titles) X of the Constitution, which contains five Articles, deals with local administrative units. The provisions of the Articles relating to local government are quoted below:

> "Art. 85. The French Republic, one and indivisible, recognizes the existence of the local administrative units. These units shall be the communes, the departments and the overseas territories.
>
> Art. 86. The framework, the scope, the eventual regrouping, and the organization of the communes, the departments, and the overseas territories shall be determined by law.
>
> Art. 87. Local administrative units shall be governed freely through councils elected by universal suffrage. The execution of the decisions of these councils shall be ensured by their mayor or their president.
>
> Art. 88. The co-ordination of the activities of government officials, the representation of the national interests, and the administrative control of these units shall be ensured within the departmental framework by delegates of the government appointed by the council of ministers.
>
> Art. 89. Organic laws will extend the liberties of the departments and municipalities; they may provide, for certain large cities, rules of operation and an administrative structure different from those of small towns, and include special provisions for certain departments, they will determine the conditions under which Articles 85 to 88 above are to be applied.
>
> Laws will likewise determine the conditions under which local agencies of central administrations are to function, in order to bring the central administration closer to the people."

Within next two years, Italy and Germany followed the example of France through the incorporations into their Constitutions detailed provisions concerning local government. The Constitution of the Italian Republic, approved by the Constituent Assembly on 22 December, 1947 and entered into force on 1 January, 1948, began with certain "Fundamental Principles" and one of the "Fundamental Principles" dealt with the reorganization and distribution of administrative functions among local bodies.[14] The Constitution also contained provisions concerning the distribution of administrative functions among local agencies.[15] The Basic Law (i.e. the Constitution) of the Federal Republic of Germany, promulgated by the Parliamentary Council on 23 May, 1949 and which is still in force, provides for the self-government for local authorities (counties and communes) in which the "people shall be represented by a body chosen in general direct, free, equal and secret elections.[16]

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14. As Article 5 of the Constitution of the Italian Republic provides: "The Republic, one and indivisible, recognizes and promotes local autonomies. It effects in the state services the broadest administrative decentralization and adapts the principles and procedure of its legislation to the needs of autonomy and decentralization",

15. As Article 118 of the Constitution of the Italian Republic provides: "Administrative functions connected with . . . . [certain] matters . . . . are [to be] exercised by the region, with the exception of those of purely local interest, which may be assigned by law of the Republic to the provinces, communes, and other local agencies . . . . The region normally exercises its administrative functions by delegating them to the provinces, communes, or other local agencies, or by making use of their offices."

    Article 129 states that ". . . . Provincial areas may be subdivided into districts with exclusively administrative functions, as a form of further decentralization."

    Article 130 provides that "An agency of the region, established in the manner prescribed by law of the Republic, exercises, also in a decentralized manner a control over the legality of the acts of the provinces, communes and other local bodies".

16. Article 28 of the Basic Law of the Federal Republic of Germany provides that "(1) The constitutional order in the Laender shall conform to the principles of republican, democratic and social government based on the rule of law, within the

Not only the Constitutions of certain European countries (adopted in the 1940s) contained detailed provisions concerning local government, elaborate stipulations in this regard are also to be found in contemporary Constitutions of some Asian countries. For example, the Constitution of Japan, promulgated on 3 November, 1946 and came into effect on 3 May 1947, devoted a full chapter, Chapter VIII (which contains four Articles), to local government. The provisions of the Constitution regarding local government are quoted below:

> "Article 92. Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.
>
> Article 93. The local public entities shall establish assemblies as their deliberative organs, in accordance with law.
>
> The Chief executive officers of all local public entities, the members of their asseblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities.
>
> Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.
>
> Article 95. A special law applicable only to one local public entity cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law."

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meaning of this Basic Law. In each of the Laender, counties (Kreise), and communes (Gemeinden) the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In the communes the communal assembly may take the place of an elected body.

(2) The communes shall be guaranteed the right to regulate, on their own responsibility, all the affairs of the local community within the limits set by statute. Within the framework of their statutory functions, the associations of communes (Gemeindeverbaende) shall also have such right of self-government as may be provided by statute.

(3) The Federation shall ensure that the constitutional order of the Laender conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

Omission of the Provisions Concerning Local Government from the Constitution in 1975

However, the integrated scheme of the Constitution concerning local government was abolished by the Constitution (Fourth Amendment) Act, 1975, passed on 25 January, 1975 during the then Government of the Awami League. This Amendment Act, which was a drastic amendment and undermined the spirit of liberal democracy in Bangladesh, omitted Articles 59 and 60 from the Constitution and the sentence concerning local government as contained in Article 11 was dropped.

Insertion of New Provision Relating to Local Government in the Constitution in 1977

Although Articles 59 and 60 of the Constitution were not restored by the First Martial Law Government (1975-1979), an Article for the promotion of local government institution was incorporated into the Constitution by the Proclamation (Amendment) Order, 1977 (Order No. I of 1977), issued on 23 April, 1977 by the President and Chief Martial Law Administrator Ziaur Rahman. This Article 9, which substituted for the provisions of original Article 9 concerning nationalism, provides that:

> "The State shall encourage local government institutions composed of representatives of the areas concerned and in such institutions special representation shall be given, as far as possible, to peasants, workers and women."

It may be mentioned here that the above provisions have exactly been reproduced from article 32 of the 1973 Constitution of Pakistan.

Restoration of Original Provisions Concerning Local Government in the Constitution in 1991

However, later the Constitution (Twelfth Amendment) Act, 1991, passed on 18 September, 1991 during the Civilian Government of the Bangladesh Nationalist Party, restored Articles 59, 60 and the

sentence of Article 11 to the effect that "and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured." Two months six days after the restoration of these Articles in the Constitution regarding local government, on 23 November, 1991, the Upazila Parishad (which had been established by the 1982 Martial Law Administration) was abolished through the promulgation of the Local Government (Upazila Parishad and Upazila Administration Reorganization) (Repeal) Ordinance, 1991. Although the Government constituted in November, 1991 a high powered "Local Government Structure Review Commission" to review and study the local government of Bangladesh and recommend a suitable, effective, responsible and accountable local government structure for the country, the Constitutional validity of the Ordinance was ultimately challenged before the Appellate Division of the Supreme Court in the case of Kudrat-e-Elahi Panir v. Bangladesh. With regard to the continuity of the system of local government institutions, the then Chief Justice of Bangladesh, Justice Shahabuddin Ahmed observed (in 1992) in that case:

> "The system of Local Government Institution may be altered, reorganized or restructured, and their powers and functions may be enlarged or curtailed by Act of Parliament, but the system as a whole cannot be abolished."[17]

Then he bitterly criticised the steps taken by various autocratic regimes both before and after the independence of Bangladesh regarding local government institutions thus:

> ".... since Independence from the British rule, these institutions fell victim to party politics or evil designs of autocratic regimes, passed through the ordeal of suppression, dissolution or management of their affairs by official bureaucrats or henchmen nominated by Government of the day.[18]

17. Supra note 6, at 336
18. Id at 329-330

He considered it necessary to give direction to bring the existing local government bodies in line with the provisions of the Constitution concerning local government. As he said:

> "But there are other local bodies constituted by, and functioning, under different statutes. With the reappearance of Articles 59 and 60 with effect from 18 September, 1991, on which date the Twelfth Amendment of the Constitution was made, these local bodies shall have to be updated in conformity with Articles 59 and 60, read with Article 152(1) for the lawful functioning of the said local bodies. The areas in which these bodies other than the Zilla Parishads have been constituted shall have to be designated as administrative units by amending these statutes. Designation afresh of the union and municipalities is also necessary in view of the fact that Act No. IX of 1973 along with the President's Order No. 22 of 1973, was itself repealed by Ordinance No. XC of 1976 — Local Government Ordinance, 1976 in the case of Unions and Paurashava Ordinance, 1977 — Ordinance No. XXVI of 1977 — in the case of municipalities. Required designations by amending the relevant statutes with effect from the date on which the Twelfth Amendment of the Constitution was made should be provided as soon as possible – in any case within a period not exceeding four months from date. The other constitutional requirement for these local bodies is that they shall be entrusted to bodies "composed of persons elected in accordance with law." The existing local bodies are, therefore, required to be brought in line with Article 59 by replacing the non-elected persons by election keeping in view the provision for special representation under Article 9. Necessary action in this respect should be taken as soon as possible — in any case within a period not exceeding six months from date. In the suggested amending statutes, all actions taken by the local bodies concerned since18 September 1991 should be ratified.[19]

Thus the local government institution unmistakably interwoven in the democratic fabric of the Constitution of Bangladesh. "It is to be remembered however that local government is a part of the constitutional system and therefore Chapter III of Part IV of the

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19. *Id.* at 336-337

Constitution containing Articles 59 and 60 cannot ever been kept as a dead letter. Local Government cannot be abolished altogether. It must exist in some form, in some tier or tiers at any given point of time to give a meaning to Chapter III of Part IV and to justify its rationale, validity and existence. It is not a mere adornment in the Constitution.[20]

Conclusions

The foregoing discussion shows that a full chapter, Chapter III, of Part IV of the original Constitution of Bangladesh, 1972, contained elaborate provisions concerning composition and powers of local government bodies to be established by an Act of Parliament. It provided that local government was to be constituted in an administrative unit and was to be composed of elected person. This comprehensive recognition of local government in the Bangladesh Constitution showed the position it enjoyed in the body politic of the country. But the provisions of the Constitution concerning local government were omitted by the Constitution (Fourth Amendment) Act, 1975. These provisions have later been restored by the Constitution (Twelfth Amendment) Act, 1991. Thus local government has again become a distinctive feature of the Constitution. It is obviously interwoven in the democratic fabric of the Constitution which "must exist in some form, in some tier or tiers at any given point of time" to make the constitutional provisions meaningful. Local government, as a tier at the bottom of a pyramid of governmental institutions consisting of elected members, should be established and maintained in Bangladesh so that local level participation in the formulation, planning and implementation of development programmes and delivering prompt basic civil services to the people of the locality can be ensured.

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20. Kamal, Mustafa J in id., at 343

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HUMAN RIGHTS: THE BRIDGE ACROSS BORDERS

DR. MIZANUR RAHMAN

1. Introduction

It is difficult to find a period in the history of mankind when the question of human rights has had a greater moral significance in study and practice than the period from 1948 to date. There have been times when the issue of human rights held capital importance in one country or another, but never has it attracted such wide attention and engrossing interest throughout the world as at present in this decade and not only for the intellectuals and the elite, but also for the large masses of people inhabiting the globe.

Even during the period since 1948 major shifts have taken place in the attitude of nations and peoples towards the basic aspects of human rights. While some four decades ago, the prime concern of human rights law was the implementation of the rights of peoples and nations to self determination, today the essence of human rights evolve round the question of protection of rights from encroachment by ones own state and rulers belonging to the same community. Obviously then, while in post 2nd world war scenario 'human rights' were directed against foreign colonial rule, domination and subjugation, today the thrust of human rights is directed against the internal foes, i. e. the tyrant and undemocratic regimes and rulers. Contemporary political developments in many parts of the globe bear testimony to this. Thus human rights were fervently pursued when peoples have suffered oppression. On such occasions, the cry of the opperessed has been for freedom from the sufferings inflicted on them-or, put another way, for vindication of their rights not to be oppressed[1] . Resentment or struggle against foreign oppression and domination was presumed to be justified *ipso facto*, but under

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1 Paul Sieghart. An Introduction to the International Covenants on Human Rights. Human Rights Unit Occasional Paper, (1 March, 1988)

conditions of self rule, the only shield that could now be used against tyranny and oppression of the state or the national government was provided by human rights.Thus human rights became the touch stone of protection of individual's freedom and liberty. The ambit of human rights has expanded so much that it is no longer restricted within the territorial boundaries of any particular nation state, and the status of human rights in any state is today a matter of truly international concern. Thus human rights is transgressing the national frontiers by interlinking all the members of the international community through a bridge — the bridge that today can only be identified with human rights.

In this paper an attempt will be made to ascertain the distinctive features of this international dimension i. e. universality of human rights and then compare them with the existing situation in Bangladesh.

2. Nationality and Universality of Human Rights

The belief that each human being has certain rights, which all governments (and all other human beings) have a duty to respect owes little to the influence of theorists and philosophers, it is the instinctive response to a feeling of revulsion occasioned by acts of political, religious or economic repression. The consciousness that human rights are universal is, in essence, a feeling of moral outrage, not of philosophical conviction. This conscious draws on the moral resources of man's belief that "there is an underlying universal humanity, that it is possible to achieve (or at least to strive for) a type of society which ensures that basic human needs and reasonable aspirations of human beings all around the world are effectively realised"[2]. Initially, this concept of universal humanity operated upon and was dependent on *moral claims*: people said that they ought to have such rights and freedoms, and were being wrongly denied

2. Fali S. Nariman, The Universality of Human Rights, ICJ Review, Special issue, 8 (June, 1993)

them.Moreover, the claim was that *everyone* ought to have these rights and freedoms, that they were fundamental to all human existence, that "they did not derive from the gift or arbitrary whim of rulers, however powerful, and that rulers could neither deny them nor abridge them, nor could they treat them as forfeited because of some offence which the individual had committed in their eyes, or even against their law's[3] . In short, these rights were *inherent*, that is, every human being had them, *without distinction*, simply by reason of being human, and they were also inalienable, that is, no one could take them (or even give them) away.

In the struggle for human rights, the victors usually ensured that the rights and freedoms for which they had fought were transformed into *legal* rights and freedoms, formally recognized and protected by new laws. However, there also had to be safeguards against any attempts by future rulers or governments to deny or abridge them again, and this was most commonly done by two mechanisms "entrenching" the rights themselves (sometimes in the form of a Bill of Rights) in the Constitution—a paramount law from which the government itself derived its powers, and which it could not therefore unilaterally amend or aberogate and independent courts where wronged individuals could seek redress against the government if it again violated their fundamental rights or freedoms.

3. Towards an International Human Rights Law

The story of human rights as we understand it today begins with the Charter of the United Nations which included, as one of the basic principles, promotion, encouragement and respect for human rights and freedoms[4] . Ariticle 55 of the UN Charter provides that the United Nations shall promote universal respect for and observance of human rights and fundamental freedoms. This prime concern of the united nations was translated in the Universal Declaration of Human Rights

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3. Paul Sieghart, supra note 1,
4. Ariticle 1, UN Charter.

(UDHR) adopted by the General Assembly on 10 December, 1948. The Universal Declaration embodied the hopes and aspirations of mankind. It articulated a new vision of humanity for a national and international order where man will be able to find fulfilment of his true self—where there will be no inequality of race, sex, power, position or wealth and where every human being will be entitled to share equally in the social, material and political resources of the community. In the words of Justice Bhagwati "It was designed to ensure the dignity of the human being and promote individual freedom with social good".[5]

The relevant instruments brought into existence after 1945 —The UDHR, the International Covenants, the large number of conventions etc.[6] have helped to individualize human rights, more than these, they have given the concept of universalisation of human rights a legal status in the law of Nations. This point has been aptly underscored by Sir H. Lauterpacht:

> "The individual has acquired a status and a stature which have transformed him from an object of international compassion into a subject of international right ... [The Charter and the UDHR] have transferred the inalienable and natural rights of the individual from the venerable but controversial orbit of the law of nature to the province of positive law"[7]

Protection of the fundamental rights and freedoms of an individual has now become "one of the basic principles of modern international law"[8].

The UDHR was proclaimed "as a common standard of achievement for all peoples and all nations". And today it may be emphatically said that the UDHR has become part of binding

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5. Justice Bhagwati, Asia and Human Rights, In: NLSIU, Human Rights Law and Practice, (17-22 October, 1995) Course Compendium.
6. For a list of these international instruments see, Werner Levi. Contemporary International Law. 163 (2nd. ed, 1991)
7. Sir H. Lauterpacht, International Law and Human Rights, 4, 159 ( )
8. G.I. Tunkin (ed). International Law 352, (Moscow, 1986)

international law, whatever may have been the intention of the member states of the UN when its General Assembly adopted it[9].

However in 1948, pragmatism of the UN dictated to proceed with the work of transforming its 30 articles into a code of binding international law through the adoption of multilateral– often referred to as–'law-making'-treaties. Eventually in 1966, the texts were finalised and adopted. By then, the material had been parcelled out into two separate treaties, both to be called covenants: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cutural Rights (ICESCR). It took another ten years before these two treaties entered into force.

These covenants now constitute the core of international human rights law. They set out, with considerable precision, definitions of all the universally agreed human rights and fundamental freedoms of all human beings, and also define the obligations assumed by the state parties to these treaties in respect of these rights and freedoms.[10]

When all the conventions and declarations relating to human rights are added up, it would be difficult to imagine the human rights of any individual or group of individuals remaining unprotected, especially, when some highly specialized conventions aimed at special groups of people or fugitives are added. Thus, one of the characteristic features of international human rights law is that a number of human rights are not rights of individuals, but collective rights i.e. the rights of groups or peoples. This is clear so far as concerns the right of self determination which has been considered

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9. For a lucid exposition on the problem see id, at 5

10. The text of all the substantive and procedural articles of both covenants, with detailed commentaries and annotations, may be found in P. Sieghart, The International Law of Human Rights, (Oxford, 1984). For a briefer and more narrative discussion of their context and content, see P. Sieghart, The Lawful Rights of Mankind, (Oxford, 1986)

as one of the cardinal principles of human rights law[11] . Apart from this right, there is the right of an ethnic group or of a people to physical existence as such, a right which is implicit in the provisions of the Genocide Convention of December, 1948. Then also there is the right of certain groups or minorities to maintain their own identity. Thus article 27 of the Covenant on Civil and Political Rights provides–

> "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language"[12]

It is intriguing to notice that notwithstanding huge number of international instruments on human rights, the real focus has always been on the two covenants of 1966. But then again, these two covenants were/are interpreted from different angles.

Civil and political rights represent basically individual rights against the state and the western approach to human rights focus principally on implementation and enforcement of civil and political rights. These rights of an individual, according to the western approach, are inalienable and imprescriptable rights impenetrable to state action. They are essential attributes of every human being by virtue of his being a human and they rise above the state and above all political organisations. They are rights and freedoms assertable against the state in order to protect the individual against state action which is in violation of certain basic norms accepted by the international community as essential to civilized existence. They are, as Justice Bhagwati puts it, "individualistic rights".[13]

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11. For an extensive study on the Right to Self-determination see Dr. Kazi A. Hamid, Human Rights, Self-Determination and the Right to Resistance : The case study of Hawaii, (Washington D. C, 1994)
12. For full texts of the relevant Human Rights Conventions see United Nations, Human Rights : A Compilation of International Instruments, (New York, 1988)
13. Supra note 5.

The western concept of human rights is based on the existence of political structures organized on the traditional democratic formula. This formula accepts political and ideological pluralism and multiparty systems. It presupposes electoral confronted claims tailored by non-discrimination of any kind–eighter personal or ideological.

However, it was soon realized that unless social, economic and cultural rights are made effective, civil and political rights will have no meaning and they would remain simply lifeless formula without reality for the underprivileged segments of the society. This realisation came on account of the pressure generated by newly independent developing countries inspired by the socialist states which laid great emphasis on realisation of social, economic and cultural rights.

Today, it is universally accepted that both set of rights are vital to the existence of the democratic structure and they are interlinked with each other and one cannot coexist without the other. Setting aside the ideological differences, the fact remains that whenever human rights have been violated on any scale, the violations have entailed some kind of discrimination against the victims– whether on the grounds of their race, their religion, the colour of their skin, their language, their national origin or some other factor which has made them unpopular with their rulers. This is why, both the covenants, in imposing obligations on their state parties in Article 2, add the identical words, taken directly from the UDHR:

" ... without distinction of any kind, such as race, colour, sex, languages, religion, political or other opinion, national or social origin, property, birth or other status".[14]

Thus protection of human rights, both individual and collective, came to be identified with the cardinal principle of non-discrimination.

4. Human Dignity : The Master Key

Prof. Sieghart very correctly observes that "human rights law does not treat individuals as equal; on the contrary, it treats them as

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14. Supra note 12, at 8, 9

so different from one another as to make each of them unique–and for that very reason entitled to the *equal respect* that is due to every unique human being"[15]. Consequently, in the changed world scenario, principle of non-discrimination fails to grasp the entire essence of human rights. Today, it is submitted that, the single principle that is able to reflect the philosophy and reality of human rights is the concept of preservation of "human dignity". Human rights today may precisely be construed as *preservation of human dignity.*

It is suggested that for a better comprehension of human rights a clear understanding of the concept of human dignity is indispensable. Further, the importance of the concept of human dignity is well exemplified by its inclusion, in the national and international basic legal texts. The UDHR mentions 'dignity' twice in its preamble and thrice in the articles.[16] Similarly, the ICESCR has also mentioned it twice in its preamble and in the article,[17] and the ICCPR mentions it twice in its preamble.[18]

Despite its heightend importance a study of the literature in the field reveals an alarming lack of agreement concerning the meaning of the term "human dignity". The term appears to be not yet comprehensively understood by the interested quarters. The dictionary meaning of the term 'dignity' denotes a quality, an honour, a title, station or distinction, of honour[19]. But this meaning is not applicable for the great masses of mankind or when we talk of the average persons dignity. Hence, we need to look elsewhere for a purposeful meaning of human dignity.

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15. Supra note 1, at 10
16. Arts. 1,22 and 23, The universal Declaration of Human Rights.
17. Art. 10, The international Covenant on Economic, Social and Cultural Rights.
18. Preamble, The international Covenant on Civil and Political Rights,
19. Black, Law Dictionary (5th ed, 1989)

Emphasizing the inviolability of human dignity, in *Kesavananda* vs. *State of Kerala*,[20] Sikri C. J. observed that the basic structure of the Indian Constitution "is built on the basic foundation, i.e., the dignity and freedom of the individual" which, cannot be destroyed by any form of ammendment.[21]

In *Minerva Mills Ltd. vs. Union of India*,[22] Chandrachud, CJ said that the dignity of the individual could be preserved only through the rights to liberty and equality.

In *Francis Coralie Mullin vs. Administrator, Union Territory of Delhi*,[23] the court observed;

We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

In his dissent in *Bachan Singh vs. State of Punjab*, Bhagwati, J. turning to the Indian constitution found that "it is a human document which respects the dignity of the individual and the worth of the human person and directs every organ of the state to strive for the fullest development of the personality of every individual. Undoubtedly . . . the entire thrust of the constitution is in the direction of development of the full potential of every citizen and the right to life along with *basic human dignity* is highly prized and cherished and torture and cruel or inhuman treatment or punishment which would be degrading and destructive of human dignity are constitutionally forbidden".[24]

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20. (1973) 4 SCC 225: AIR 1973 SC 1461.
21. Id, at 366.
22. (1980) 3 SCC 625, 660: AIR 1980 SC 1789
23. (1981) 1 SCC 608, 618-19: AIR 1981 SC 746
24. (1982) 3 SCC 24, 77: AIR 1982 SC 1325

In *Neeraja Choudhury vs. State of M. P.*.[25] Bhagwati, J. again reiterated:

> It is obvious that poverty is a curse inflicted on large masses of people by our malfunctioning socio-economic structure and it has the disastrous effect of corroding the soul and sapping the moral fibre of a human being by robbing him of all basic human dignity and destroying in him the higher values and the finer susceptibilities which go to make up this wonderful creation of God upon earth, namely man.

A close scrutiny of the above excerpts leads us to believe that, so as to be part of the world civilisation, which we claim to be, human dignity should be understood at least in the following two senses[26].

i) The dignity of the individual can only be preserved if his rights to liberty and equality are not infringed;

ii) The word 'dignity' should be identified with the bare necessaries of life such as adequate nutrition, clothing, shelter and facilities for education. Accordingly, these basic essentials go to make up a life of human dignity.

The birth of Bangladesh is associated with the pledge of the nation and the Republic to ensure human dignity. The proclamation of Independence, *inter alia*, declares the following as main objective of liberation struggle:

" . . . in order to ensure for the people of Bangladesh equality, human dignity and social justice . . ."

It is heartening to note that the Constitution of Bangladesh is also based on the premise of preservation of human dignity (Art. II).

Dignity of a person cannot be guaranteed, for what is guaranteed may be withheld. Dignity, being inherent in a person as either assured or recognized or respected. Thus human dignity, being an

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25. (1984) 3 SCC 243, 245, 255: AIR 1984 SC 1099

26. For and analysis of these conclusions see Govind Mishra, The Concept of Human Dignity and the Constitution of India, In, Comparative Constitutional Law.

inherent quality of every human person, is common, to all civilisations, and human rights interpreted in terms of respect for human dignity can bring together all nations and peoples transgressing all borders.

5. Impediments to Universalization of Human Rights.

In the aftermath of the UDHR and in a world divided into blocs on ideological basis one could always hear a loud, clear and strong voice against full universalization of human rights. As a matter of fact, it had been the official approach that "the emergence of the principle of respect for basic human rights and freedoms of man and the emergence of other norms and standards of international law relating to human rights does not mean that these rights are regulated by modern international law directly and have ceased to be an internal affair of states, securing human rights remains and will continue to remain primarily an internal affair of states . . . The international protection of human rights, implemented chiefly by international legal means, is, although important, nevertheless, an auxiliary measure for securing these sights[27] . One can very easily detect in this approach a deliberate intention to undermine the 'universal' or 'international' aspects of human rights.

At a more fundamental level the problem boils down to the dichotomy of monism and dualism in international law, and though the specific relationship between these two depends on a particular legal system, the tilt in favour of international law supremacy is now generally recognized. However, this problem was given exellent exposition by judge Tanaka in his dissenting opinion in the *South West Africa Case,* 1966.[28] In the words of Judge Tanaka:

> "The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from universal human nature. Then existence

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27. G. I. Tunkin (ed), International Law, Moscow, 353 (1986)
28. ICJ Report, 1966.

> of human rights does not depend on the will of a state, neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or a tacit will of a state constitutes the essential element . . . A state or states are not capable of creating human rights by law or by convention, they can only confirm their existence and give them protection. The role of the state is no more than declaratory.[29]

In the changed world scenario, even the protagonists of subordination of human rights protection to state jurisdiction have fundamentally shifted away from their position. Russian scholars Vreshchetin and Mullerson have written that human rights activity is one of the most important components of a comprehensive system of international security and that the role of the individuals is "primary"[30]. In particular they have stated that:

> Soviet legal scholarship has always emphasised that international human rights treaties obligate signatories to ensure the applicable rights and freedoms. However, until now, Soviet scholars have unjustifiably advocated that these documents do not represent rights directly enforceable by the individual. This approach has been excessively legalistic. A citizen of a state based on the rule of law has the right to demand that state agencies observe voluntarily adopted international obligations which directly affect the individual interests. Human Rights treaties establish state obligations to citizens, not just to other state parties to the international agreements.[31]

This creates some apparent anomalies, for it is against the inherent interest of rulers to constrain their own powers over those whom they govern. "Rulers" have few incentives to enact laws to protect their subjects from them[32] That is precisely, why some constraints must ultimately be imposed on the state at some level

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29. See Ian Brownlie (ed) Basic Documents of Human Rights, 441 (2nd ed, 1981)
30. "International Law in an Interdependent World", 28 Columbia Journal of Translational Law, 291, 300 (1990) cited in: M. N. Shaw, International Law, 191 (3rd ed 1991)
31. Id.
32. Paul Sieghart, The Lawful Rights of Mankind, 44 (Oxford, 1985)

superior (or at least external) to itself–and the only such level that we have is that of the international community. Consequently, the real problem of universalization of human rights through their implementation and enforcement must be carried by international organisations because "in the majority of cases an individul's rights are violated by his or her own state, and so he or she can hardly count upon that state for satisfaction.[33]

For purposes of protection of human rights some authors made an attempt to distinguish between rights having internatioal nature and rights having internal/domestic nature, and on this basis it was submitted that all violations except involving the rights of the first category "are essentially a problem of municipal law of every state concerned and therefore, state liability in case of violation can be determined only in accordance with the national laws of that particular state".[34] Today, any national law of human rights must be shaped under direct influence of the international bill of rights and other human rights norms.[35] However, impediments to such universalization of human rights enforcement have been correctly identified with two fundamental aspects of contemporary international law: *its statism and the centrality of the sovereign state in the international legal system,*[36] and their consistency with the realities of the present day world has been justifiably contested. Enter human rights considerations, and the view of international law that regards state sovereignty as a function of political power, rather than justice, rather than the judgement that a government justly represents the people, becomes evidently unacceptable. Similarly,

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33. Supra note 6, at 183.

34. Mizanur Rahman, Protection of Human Rights: A National or International Question, 10 BIISS Journal, 51, (Jan, 1989)

35. For an indepth analysis of the proposition, see Rosalyn Higgins QC, Domestic Implementation of International Human Rights Norms, I n: conference papers, 10th Commonwealth law conference,Nicosia, 251-257 (1993)

36. Karen Knop, Why Rethinking the Soverign State is Important for Women International Human Rights Law, In : Rebecca J. Cook (ed) Human Rights of Women,151.

the notion of centrality of sovereign state reflects the understanding that despite the growing cast of characters on the international scene, the state continues to be the only actor in international law that really matters, is also not tenable in logical scrutiny. As alternatives to statism, it may be proposed that statehood in contemporary international relation should be defined in terms of observance of human rights by that entity, and only a state that represents the people is legitimate (only a state that respects human rights and the principle of democratic representation is legitimate) and therefore entitled to represent its citizens internationally.[37]. In similar way, it is argued that the concept of centrality of the state has been shaken by different existing and emerging alternatives, like international civil society,[38] international NGO's and other international institutions and organisations. These emerging trends in international relations may be the remedy to the impediments to universalization of human rights posed by statism and centrality of the state. The main factor which induced such fundamental changes in the theory of international law is human rights.

6. Domestic Application of International Human Rights: The Bangladesh Experience

Not all the international human rights norms are dependent on treaties. The right to life, to freedom from torture, to freedom of religion, for example, are surely by now general principles of international law which do not owe their existence to treaties. The fact that Bangladesh has not ratified the convention against torture, for example, does not leave it free, as no-treaty party, to torture its citizens. Undoubtedly, participation in the international treaties is the most important building block for human rights. This is because the treaties not only identify the rights, but provide for a variety of procedure and ancillary obligations to make the international

37. Id. at.154, 156.

38. More on this see Szymon Chodak, The New State, Etatization of Western Societies, (London, 1989)

commitment effective. Human Rights norms consist of both substantive rights and the means to guarantee them, and whatever might be the international dimensions of human rights, it need not be emphasised that the procedural guarantees as much as the substantive rights require implementation at the domestic level.[39] Generally, this is done through the guarantees provided in the state constitution.

In this respect Bangladesh may well take pride in the existing legal framework for implementation of human rights. As one of the primary objectives of the emerging new state, the Proclamation of Independence of Bangladesh declared to ensure for the people of Bangladesh*equality, human dignity, and social justice*".[40] The same principle is further reiterated in article 11 of the constitution of Bangladesh:

"The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed and in which effective participation by the people through their elected representations in administration at all levels shall be ensured." This article guarantees those rights which we have identified in preceding sections as instituting the edifice of human rights jurisprudence, namely, human dignity, participatory democracy and truely representative character of government.

In addition to this, the constitution contains fundamental principles of state policy consisting basically the social, economic and cultural rights (Art 8-25) and a separate chapter on fundamental rights consisting mainly of the civil and political rights of the citizens (Art. 26-41).

If these constitutional provisions are interpreted in the light of article 7 (2) which declares that:

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39 Supra note 35, at 252

"This constitution is, as the solemn expression of the will of the people the supreme law of the Republic, and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void", it appears that a sound basis for human rights protection and enforcement exists in the country. The reality, however, tells a different story.

In our recent past history, on occasions of extraconstitutional takeover of the state power, our judges have been haunted by the 'Ghost of Kelsen' and more often than not, legitimized the extra-constitutional regime at the cost of the supremacy of the constitution.[41] In *state vs. Haji Joynal Abedin,* the Appellate Division of the Supreme Court observed, *inter alia*:

" . . . The moment the country is put under martial law, the above noted constitutional provision along with other civil laws of the country loses its superior position. Martial Law courts being creatures either of the proclamtion or Martial Law Regulation, have the authority to try any offence made triable by such courts".[42] Even the dissenting judge could go as far as to mention that the Constitution and the Martial Law are co-extensive and that the Constitution is not subordinate to the Martial Law.[43] With this interpretation of the constitution human rights guarantees remain a mirage.

6.1 Judicial Activism

The judges can and must so interpret the constitutional guarantees as to expand their meaning and content and widen their reach and ambit.[44] And the efforts of our highest judiciary, in this respect, has not been totally insignificant. Today, the old concept of *l*

41. For more on this see. Justice Mustofa Kamal, Bangladesh Constitution: Trends and Issues, 54 (Dhaka, 1994)

42. 32 DLR (AD) 110.

43. Id., the Dissenting Judge was K. M. Subhan, J.

44. The Indian supreme judiciary has been playing a laudable role in this regard, see Justice P. N. Bhagwati, Domestic Application of International Human Rights. The Bangalore Principles Revisited, In conference papers, supra note 35, at 271-275.

ocus standi is dying its death, though natural but not without aid from the Supreme Court. In *Kazi Mukhlesur Rahman vs. Bangladesh*[45] the Supreme Court observed, *inter alia*:

"It appears to us that the question of *locus standi does not involve the court's jurisdiction to hear a person but of the competency of the person to claim a hearing*, so that the question is one of discretion which the court exercises upon due consideration of the facts and circumstances of each case," (emphasis added-M. R.)

In each case, therefore, it is for the petitioner to establish his competence to claim a hearing and to prevail upon the court to exercise the discretion in his favour. It was the first attempt to legitimize public interest litigation in the sub-continent.

Article 32 of the Bangladesh constitution establishes that "No person shall be deprived of life or personal liberty save in accordance with Law". But, what, if the law is violative of the human rights? Today, through judicial interpretation in *Maneka Gandhi's*[46] case we know that it is not sufficient merely to have a law in order to authorise constitutional deprivation of life and liberty but such *law must prescribe a procedure and such procedure must be reasonable, fair and just.* Thus, an active judiciary can play a crucial role in advancement of human rights provided the judges are committed to the cause of human rights and are not timorous souls and they have the requisite craftsmanship to mould and shape the provisions of the constitution and the law so as to bring them into accord with the international human rights norms.

In a series of landmark cases, the courts in Bangladesh have established a silver lining of hope by progressive interpretations of the statutory provisions for an expanded protection of human rights. While *Nazrul Islam's case*[47] *and Alam Ara Hoq vs. Govt. of*

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45. 26 DLR (AR)44.

46. (1978) 1 SCC 248.

47. In Re Nazrul Islam, SAARCLAW, Inaugural issue, 39-46 (SEPT, 1993)

Bangladesh[48] expanded the horizon of political righs, *Nelly Zaman vs. Ghiyasuddin,*[49] *Abu Bakar Siddiq vs. AB Siddiq,*[50] *Hasina Ahmed vs. Syed Abul Fazal*[51] and *Hefzur Rahman vs. Shamsunnahar Begum & others*[52] etc. provide a few examples of enforcement of personal laws in hitherto unknown dimensions.[53]

6.2. Participatory Democracy

No human rights can be effectively enforced without the participation of the people who are the victims of violations of human rights. If human rights are to prove meaningful to those who most need them, it is vital to adopt a participatory approach for the development of human rights and their enforcement. This is also the message that flows from article 7 of the constitution read along with article 11. Article 7 is the guiding star of the constitution and the yardstick to ascertain the legitimacy of the government as well as to determine whether a democracy is a "truly democratic one".

Few governments are universally popular with their own citizens, but most citizens will accept even an unpopular government– provided they regard it as *legitimate*.

Today, democracy is essentially "a combination of governmental system and community attitudes which is possessed and sustained by its people rather than by a ruler or rulers. A democracy will be maintained and improved only if its people in the various areas of activity do what is necessary to maintain or improve it. It subsists and advances if the attitudes and capacities of citizens in those areas impel them of their own initiative to do the things that will preserve

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48. 42 DLR (HCD) 98
49. 34 DLR 221 (1982).
50. 38 DLR (AD) 108 (1986)
51. 32 DLR 294 (1980)
52. 15 BLD (1995) 15, 47 DLR (1995) 54.
53. For an analysis of these cases see, Sara Hossain, Women's Rights and Personal Laws in South Asia, in: Rebecca J. Cook (ed.) supra note 36, at 478-480

and enhance the democracy. A democracy has no entrenched ruler or rulers to tell them to do this or how to do it".[54]

In such a democratic environment, it is the human rights performance of a government which provides one of the most important criteria for its legitimacy. And if that legitimacy begins to become undermined, it becomes transferred to the government's opponents; as their claim to legitimacy increases in the measure that the government's diminishes it also becomes increasingly legitimate for others outside the country to support them, until the offending government is finally overthrown.[55] This is also the essence of UDHR, which in Article 21(3) states:

"The will of the people shall be the basis of the authority of government, this will shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[56] Consequently, non-existence of a machanism to ensure free and fair election coupled with distrust of the people in the electoral process because of its non-transperency may be construed as elements reflecting the eroding legitimacy of a government.

7. In Lieu of Conclusion

Under the new international order which now reigns in the field of human rights, the domestic human rights record of every country is already the legitimate concern of the whole of the international community. But whats about the 'disparities' in a society like Bangladesh? With slight adaptations Ambedkar's remarks made in the Indian Constituent Assembly almost half a century ago, may sound applicable to Bangladesh:

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54. The Hon Richard E Mc Garvie, AC, Supping with the Devil, In: AIJA, Courts in a Representative Democracy, 199 (Australia, 1995)
55. Supra note 1, at 19.
56. See Ian Brownlie (ed) Basic Documents in International Law, 148 (Oxford, 1978)

> "We must begin by acknowledging the fact that there is a complete absence of two things in our society. One of these is equality. How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we shall do so by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those suffering from inequality will blow up the structure of political democracy which we so painstakingly built up".[57]

It requires more emphasis on the socio-economic development of the state, which process itself is a transnational one. Thus international development must accompany international human rights and vice-versa. Indeed, the realization of our collective human right to development can provide new and much needed avenues for national and regional human rights activism and international human right cooperation and only then, the perception of human rights as a bridge across borders would become a reality.

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57. For the original text of Ambedkar's speech, see: Rajeev Dhavan, Ambedkar's Prophecy: Poverty of Human Rights in India, 36: Journal of the Indian Law Institute, 8(1994)

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TALAQ : A MODERN DEBATE

DR. NAIMA HUQ

The Law of *talaq* has been the subject of a long running controversy among Muslim scholars. The law of *talaq* repeatedly raises two important issues for consideration : first, the concept of the 'unilateral right' of the husband to divorce his wife and second, the modes of *talaq*. There is divergence of opinion among the various schools of jurists and scholars relating to *talaq.*[1] The modernists have argued against the conventional interpretation of *talaq.* They exegete the law according to the spirit of the *Quran* and *Sunna* and the changing circumstances of the society.

Islam has given rights to both the husband and the wife to dissolve the marriage. It emphasises the importance of the happiness of both spouses. It ordains that every attempt should be made to maintain the marriage tie, but once it is established that the marriage has broken down, the *Quranic* law allows the parties to dissolve the marriage in order to avoid greater evil. Despite the freedom of the parties to divorce, Islam warns both parties against unscrupulous use of the right. It says that divorce is the most detestable thing even when lawfully allowed or permitted. Thus divorce is allowed as a last resort, it is discouraged rather than encouraged in Islam. This attitude is preserved in the tradition of the prophet and the verse of the *Quran* (IV : 35). However, the orthodox jurists were reluctant to accept divorce as a last resort. Hedaya calls, a legal manual, which describes divorce as

> "a dangerous and disapproved procedure as it dissolves marriage, an institution which involves many circumstances as well of a temporal as a spiritual nature; nor is it propriety at all admitted, but on the ground of urgency of relief from an unsuitable wife".[2]

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1 Syed Ameer Ali, II Mohammadan Law , (1985)PLD (Lah.) 423, (1965)

2. Charles Hamilton, The Hedaya : A Commentary on the Mussulman Law, 73 (Lahore, 1957)

The Islamic ideal is often defeated by social custom. The Arab custom enabled a man to divorce his wife at will and on whim. This is followed by orthodox jurists, although the *Quran* and *Sunna* established certain guidelines for man and rights for women based on considerations of equity and responsibility. This article examines and orthodox interpretation of the law of *talaq* and shows how the modernists counter these exegeses.

Unilateral right

Modern jurists contend that the concept of *talaq* as a 'unilateral act of the husband' is due to the influence of Hebraic Laws[3]. The laws of Manu and, to a great extent, the matrimonial law of pre-Islamic Arabia.[4] Ali says that under ancient Hebraic law a husband could divorce his wife for and cause which made her unacceptable to him, and there was little or no restraint on his arbitrary and capricious use of this power[5].

Orthodox jurists often cite the following two verses of the *Quran* in support of the husband's authority to pronounce unilateral divorce (*talaq*). First, (*Quran* II : 228) :

> "And women shall have rights similar to the rights against them, according to what is equitable, but men have a degree over them[6] ."

The second (*Quran* IV : 34) :

> "Men are the protectors and maintainers of women. Because God has given the one more (strength) than the other and because they support them from their means[7] ."

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3. Id. at 432 (1965).
4. M. R. Zafar, "Unilateral Divorce in Muslim Personal Law", in Tahir Mahmood (ed.) Islamic Law in Modern India,168 (Bombey, 1972)
5. Ameer Ali, supra note 1, at 432; Ameer Ali, the Spirit of Islam : The History of the Evolution and Ideals of Islam with a Life of the Prophet, 241 (1967); see M. A. Qureshi, Muslim Law of Marriage, Divorce and Maintenance, New Delhi, 186 (1992); Bashir Ahmad "Status of Women and Settlemant of Family Disputes Under Islamic Law" in Tahir Mahmood (ed.) Islamic Law in Modern India, 187 (Bombay, 1977)
6. Abdulla Yusuf Ali, I & II The Holy Quran, 190 (New Delhi) 1979.
7. Id. at 190.

Orthodox jurists[8] have held that the husband can put an end to the marriage at his absolute discretion. The wife may do the same only if the husband has conferred such a power upon her[9] . Rahim says that, with a view to regulating matrimonial relations, Muslim Law allows a predominant position to the husband because, generally speaking, he is mentally and physically the superior of the two. Some orthodox jurists treat the dower payable to the wife as consideration for enjoyment of sexual freedom over the body of the wife[10] .

However, some modern jurists do not agree with the above argument and hold that the spirit of these two key verses is not intended to be prejudicial to the equality of the sexes[11] . Engineer clarifies the reference in the *Quranic* verse that men are 'a degree above them'. This is not meant to indicate their superiority over women : the 'edge' that men have over women is a biological not a social fact. The statement also relates to other matters referred to in the verse (*Quran* LXV : 1) namely that women, on being divorced, have to wait for a period of three courses i. e. *iddat* so as to be sure

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8. The orthodox jurists consider that Islam is inimical to change. Esposito points out that conservative religious leaders lend to be fixed on the past. For them tradition is not so much a source of inspiration and direction as a literal map to be followed in all its details. This perfect blueprint for Muslim society, contained in the traditional (classical) legal manuals, is not seen as a response to a specific socio-historical period–a conditioned produced hammered out by jurists in light of Islamic principles and values–but as a final, comprehensive guide. The orthodox jurists failed to distinguish between revealed, immutable principles and the historically conditioned laws and institutions that were the product of the early jurists fallible human reasoning and the assimilation of foreign influences and practices (John L. Esposito, Islam : The Straight Path, 214 (Oxford, 1994).

9. Abdur Rahim, The Principles of Muhammadan Jurisprudence, 335 (London, 1911).

10. Id. at 327; also see Paras Diwan, Muslim Law in Modern India, 76 (1991); C. M. Shafqat, The Muslim Marriage, Dower and Divorce, 96 (New Delhi, 1979); Radha Krishna Sharma, Nationalism, Social Reform and Indian Women, 32 (Patna, 1989).

11 See L. N. Ahmed, Muslim Law of Divorce,14-16 (New Delhi, 1978); Firasat Ali & Furqan Ahmed, Divorce in Mohammedan Law, 16-17 (New Delhi, 1988).

whether *Allah* has created life in their womb or not. This does not apply to men who are free to marry without observing *iddat*[12] .

Moreover modern scholars contend that a husband cannot exercise the power of *talaq* in an arbitrary, irrational or unreasonable manner[13]. While the *Quran* recognizes the right to divorce, it recognizes *talaq* only with numerous injunctions to observe justice and fair play, generosity and kindness[14] . The behest of the *Quran* (II : 299) in this regard is :

"A woman must be retained in honour or released in kindness" and in the words of the Prophet :

"With *Allah,* the most detestable of all things permitted is divorce[15]."

Divorce in Islam is strongly disapproved of and discouraged. It is permitted only when it is absolutely necessary[16]. Radd-ul-Muhtar limits the use of *talaq* by the husband and lays down that *talaq* is allowed only when the wife by her conduct or her words does injury to the husband or is impious. On the other hand, on the part of the husband it is *wajib* (obligatory) when he cannot fulfil his duties, as when he is impotent or an eunuch[17] . Anderson contends that it is a sin before God for a man to divorce his wife without cause or to divorce her in any way other than the two traditional forms (*ahsan* and *hasan*), which alone are regarded as being divinely sanctioned[18]. However, the capricious use of *talaq* in the Sub-continent, as elsewhere, gives an impression that it is an unfettered right of the husband to divorce his wife. Justice Iyer has commented on the arbitrary use of *talaq* :

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12 . Asghar Ali Engineer, The Rights of Women in Islam, 53 (New Delhi, 1992).

13 . See Tahir Mahmood, The Muslim Law of India,114 (Allahabad, 1982).

14 . Kamila Tyabji, "Polygamy, Unilateral Divorce and Mahr", in Tahir Mahmood (ed.), Islamic Law in Modern India, 142 (Bombay, 1972).

15 . Maulana Muhammad Ali, A Manual of Hadith, 284 (Lahore).

16 . Ahmed, supra note 11, at 3.

17 . Cited in Ameer Ali, supra note 1.

18. J. N. D. Anderson, Law Reforms in the Muslim World, 150-169 (London, 1976).

"It is a popular fallacy that a Muslim male enjoys under the *Quranic* law, unbridled authority to liquidate the marriage . . . The view that muslim husband enjoys an arbitrary, unilateral power to inflict divorce does not accord with Islamic injunctions. However, Muslim Law, as applied in India has taken a course contrary to the spirit of what the Prophet or the Holy *Quran* laid down and the same misconception vitiates the law dealing with the wife's right to divorce[19]."

The *Quran* (IV : 19) enjoins forbearance even if the husband is not satisfied with his wife :

"If ye take a dislike to them, it may be that ye dislike a thing and God brings about through it a great deal of good[20]."

On the other hand, Islam does not require the couple to hang on to an ill founded marriage tie. When the husband and wife cannot live together in peace and harmony, they are given the option to separate[21] , but before such a separation it is recommended that there is an attempt at reconciliation. The *Quran* (IV : 35) counsels arbitration between spouses :

If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peach God hath full knowledge and is acquainted with all things[22] .

Ali, commenting on the verses, states that it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression given is that a capricious use of *talaq* is a grave distortion of the Islamic institution of divorce[23] . It can be argued that Islam condemns the husband giving *talaq* to his wife unreasonably and encourages reconciliation between the couple

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19 . Yusuf v Sowramma AIR 1971 Ker 264.

20 . Yusuf Ali, supra note 6, at 184.

21 . Ahmed, supra note 11, at 4.

22 . Yusuf Ali, supra note 6, at.

23 . Maulana Muhammed Ali, The Religion of Islam, 627 (Lahore,1936); Tahir Mahmood, "A Unreported Judgement on the Islamic Law of Divorce" In II Islamic and Comparative Law Quarterly, 47-48 (1982)

before a hasty decision is made by the husband. Ali has pointed out that the Prophet restrained the husbands' power of *talaq,* he gave to women the right of obtaining a separation on reasonable grounds; and towards the end of his life he went so far as practically to forbid its exercise by men without intervention by arbiters or a judge[24] .

However, divorce law as applied in the Sub-continent has taken a course contrary to the spirit of what the *Quran* and *Sunna* has laid down[25] . The husband's right of *talaq,* at his whim and caprice, has been found valid in law[26] . Munro and Abdur Rahim JJ. said in *Asha Bibi v Kadir Ibrahim Rowther*[27] .

> "No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the *Koran* and in the reported sayings of the Prophet (*Hadith*) and is treated as a spiritual offence."

but at the same time the judges held:

> ". . . impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband."

The law of *talaq* was only partially understood by the judges of British India. They ignored totally the provision of taking recourse to reconciliation before any marriage is dissolved. The British Parliament left the Muslim personal law more or less untouched as they were fully alive to the fact that Muslims consider their religion to be based upon divine origin and therefore, infallible and unchangeable[28] . In fact the British Colonial powers were more interested in the wealth of British India and the protection of Christianity than interfering in the

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24 . Ameer Ali, supra note 1, at 432

25 . V. R. Krishna Iyer, "Reform of the Muslim Personal Law" in Tahir Mahmood (ed.), Islamic Law in Modern India, 26 (Bombay,1972).

26 . Ahmed Nasim Molla v Khatoon Bibi, 1933 ILR 59 Cal 833, Reuben Levy, The Social Structure of Islam, 121 (Cambridge 1957).

27 . ILR (1909) 33 Mad 25.

28 . Nisar Ahmed Ganai, "Judicial Contribution to Muslim Matrimonial Law in a Changing Soiciety in India : Some Policy Perpectives" in K. L. Bhatia & Shri Jagmohan (eds.), Judicial Activism and Social Change, 408 (New Delhi, 1990).

personal laws of India. Fyzee argues that there were three main considerations which dictated their non-interference with personal law. First, they did not desire any break with the past, that is, the Mughal rules of non-interference with the religion. Second, their chief object was to have security in social matters so as to facilitate trade. Thirdly, they had no desire to interfere with the religious susceptibilities of their subjects[29] .

However, the administrators and judges of British India supplemented the indigenous law, custom and Islamic law with their own ideas of justice and fairness. Hussain contends :

> "European Judges slowly and cautiously introduced the elements of English Law and Principles of equity into the native systems including the Muslim Law. There is no doubt that of the agencies that have influenced the development of Anglo-Muslim Law in British India, the Judges were the earliest and the most important. It is the how directly modified the operation of Muslim Law by refusing to apply its provisions as being repugnant to usages of the country or the general notions of justice, equity and good conscience or at times curtailing the extent of their application or at other times by substituting a foreign principle[30] ."

In India a large number of Muslims were converted Hindus who maintained their deep-rooted customs, especially in the case of succession (females were excluded from inheritance by their customary law). The British judges gave effect to such custom to the extent of undermining the *Quranic* text.

The British Indian judges ignored the rationale and spirit of the *Quran* and *Sunna* and gave effect to the evil practice of *talaq-ul-bidat* which the Prophet called a 'sin'. In this respect Justice Iyer observed :

> "Marginal distortions are inevitable when a judicial committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture — law is largely the formalised and

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29 . A. A. A. Fyzee, Outline of Muhammadan Law, 55-56 (Delhi,1974).

30 . Abul Hussain, Muslim Law as Administered in British India, 16 (Calcatta, 1935).

> enforceable expression of a community's cultural norms — cannot be fully understood by alien minds."[31]

Tahir Mahmood argues more emphatically :

> "What the English judges in British India did in respect of the *Shariat* law was however, much worse than a 'marginal distortion'. They changed the very nature of the Islamic legal principles by ignoring their true rationale and spirit and often enforcing them as they appeared in literal (sometimes faulty) English translations[32] ."

It can be argued that, in respect of family law, the equitable laws of divorce have suffered as a result of the rigidity and conservations of orthodox jurists. The British judges influenced by these sentiments, by-passed the *Quranic* reconciliation provisions and left women vulnerable to the husband's unilateral right to *talaq.*

Modes of TalaQ

The law of *talaq* has been classified by traditional Muslim jurists as *talaq-ul-Sunna't* i.e. in conformity with the dictates of the Prophet and *talaq-ul-bidat* i.e. of innovation and therefore not approved. The Hedaya refers to these respectively as 'laudable divorce' and the 'irregular form of divorce'[33] .

Talaq-ul-Sunna't

The Prophet though disapproving and discouraging all divorce, favoured the *talaq-ul-Sunna't* mode of divorce : divorce which is effected in accordance with the rules laid down in the tradition (*Sunna't*) handed down from the Prophet or his principal disciples. It is the mode or procedure which seems to have been approved of by the Prophet at the beginning of his ministry and is consequently regarded as the regular or proper an orthodox form of divorce[34] .

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31 . Yusuf Rowthan v Sowramma, AIR 1971 Ker 264.

32 . Tahir Mahmood, Personal Law in Crisis, 52 (New Delhi, 1986).

33 . Hamilton, supra note 2, at 72-73.

34 . Ameer Ali, supra note 1, at 434.

Talaq-ul-Sunna't is itself again classified by the traditional jurists into first the most approved form or most laudable divorce, being *talaq ashan,* and second, the approved form or laudable divorce being *talaq hasan.* In the *talaq ashan* form the husband can repudiate his wife by a single sentence within a *tuhr* or term of purity[35]. The Hedey a calls the *ashan* as 'most laudable', for two reasons. First, the companions of the Prophet chiefly esteemed those who gave no more than one divorce until the expiration of the *iddat* as holding this to be a more excellent method than that of giving three divorces, by repeating the sentence on each of the two succeeding *tuhr.* Second, in this method the husband still retains the power of recalling his wife before the expiry of *iddat*[36].

Talaq hasan or laudable form of divorce involves the husband pronouncing *talaq* three times during three successive *tuhrs,* namely three periods of purity of the wife[37] . Each of these pronouncements, as held by the jurists should be made at a time when no intercourse has taken place during that particular period of purity.[38] In this method the third pronouncement of *talaq,* as popularly understood, operates as a final and irrevocable dissolution of the marriage tie.

A contemporary Muslim jurist, Mahmood, contends that the different modes of *talaq* are erroneously allowed and that *talaq hasan* has been wrongly interpreted by Muslim orthodoxies.[39] According to him:

> "the law of Islam simply prescribed a procedure for pronouncing *talaq,* keeping all chances of reconciliation and reconsideration open[40] ."

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35 . Hamilton, supra note 2, at 72.

36 . Id. at 72.

37 . Ameer Ali, supra note 1, at 436; Hamilton supra note 2, at 72.

38 . Fyzee, supra note 29, at 153.

39 . Tahir Mahmood, supra note 13, at 116 Tahir Mahmood, "No More Talaq, Talaq-Juristic Restoration of the True Islamic Law of Divorce" In Islamic Comparative Law Review, 5, (1992).

40 . Tahir Mahmood, supra note 13, at 114.

He goes on to say that it is not necessary that the *talaq* should be pronounced on three consecutive *tuhrs* but that it can be pronounced at any time during the subsistence of the marriage[41] . The *Quran* (II : 229) in respect of *talaq* holds :

> "A divorce is only permissible twice, after that the parties should either hold together on equitable terms, or separate with kindness[42] ."

In another verse the Quran (II:230) counsels,

> "So if a husband divorces his wife (orrevocably), he cannot after that remarry her until after she has married another husband and he has divorced her[43] ."

The *Quran* (LXV:1) also specifies when *talaq* should be pronounced.

> "When ye divorce women divorce then at their prescribed period, and count (accurately) their prescribed periods. And fear *Allah,* your Lord." [44]

The above verses as understood provide the procedure of giving *talaq,* rather than the classification of the modes of *talaq.* 'A divorce is only permissible twice' indicates that a husband is allowed to divorce his wife and revoke such divorce twice during his life time and each divorce must be followed by the prescribed period of *iddat* to form a complete divorce (*Quran* LXV:1). After the third divorce he is barred by law (*Quran* II:230) from revoking the divorce and he cannot marry the same wife without going through the penalty of '*hila*' (intervening marriage).

This view also finds support from Valibhai. He argues that a divorce once given always counts, no matter how long the

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41 . Id. 116; see II Shahih Muslim translated by A Hamid Siddiqi 760 (Lahore 1972).

42 . Yusuf Ali, supra note 6, at 91.

43 . Id.

44. Id, at 1563

interval between a first and a second divorce or between a second and a third divorce: there is no limitation as to time in this case.[45] Ali in the notes on the *Quran* (II:230) refers to an instance in which a woman was divorced for the first time in the time of Prophet; a second time in the time of Omar, the second *Khalifa;* and a third time in the time of Usman, the third *Khalifa.* If, after recalling a divorce twice, a man is impelled to pronounce it for the third and last time it shows that there is no chance of the couple living happily together and that they had better, in that case, part for ever. Their reunion after this is practically made impossible. When a man divorces his wife for the third and last time, he is told that it is not lawful for him to take her again unless and until she shall have married another husband and he also in turn divorces her.[46] It is evident from the above discussion that definite guidelines are provided that a *talaq* should be pronounced when the wife is free from her menstruation courses and *iddat* should be counted to effect a divorce, it does not indicate that *talaq* should be pronounced in three consecutive *tuhrs* to constitute *talaq hasan* as popularly understood.

Talaq-ul-bidat

Talaq-ul-bidat is an irregular mode of divorce which was introduced in the second century of Islam. The Ommayyad monarchs, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find a way out from the strictness of the law. They found in the pliability of the jurists a loophole to effect their purpose.[47] The question arises as to why Hazrat 'Umar' the second Caliph, enforced *talaq-ul-bidat.* Scholars maintain that it was done in

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45 . Muhammad Valibhai, A Book of Quranic Laws,151 (New Delhi 1981).

46 . Id. 152

47 . Ameer Ali, supra note 1, at 435 ;Firasat Ali & Furqan Ahmad, supra note 11, at 21 Ibrahim Abdel Hamid, "Dissolution of Marriage in Islamic Law" in III Islamic Quarterly 171-172 (1956)

view of the extraordinary conditions prevailing at the time. During the wars of conquest many women from Syria, Egypt and other places were captured and brought to Madinah. They were fair complexioned and beautiful and the Arabs were tempted to marry them. But these women were not used to living with co-wives and often made a condition that the men divorce their former wives thrice so that they could not be taken back. Little did they know that according to the *Quaranic law* and the *Sunna* three divorces were treated only as one divorce. The Arabs would pronounce three divorces to satisfy these Syrian and other women but later took their former wives back, giving rise to innumerable disputes. To overcome these difficulties, Hazrat 'Umar' thought it fit to enforce three divorces in one sitting as an irrevocable divorce.[48] However, the modern jurists often argue that during the Ommayyad period a *Quranic* or *Sunna* injunction on *talaq* was substituted by a different rule to retain the husband's absolute authority to divorce.[49]

The essential feature of *talaq-ul-bidat* is its irrevocability. In this form of divorce the husband repudiates his wife by three divorces at once or he repeats the sentence separately thrice within one *tuhr*.[50] But the triple repetition is not a necessay condition for *talaq* in the *bidat* form and the intention to render a *talaq* irrevocable may be expressed even by a single declaration. Thus if a man says: I have divorced you by a bain *talaq* (irrevocable *talaq*), the *talaq* is *talaq-ul-bidat* and will take effect immediately it is pronounced.[51] It leaves no room for revocation and reconsideration.

The Prophet condemned the simultaneous pronouncement of three divorces and declared it a sin.[52] In a *Hadith* (statement of the

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48 . Cited in Asghar Ali Engineer, supra note 12, at 125.

49 . See Justice Altaf Hussain, Status of Women in Islam,590 (Lahore, 1987).

50 . Hamilton, supra note 2, at 72.

51 . Hussain, L supra note 49, at 586.

52 . M Abul A' Ala Maududi, The Laws of Marriage and Divorce in Islam 31 (Lahore, 1983).

Prophet) it was reported that the Prophet was told about a man who once gave three divorces at a time to his wife. The Prophet, enraged, then got up and said "you are making a plaything with the Book of the Almighty and Glorious Allah while I am (still) amongst you".[53] Such a pronouncement of divorce on a single occasion is un-Islamic and has no basis in the *Quran* or *Sunna*.[54] In another *Hadith*, narrated by Anis Bin Sirin, when Umar divorced his wife while she was menstruating, the Prophet told Umar to take back his wife and divorce her when she was clean.[55] From these *Hadith* it can be gathered that the Prophet warned the people not to make a toy out of *Allah's* commandments and directed the husband to divorce (when absolutely necessary) only in the way prescribed by *Allah*.

Most of the orthodix jurists recognise the practice of *talaq-ul-bidat* (triple divorces) and this was followed by the judges of British Indian courts with this form of *talaq* declared to be good in law.[56] Tyabji says:

> "deplorable, though perhaps, natural development of the *Hanafi* law, it is the fourth and most disapproved or sinful mode of *talaq* that seems to be most prevalent, and in a sense even favoured by the law." [57]

The *talaq* with regard to its effect is again classified by the orthodox law as *talaq-ul-rajee* i.e. revocable and *talaq-ul-bain* i.e. irrevocable *talaq*. In the case of the revocable or *rajee* form of *talaq* the husband can remarry the same wife without the intervening marriage even after the expiry of the *iddat* period. The *rajee* form of divorce becomes *bain* (irrevocable) divorce after the third pronouncement of *talaq*.

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53. M. I. Siddiqi, The Family Laws of Islam,222 (New Delhi,1986); Hussain, supra note 49, at 589-637.

54. Muhammad Ali supra note 23, at 288

55. Al Bukhari Shahih, translated by Dr. Muhammad Mushin Khan, 130 (undated).

56. Amiruddin v Mt Khatun Bibi, AIR 1917, All 343, Fazlur Rahman v Mt Aisha AIR 1929 Pat. 81.

57. Faiz Badruddin Tyabji, Muhammadan Law, 221 (Bombay, 1940); see also Joseph Schacht, An Introduction to Islamic Law, 164 (Oxford, 1964).

In Sarabi v Rabiabai,[58] 'A', a Mahamedan belonging to the *Hanafi Sunni* sect, took two witnesses with him to the *kazi* and there pronounced single *talaq* to his wife. In her absence he had a *talaqnama* written out by the *kazi*, which was signed by him and attested by the witnesses. 'A' then took steps to communicate the divorce and make over the *iddat* money to the plaintiff, but she evaded both. 'A' died soon after this. The plaintiff thereupon filed a suit alleging that she was still the wife of 'A' and claimed maintenance and residence. The court held that *talaq-ul-bidat* was considered good in law, though bad in theology. The court further held in answer to the contention that the divorce was not final as it was never communicated to the wife, that a *bain-talaq,* such as the present, reduced to manifest and customary writing, took effect immediately on the mere writing. The divorce being absolute, it was effected as soon as the words were written even without the wife receiving the writing.

The husband had pronounced a single divorce but the court gave the meaning of the word '*talaq dia*' (*talaq* given) as *talaq-ul-bain* by implication and gave effect to an irrevocable divorce. In fact it was a single revocable divorce and it was effective only after the expiry of the *iddat* period, but the husband died before expiry of the *iddat* period. The court in denying the wife's right to inherit her husband's property misconstrued the law and ignored the rationale and spirit of the *Quran.* The authoritative jurists like Ali and Tyabji hold that when the *talaq* in *rajee* or revocable form is not definitive and the husband dies within *iddat,* the wife retains her right of succession.[59]

In another case the husband divorced his wife by a written *talaq* but the parties reconciled soon after the divorced and once again lived as husband and wife. The Lahore court refused to accept the subsequent reconciliation as revocation of the *talaq* and held, purportedly on the basis of orthodox law, that a divorce by a

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58 . ILR (1906) 30 Bom 537.

59 . Ameer Ali, supra note 1, at 543 ;Faiz Badruddin Tyabji, supra note 57, at 219

husband, evidenced by a written document, the contents whereof had been duly communicated to the wife, constituted an irrevocable form of divorce.[60]

However, orthodox form of *talaq* has been reformed by the Muslim Family Laws Ordinance, 1961. Here only the relevant provision, namely section 7 is considered. This section lay down the procedure to be followed when the husband and the wife wish to divorce each other without the intervention of the court.

Section 7 of the Muslim Family Laws Ordinance, 1961 provides:

(1) "Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife."

(2) "Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to ten thousand taka or with both."

(3) "Save as provided in sub-section (5), a *talaq*, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman."

(4) "Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purposes of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation."

(5) "If the wife be pregnant at the time *talaq* is pronounced, *talaq* shall not be effective until the period mentioned in sub-section (3) or pregnancy, whichever be later, ends."

(6) "Nothing shall debar a wife whose marriage has been terminated by *talaq* effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective."

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60 . Mt. Hayat Khatun v Abdullah Khan 1937 AIR Lah.270.

The procedural law makes it incumbent upon the husband to send notice of *talaq* to the Chairman of the *Union Parishad* (Section 7 of the Muslim Family Laws Ordinance, 1961) irrespective of the methods adopted by the husband, that is, whether it be *talaq ahsan, talaq hasan* or *talaq -ul-bidat* . Failure to give such a notice will be an offence punishable under the Ordinance. The *Union Parishad* must take all steps necessary to bring about a reconciliation between the spouses. The divorce will, if not revoked earlier expressly or by conduct (as a result of reconciliation brought about by the *Union Parishad* or otherwise), be effective only after the expiry of ninety days from the date of the notice, or if the wife is pregnant after the pregnancy ends, whichever period is longer. If and when a divorce becomes effective, the parties may remarry each other, except in the case of a third divorce.

Section 7 of the said Ordinance has made all forms of *talaq : ashan, hasan and talaq-ul-bidat* into single revocable *talaq* . The Ordinance further made provision for reconciliation at the initiation of the Chairman. The object of this section is to prevent the hasty dissolution of the marriage by way of *talaq* pronounced by the husband unilaterally, without any attempt being made to prevent the ending of the matrimonial tie.[61] This Ordinance was intended to draw upon the original spirit of the *Quran* and *Sunna* in respect of reconciliation.

Sub-section 3 of section 7 of the 1961 Ordinance provided that the *talaq* will not be effective until the expiry of 90 days from the receipt of the notice by the Chairman of the *Union Parishad* in the rural areas, or the Chairman of a Ward within a municipality. Failure on the part of the husband to give notice or his abstention from giving notice to the Chairman concerned should perhaps be deemed, in view of section 7, as if he has revoked the pronouncement of *talaq* and that would be to the advantage of the wife.[62] In Abdul Aziz v

61 . Syed Ali Newaz Gardezi v Lt Col Md. Yusuf (1963) 15 DLR SC.

62 . Ib.

Rezia Khatoon,[63] it was held that non-compliance with the provisions of section 7(1) (regarding delivery of notice to the Chairman) makes *talaq* legally ineffective. However, recently the High Court Division of Supreme Court of Bangladesh in contradiction to section 7 of the Muslim Family Laws Ordinance, 1961 held:

> "Non-service of notice to the Chairman of the Union Parishad under the provision of this section cannot render ineffective divorce disclosed in an affidavit".[64]

The High Court Division emphasized on the intention of the husband to divorce rather than the formalities of the procedural law. In Sirajul Islam's case, the husband did not serve divorce notice to the Chairman of the Union Parishad but swore an affidavit before the Magistrate and the copy of the said affidavit was served upon the Nikah Registrar to record the divorce according to section 6 of the Muslim Marriages and Divorces (Registration) Act, 1974. The said Court further observed:

> "It shows that he purposely avoided to give notice to the Chairman of Union Council under section 7 of the Ordinance 1961 and with the intention not to revoke it again, otherwise he would have given notice to the Chairman and would have tried for reconciliation but he did not. Be that as it may, we are however, of opinion that mere non-service of notice upon the Chairman of the Union Council under section 7 of the Muslim Family Laws Ordinance cannot render the divorce infective if the conduct of the husband appears to be so.[65]

The High Court Division of Supreme Court of Bangladesh relied on the decision of Pakistani Courts and referred to the case of Ganhar v Mrs Ghulan Fating and another.[66] The High Court of Lahore in Muhammad Rafique v Ahmad Yar[67] made redundant the provisions of section 7(3) of the Family Laws Ordinance 1961 by

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63. 21 DLR 733.

64. Sirajul Islam v Helana Begum 48 DLR (1996) 51.

65. Id. at 51

66. PLD 1984 Lah.124.

67. Muhammad Rafique v Ahmed Yar 1982 PLD 825.

declaring that failure to notify the appropriate Chairman did not invalidate the divorce, contrary to the 1963 decision of the Pakistan Supreme Court.[68] Carroll[69] focuses on Pakistan Court judgements which deviated from section 7 of the Muslim Family Laws Ordinance, 1961 and concludes that if that interpretation of section 7 as held by the present courts of Pakistan were allowed then the opportunity for wives to try to save their marriages would be denied.

Whether giving notice of divorce to the wife is a necessary condition is not very clear. In Zikria Khan v Altaf Ali Khan,[70] the court held that the non-supply of a copy of the divorce notice to the wife did not prevent the divorce from becoming effective after ninety days. The whole emphasis is on the date of receipt of the notice by the Chairman of the *Union Parishad* or Ward. However in Inamul Islam v Mst Hussain Bano,[71] it was held that service of the copy on the wife was as important as service of the notice on the Chairman. Carroll suggests that the interpretation of section 7(3) in the earlier case[72] is preferable to that in the later case.[73] The former gives an opportunity to the wife to try to save marriage within the *iddat* period.[74]

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68 . See also Chulam v Ghulam Fatima 1984 PLD Lah 234, Dr. Ashique Hussain v 1st Additional District Judge and Family Appellate Court Karachi, 1991 PLD Kar 174, Mirza Qaman Raza v Mst Tahira Begum 1988 PLD Kar 169, Shaukat Hussain v Mst Rubina 1989 PLD Kar 513.

69 . Lucy Carroll, "Jurisdiction in Regard to Talaq under the Pakistan Muslim Family Laws Ordinance" in III Islamic and Comparative Law Quarterly, 132-137 (1983 a); Lucy Carroll, "Divorce and Succession; Some Recent Cases from Pakistan" in (1984); Lucy Carroll, "Talaq and Polygamy; Some Recent Decision from England and Pakistan" in V Islamic and Comparative Law Quarterly, 271-297 (1985a); Lucy Carroll, "Wife's Right to Notification of Talaq under Muslim Family Laws Ordinance, 1961 in Journal of 37 PLD 272-276 (1985b).

70 . Zikria Khan v Altaf Ali Khan 1985 PLD Lah 319.

71 . Inamul Islam v Mst Hussain Bano 1976 PLD Lah 1466.

72 . Ib.

73 . Supra note 70.

74 . Lucy Carroll, supra note 69 278 (1985b); see Rubya Mehdi, The Islamization of the Law in Pakistan,166-172 (Surrey 1994).

The author's fieldwork reveals that divorces are mostly obtained by registering with *kazis.*[75] The legislation provides that a *kazi* (Nikah Registrar) may register divorces.[76] The registration of divorce has not been made compulsory. Section 6(2) of the Muslim Marriages and Divorces Registration Act, 1974 provides: "An application for registration of a divorce shall be made orally by the persons who has or have effected the divorce." The whole emphasis is on the wording "who has or have effected the divorce." The wording indicates that one may register the divorce who has actually divorced his wife or her husband by a formal method of divorce. As it appears from section 7 of the Ordinance, 1961 that the divorce is not effective until the expiry of 90 days from the receipt of the notice by the Chairman.[77] A question may arise as to whether such divorces are valid according to section 7(1) (3) of the Muslim Family Laws Ordinance, 1961. According to the orthodox law the divorce is effective after the expiry of the *iddat* period, that is, after 90 days, but the Ordinance makes it clear that its provisions override other laws, custom and usages (section 3 of the Muslim Family Laws Ordinance,1961). Neither the Muslim Family Laws Ordinance of 1961, nor the Muslim Marriages and Divorces Registration Act of 1974, provide for reconciling the two statutes and they do not state the effectiveness or consequences of divorces if no notice is sent to the *Union Parishad* but nevertheless the divorce is registered at the Marriages and Divorces Registration office. It is presumed that all such divorces registered in the Marriages and Divorces Registration office have no effect in the eye of the law, but in practice such divorces are considered effective by the *kazis*. Pearl comments on the Ordinance:

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75 . Findings of a village shows that almost all divorces were only registered with the Kazis and the procedure of Section 7 of the Muslim Family Laws Ordinance had been ignored by the rural society. Naima Huq, Women's Right to Divorce in Rural Bangladesh, Unpublished Ph. D Dissertation, University of East London, 1995).

76 . Section 6 of the Muslim Marriages and Divorces Registration Act, 1974.

77 . Abdul Aziz v Rezia Khatoon DLR 733.

> "a large number of marriages in these areas are not registered and there are still a proportion of marriages where the bride is under 16. Many divorces are not communicated to the Chairman, thus at least in strict legal theory that marriage would still be in existence. Where the matter is communicated to the Chairman and he establishes an Arbitration Council, the Council, more often than not, will follow prevailing social norms in making decision regarding polygamy and divorce. Contrariwise amongst the upper-middle class in the large towns such as Karachi, Lahore or perhaps Dacca, the Ordinance has done no more than continue a trend already apparent". [78]

This observation of Pearl was made in 1976 i.e. "fifteen years after the promulgation of the Ordinance and we have seen that the situation is not very different today".[79] The author's study in Shohonpur village reveals a similar situation with the only difference being that almost all marriages were registered. The women of Shohonpur were aware that registration of marriage is an essential condition of marriage. Moveover, they were aware that without a registered *kabinnama* (marriage document) they cannot obtain *talaq-e-tafweez.*

One of the objects of the said Ordinance is to give effect to the sanction of the *Quranic* verse (*Quran* IV : 35). It made provision for reconciliation within a period of 30 days from the receipt of the notice [Muslim Family Laws Ordinance,1961 of section 7 (4)] Nothing has been said in the section, or anywhere else in the Ordinance, as to what will happen if upon receipt of such written notice of *talaq* the Chairman does not constitute an Arbitration Council and does not take any steps to facilitate a reconciliation between the parties. It has been held to be a failure of the Chairman to constitute an Arbitration Council or a duly properly Constituted Arbitration Council to take the necessary steps to bring about reconciliation.[80]

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78 . David Pearl, "The Legal Rights of Muslim Women in India, Pakistan and Bangladesh" in V New Community73 (1976).

79. Rubya Mehdi, the Islamization of the Law in Pakistan, (198 Surrey, 994).

80 . Abdus Sobhan Sarker v Md Abdul Ghani, 1973, 25 DLR 227.

This loophole in the law to some extent frustrates the object of the said Ordinance. The purpose of the reconciliation is that before making a hasty decision the husband and wife get an opportunity to reconsider. It has been seen that during the long period of *iddat*, much of the intensity of the disputes providing the grounds for divorce is tempered with more cool headed after thought. Where there are children to think about sobriety prevails which may lead the parties more readily to a reconciliation.[81] The statistics of Dhaka City Corporation shows that 4.3 percent and 10 percent of couples were reconciled through the Chairmen as per the Ordinance during the period of 12.2.92 to 31.12.92 and 1.1.93 to 31.12.93 respectively.[82] The percentage of reconciliation is very low even in urban areas and it is worse in the rural areas. Two explanations can be given for the low percentage of reconciliation : first it may be the Chairman's lack of initiative to arrange for reconciliation; second it may be the parties reluctance to be reconciled.

Conclusion

The paper explored the scholarly debate on the law of *talaq*. What emerges out of this exposition is that *talaq* is one of the misconceived and distorted aspect of the Muslim Law. The conservatism of or thodox jurists hindered the development of the law for a long time. With the dawn of modernist movement the scholars reinterpretated the law through *ijtihad*. Legislative reforms were made in many Muslim countries including the then East Pakistan and presently Bangladesh. The Muslim Family Laws Ordinance, 1961 was enacted in order to protect women from their husband abusing their right to *talaq*. This Ordinance has done away with the difference between *talaq-e-rajee* and *talaq-ul-bain*. As a result it simplifies the matter of remarriage between the same husband and wife even after an irrevocable divorce between the parties. The Ordinance has also imposed restriction on the unilateral right of a husband to *talaq* by laying down a procedure of service of

81 . The Daily Star, 12 (9 April 1994)

82 . Id

divorce notice. A waiting period of 90 days to enable reconciliation as well as a period of moratorium during which the divorcing the husband cannot marry another because as per Ordinance he needs the consent of the very woman he purports to divorce. The Ordinance also has a restraining effect on polygamy by providing for the necessity of consent and in default criminal proceedings leading to even jail custody to husband violating the provision.

However, it did not reduce the constant threat to the wife which can, at any time, throw her into a state of insecurity. The husband still retains the absolute right to dissolve marriage extrajudicially. He can divorce his wife at his will and without showing any cause. Contraire, the right to divorce that a wife has is not absolute. Her right to divorce depends upon the presence of conditions in the *kabinnama*, breach of a condition or evidence to prove before the court of law that the marriage has broken down. Ironically, the provisions of Ordinance of 1961 are not being invoked, particularly in the rural area as revealed from my village study. [83] This is due to the prevalence of orthodox law and sociocultural norms of the society. Nevertheless, even with these drawbacks, the Muslim Family Laws Ordinance, 1961 is an important development in the Family Law, unfortunately we have not another legislation concerning divorce. Now the consideration is needed for ways and means for effective implementation of the law. The Courts by and large upholds the provisions of the 1961 Ordinance, however a recent decision in *Sirajul Islam v Helana* Begum[84] has watered down the implication and importance of the provisions by holding that *talaq* would be effective without notice to Chairman. The significance of notice ought not to be lost sight of, otherwise it will deprive the opportunity of reconciliation between the parties and moreover will go against the spirit of Islam. If this recent decision is considered as a correct interpretation of the provision of section 7 of the Muslim Family Laws Ordinance, 1961 then it is definitely retrograde step.

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83 . See chapter II of Women's Right to Divorce in 'Rural Bangladesh, an unpublished Ph. D. Dissertation (University of East London, 1995)

84 . Op. cit 64.

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COMMON LAW TORT PRINCIPLE OF NUISANCE AS APPLIED IN BANGLADESH

LIAQUAT ALI SIDDIQUI

1. Introduction

Many of our present day inconveniences are based on the common law principle of nuisance. With the over increasing amenities and activities of modern life, the legal issue of nuisance is becoming more and more pivotal in determining the extent of various conflicting rights. Nuisance issues pose not only a question of balancing of various interests but a question of providing legal support for development works while ensuring personal rights. This paper intends to examine important relevant issues of the principle of nuisance including the rationale of the law of nuisance, how it balances among different conflicting interests, its present trends, its application in Bangladesh laws and the ways of improving the existing structure for better regulation of nuisance problems.

2. Common Law Principle of Nuisance

In this section we will briefly discuss the major features of the principle of nuisance so far developed by the common law Courts in England. The tort of nuisance has been considered as interference with the use and enjoyment of land by water, fire, smoke, smell, fumes, gas, noise, heat etc. Thus the defendant who has destroyed neighbors trees by causing poisonous fumes to be emitted from his land may be held liable in nuisance. An actionable nuisance is incapable of exact definition.[1] Nuisance are of two kinds— public and private. A public nuisance is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of a right belonging to him as a member of the public. A private nuisance, on

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1. Pwllbach Colliery Co. Ltd. V. Woodman (1915) AC 634.

the other hand, is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of his ownership or occupation of land or of some easement, profit or other rights used or enjoyed in connection with land[2] .

A public nuisance is a criminal offence[3] . It becomes a civil wrong and actionable as such when a private individual has suffered particular damage other than and beyond the general inconvenience and injury suffered by the public[4].

A nuisance to be public, what number of people should be affected, is not certain. A requisite number are affected if the nuisance is so widespread in its range or so indiscriminate in its effect that it would be unreasonable to expect one person to take preventive legal measures as opposed to the community at large[5] . A person is held liable for private nuisance, when the consequence of his acts or omissions extend to the land of his neighbor by (A) causing an encroachment on his neighbor's land when it closely resembles trespass i.e. projecting cornice over his neighbor's garden so as to cause rain water to flow thereon, or (B) causing physical damage to his neighbor's land or building or vegetation upon it, i. e. digging a hole in his own land so as to cause the surface of his neighbor's land to subside, or (C) unduly interfering with his neighbor in the comfortable and convenient enjoyment of his land e.g. causing smoke or noxious fumes to pass on to the plaintiff's property, making unreasonable noises or vibration. It is said that in nuisance of the first two kinds, liability for nuisance is established by proving the encroachment or the damage to the land as the case may be; but for the third kind, there is no absolute standard to be applied[6].

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2. Clerk and Lindsell on Torts 1354 (1989)
3. Archbold's Criminal Pleading and Practice, paras 27-44[1988]. J.R. Spencer, 'Public nuisance– a critical examination' 48 Camb. L. J. 55 (1989)
4. Kodilnye, 'Public Nuisance and Particular Damage in the Modern Law' 6 Legal Studies 182 (1986)
5. A-G V PYA Quarries Ltd. (1957)2 QB169, (1957) 1 ALL ER 894.
6. Lindsell supra note 2, at 1357

It is a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. A particular action may be lawful in one circumstance but wrongful in another. The courts in deciding whether an interference can amount to an actionable nuisance have to strike a balance between the right of the defendant to use his property for his own lawful enjoyment and the right of the plaintiff to the undisturbed enjoyment of his property[7]. Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including for example, the time of the commission of the act complained of; the place of its commission; the manner of committing it, the effect of its commission that is, whether the effects are transitory or permanent, occasional or continuous; so that the question of nuisance or no nuisance is one of fact.[8]

No precise or universal formula is possible but a useful test is: what is reasonable according to ordinary usages of mankind living in a particular society. To send large volumes of heavy smoke over a field habitually used for sporting activities may well be accounted a nuisance. It is not necessary to prove injury to health. In considering the standard of comfort or convenience of living of the average man, the character of the neighborhood must be taken into account. A person who lives in the heart of a large manufacturing town cannot reasonably expect the same purity of air, a freedom from noise as in a secluded country district. But still one can complain of an increased volume of noise, if it is so substantial as considerably to detract from the standard of comfort previously prevailing[9] .

3. Recent trends in the common law of nuisance

It appears that the medieval common law courts were very strict in safeguarding the natural rights of individuals from being interfered by

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7. Sedleigh-Denfield V. O'Callaghan (1940) A. C. 880.
8. Stone V. Bolton (1949)1 ALL ER, 237.
9. Sturges V. Bridgman (1879) 11. Ch.D. 852. Smith V. Gwynes (1920) 89 L.J. Ch. 368.

wrongful acts. Thus in William Aldred's case[10], the defendant erected a hog sty near the plaintiff's house. The sty allegedly fouled the air in the house and cut off plaintiff's light. At the Norfolk Assizes damages were assessed whereupon the defendant appealed to the King's Bench, arguing: i) that there was no damnum to the plaintiff in the corrupted air because the law should not favor delicate wishes; one ought not to have so delicate a nose, that he can not bear the smell of hogs, ii) that the blocking of windows was permitted by a local custom and iii) that the building of the house for hogs was necessary for the sustenance of man.

Court of Kig's Bench, dismissed the appeal and upheld the award of the Norfolk Assizes. The court stated that any injury to the plaintiff's enjoyment of his land was actionable so long as the injury pertained to a matter of necessity such as wholesome air or light. Purely aesthetic damage, however, was beyond the scope of the action, and also the court delineated the rule of "sic utere tuo ut alienum non laedas" meaning so use your own property as not to injure your neighbors[11]. This rule responded directly to the defendants allegation that social utility justified some interference. Thus, given actionable damage, the defendant could not ask the court for balancing social utility. The 'sic utere tuo' rule prohibiting court from balancing the social utility of an alleged nuisance against the injury to the plaintiff was not seriously challenged in England until the middle of the 19th century. According to Brenner[12], the case that introduced the change was Hale V. Barlow[13], where justice Willes subjected the common law right of having air uncontaminated and unpolluted to some qualifications.

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10. K. B. 1611.
11. This famous latin maxim was derived from Ulpian and is related to the general Roman principle: expelit reipublicae ne sua re quis male utatur (it is for the public good that no one should misuse his own property). See, Baker, J., An Introduction to English Legal History 354 (1979)
12. Brenner, Nuisance, Law and the Industrial Revolution, 3. J Legal Studies, 403 (1974).
13. Hale V. Barlow, 4. Com. B (n.s.) 334.

In St. Helen's Smelting Co., V. Tipping[14], a case on air pollution, the facts were: the noxious fumes and vapors from the defendant's copper smelting works extensively damaged the trees and shrubs and bothered occupants of the plaintiff's estate situated one and a half miles away from the defendant's factory. The court held that it was a nuisance and awarded damages. The House of Lords restricted the balancing of utility doctrine to the personal sensibilities with a strict sic utere tuo rule retained for material injury to property[15]

A reading of different English private nuisance cases would reveal that in some cases the court has made the defendant strictly liable for his unlawful act by applying the strict liability principle and in some cases asserted that the duty is based on reasonable foreseeability test and made the defendant liable for negligence by applying the test whether he would have foreseen the danger of damage. All nuisance cases are not the results of defendant's negligent action rather sometimes they occur as deliberate interferences in which the defendant has miscalculated the amount of interference which the law allows as between neighbor's. It has been proposed that: there are no two separate categories of nuisance, one fault based and the other strict, but one principle that the defendant is liable if his interference with his neighbor's land is of sufficient gravity to constitute a nuisance in law and if he is responsible for that interference in the sense that he knew or ought to have known of a sufficient likelihood of its occurrence to require him to take steps to prevent it[16] .

Against the above formulation of the duty, it is observed that: it manifestly excludes strict duty from a role within the scope of actionable nuisance. The case law may have moved in that direction, but it would be premature to say that such a proposition has been

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14. 11 Eng. Rep. 1483 H. L. (1865).
15. Daniel R. Coquillette; Mosses from an old Manse; Another Look at Some Historic Property Cases About the Environment, 64 Cornell Law Review, 782, (June, 1979)
16. Winfield, Tort, 386.

accepted by the judiciary as an all inclusive principle of nuisance[17] . However in a recent case of Eastern countries Leather V. Cambridge Water Co[18], the House of Lords has held that foreseeability of harm is a prerequisite for the recovery of damage in the law of private nuisance. Thus the courts increasing use of foreseeability test in nuisance cases has made it less hopeful in proving the liability of the defendant.

4. Statutory Nuisance: Further Development in English Law

In order to avoid the common law nuisance regulation which is slow and expensive, the Environmental Protection Act, 1990 in England has provided a quick and easy remedy of statutory nuisance under sections 79-82.[19]

Under section 79 of the 1990 Act, the local authorities (districts and London boroughs) have the duty to inspect their areas from time to time and to investigate complaints from the inhabitants for statutory nuisance which includes inter alia, smoke emitted from premises, fumes or gases emitted from premises, any dust, steam, smell or other effluvia arising on industrial, trade or business premises, any accumulation or deposit, any animal kept, noise emitted all of which being prejudicial to health or nuisance or any other matter declared by any enactment to be a statutory nuisance.

Under section 80, where local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, the authority is under duty to serve an abatement notice requiring either (a) the abatement of the nuisance or prohibiting or restricting its occurrence or re-occurrence; (b) execution of such works and the taking of such steps as may be necessary for those purposes, and the notice shall specify the time or times within which the requirements of the notice are to be complied with.

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17 Clerk & Lindsell on Torts1371 (1989)

18. New Law Journal, 64-5 (January 1994)

19. Simon Ball and Stuart Bell: Environmental Law,166 (1994)

Anyone served has a right of appeal to the magistrate's court against the notice within 21 days of the date of service. In practice, the notice provision gives the opportunity to environmental health officers to negotiate with the person causing or responsible for the nuisance. Once the 21 days have elapsed and there has been no appeal, an offence will be committed if the person acts in contravention of the notice. A fine of up to 20,000 pounds may be imposed. A person who commits an offence in the course of private activities, such as a noisy neighbor, in contravention of the notice may suffer a fine of up to 2,000 pounds. In the case of an offence committed by a trade or business the penalty leaps ten fold with a maximum penalty of 20,000 pounds[20].

An aggrieved person under section 82 of the Environmental protection Act may make a complaint to the magistrate's court. First of all, the aggrieved person is required to serve a notice on the person or premises concerned. In case of a noise nuisance three days' notice and in case of other nuisance 21 days' notice is to be served. The notice must specify the intention to bring proceedings and shall specify the matter which is the source of the complaint. Failing which a criminal action is brought to the magistrate's court, which if satisfied that the alleged nuisance exists may make an order either: (1) requiring the defendant to abate the nuisance, within the time specified in the order; (2) prohibiting a recurrence of the nuisance, and requiring the defendant, within a time specified in the order, to execute any works necessary to prevent the recurrence.

In addition, the court may impose a fine and a compensation order, and where a person contravenes any requirement or prohibition imposed by an order, a fine of up to 2,000 pounds may be imposed, together with a fine at a rate of 200 pounds a day for each day on which the offence continues after conviction. If the responsible person or the owner or the occupier of the premises cannot be found, under section 82 (13), the court may order the local

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20 Murdie, Akn Environmental Law and Citizen Action, 117-8 (1993)

authority in whose area the nuisance occurs, to undertake work that the person responsible would have been ordered to undertake. A right of appeal exists for a person who has been served with an abatement notice[21] . Actions can only be brought on an individual basis for harm which is caused to the plaintiff or to interferences with personal property.

5. Common Law Principle of Nuisance as Applied in Bangladesh

Common law tort principle of nuisance is applicable in Bangladesh. Although the aspect of private nuisance has not been applied and developed to a significant extent, the aspect of public nuisance received statutory recognition nearly hundred years ago during the time of British India and since then has played an important role in the public system of control.

Public nuisance regulations have been codified in various substantial and procedural laws in Bangladesh like,

1) Code of Civil Procedure, 1908,
2) Bangladesh Penal Code, 1860,
3) Criminal Procedure Code, 1989,
4) General Clauses Act, 1897.

Both civil and criminal remedies are available in Bangladesh for an act of public nuisance. The remedies under the civil laws are two — one is under section 91 of the civil procedure code for no special damage and the second is by a private individual for a special damage suffered by him. There are three remedies under criminal laws. The first relates to prosecution under chapter xiv of the penal code, second provides for summary proceeding under criminal procedure code and third relates to remedies under local or special laws. The

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21. See, Statutory Nuisance (Appeals) Regulations 1990 (s.i. 1990 no.2276 as amended by s.i. 1990 no. 483).

two kinds of remedies are concurrent and the pursuit of the one does not shut out the other.[22]

Under section 91 of the code of civil procedure, 1908— [i] in the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted [a] by the Attorney-General, or (b) having abtained written permistion of Attorney-General, two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act, [ii] nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions. Under section 93 of the code, with the government previous sanction, the collector or by such officer as the government may appoint, may exercise the power of Attorney-General under section. [91]

Public nuisance is not defined in the civil procedure code. Perhaps it is used in the same sense as it is used in section 268 of the Bangladesh penal code which reads; a person is guilty of public nuisance, who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage. The General Clauses Act [x of 1897] has taken the same view: public nuisance shall mean a public nuisance as defined in the penal code.[23]

Public nuisance is a criminal offence and punishable under sections 269, 270, 277, 278, 283, 284, 285, 286 and 290 of the penal code. Thus negligent act likely to spread infection of disease

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22. Criminal Law Journal, 462. (1976)

23. See. 3, Cl 48, Sec, 4(2), The General Clauses Act, 1897.

dangerous to life, malignant act likely to spread infection of disease dangerous to life, making atmosphere noxious to health etc. are offences under the code. But guilty intention is a prerequisite for punishing an offence under the code. The amount of fine provided under the code is nominal in consideration to the gravity of environmental problems. Thus the provisions are inadequate for an effective environmental protection.

Chapter x, sections 132A to 143 of the criminal procedure code, 1898, deal with public nuisance. The provisions of this chapter do not apply to a metropolitan area. The remedies for public nuisance provided under criminal procedure code are meant to be exercised under extraordinary circumstances where recourse to ordinary law is not possible owing to urgency of the matter. It is applied where the public is likely to be put to great inconvenience and will suffer an irreparable injury if the obstruction or nuisance is not removed. Where the alleged obstruction is an old one, the matter is one to be decided by civil court[24]. Criminal procedure code provisions are used in case of nuisance of recent origin, not an old one.[25]

A magistrate can act on a police report or on receipt of an information from any source including his personal observation. If a magistrate acts on an information, he acts suomoto. A private person has no right to insist that magistrate should pass order under section 133. Whether any order should be passed is a matter of discretion of the magistrate.[26]

A public right is not dependent on the number of individuals enjoying it. It is a right enjoyed by members of unascertained mass of the public[27] . A place in order to be public, must have access by right, permission, usage or otherwise[28]. When pollution is itself a public

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24. A. I. R. 1948 Pat. 210, 27 Cr. L. J. 27.
25. 21 D.L.R. 557.
26. A.I.R. 1931 ALL 785; 59 Cr. L. J. 148.
27. A.I.R. 18 PAT. 76
28. 1973 Cr. L. J. 1527.

nuisance it does not cease to be so only because one person has complained about it.[29]

Summary proceeding under criminal procedure code is as follows. A competent magistrate under section 133 of the code on receipt of a police report or other information and taking other evidence, if considers that any act of public nuisance should be removed, may make a conditional order requiring the concerned person to remove, desist, prevent etc. the same or to appear before the court to show cause;[30] if he does not perform such an act or appear and show cause, he shall be liable to the penalty under section 188 of the penal code;[31] if he shows cause against the order, the magistrate shall take evidence in the matter, and if satisfied that the order previously made is not reasonable, no further proceeding shall be taken, if not satisfied shall make the order absolute.[32]

If the alleged person denies the existence of any public right in support of the way, river, channel or place, the magistrate after inquiry if satisfied that reliable evidence in support of the denial exists, shall stay the proceeding until the matter of right is decided by a competent civil court, if not satisfied shall proceed according to section 137.[33] Then the magistrate shall give notice to the concerned person to act according to the direction or will be liable to penalty under section 188 of penal code. If still disobeyed, the magistrate may cause it to be performed, and may recover the costs in different prescribed ways.[34] If a magistrate considers that immediate measures should be taken to prevent imminent danger he may issue necessary injunction orders, in default, he may use other

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29. 1968 Cr. L. J. 396.
30 Sec.133.
31 Sec.136.
32 Sec.137.
33 Sec.139a.
34 Sec.140.

means to obviate such danger.[35] A magistrate may even order any person not to repeat or continue a public nuisance under section 143.

6. Comparative Study

Under the codified law of nuisance in Bangladesh suit for damages and injunction may be instituted in civil matters and in criminal matters fine and imprisonment to a limited extent may be imposed. In England on the other hand, most of the civil suits for damages in nuisance cases are decided by common law although increasingly now a days statutory laws are being passed to cover the damages even in civil matters. Under the statutory nuisance system criminal action can be brought in magistrate courts at the instance of attorney general, local authority and aggrieved persons. Opposite to this, in Bangladesh the criminal action in public nuisance cases depends absolutely on the will of a magistrate. An aggrieved person cannot of his own status bring an action. The scope of bringing legal actions is thus limited. In civil matters only the attorney-general or two or more persons having obtained written permission of the attorney-general may institute a suit. It is argued that in order to prevent the multiplicity of suits in public-interest litigations the scope of filing suits has been restricted to the attorney-general and his authorized persons. The provision under the code of criminal procedure even does not apply in metropolitan areas.

It therefore, appears that in Bangladesh the power of bringing pollution matters to a court of law is limited to a few individuals and dependent on their sweet will. People in general are not allowed to go to a court for taking necessary actions. The whole nuisance related problem issues would be put to a big threat if the chosen few officials fail to appreciate the gravity of a problem in time. There might be some other reasons for their non action including negligence and corruption. That is why the modern trend is to extend the scope of

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35. Sec.142.

right of suing and to allow the citizens to go to the court with minimum requirement of standing. Even in India section 91 of the *Code of Civil Porocedure* has been amended in order to remove the restrictions on the citizens' right to go to the court for the purpose of effective nuisance and pollution control. The law commission recommended the revision of section 91 in the following words:

> "section 91(1) authorizes the filing of a suit in respect of a public nuisance by the advocate-general, or by two or more persons who have obtained the written consent of the advocate-general. It appears to us that the advocate-general should not be troubled with such questions. It is enough if the leave of the court is obtained. In the coming years, problems of pollution of water and air and the emergence of new and unknown hazards to health are likely to require considerable attention. And, until a full-fledged environmental law takes shape, section 91 could serve a useful purpose in combating these kinds of nuisance".[36]

So now in India section 91 has been amended and any two persons with the leave of the court, even though no special damage has been caused, may institute a suit for declaration and injunction or such other appropriate relief.[37]

In different states of America (Michigan, Florida, Minnesota etc.), legislations have been passed in order to provide many others in addition to attorney-general, the right of approaching the court for public nuisance cases.[38]

The favorable aspect of the public nuisance regulation in Bangladesh is that unlike common law it has been codified and for bringing an action an individual does not require to suffer any special damage other than the public in general. It has been favorable for environmental pollution control in Bangladesh, due to its.

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36. Fifty- Fourth Report of the Law Commission of India on the Code of Civil Procedure, 65 (1908).
37. Code of Civil Procedure (Amendment) Act, 1976.
38. Thomas J. Schoenbaum, Ronald H. Rosenberg: Environmental Policy Law—Problems, Cases, and Readings,36-7 (New York, 1991).

Also civil litigation in Bangladesh is costly, time consuming and troublesome. The criminal remedies provided under the penal code and criminal procedure code are also not effective in the sense that the whole process depends upon the will of the magistrate and the fine scheme provided for the punishment of the offender is nominal and therefore does not operate as an effective deterrent in public nuisance and environmental pollution cases.

7. Conclusion

The recent trend of the courts in England to apply foreseeability test in nuisance cases, pose increasing difficulties in balancing conflicting interests of different entities. One way of justifying court's position is that in order to safeguard the greater interests of the society it outweighs the personal discomforts by applying the foreseeability test while safeguards the infringement of substantial personal rights by applying strict duty test in proper cases. However, the common law principle of nuisance has failed adequately to respond to the needs of modern environmental pollution cases. This is one of the reasons why in England statutory nuisance system has developed and common law nuisance system has been avoided in the Environmental Protection Act of 1990. In pollution cases even damages are being provided under statutory laws in order to avoid the uncertainty of the common law.

So far Bangladesh law is concerned, it appears that the common law nuisance principle is mostly codified. Probably the legislators of British India, keeping the peculiar socio-legal circumstances of this subcontinent in mind, thought it wise to codify the law of nuisance for British India which was a common law relief in England.

The scope of controlling environmental pollution under public nuisance regulation is limited in Bangladesh and there is ample scope for improving the existing codified public nuisance system in Bangladesh. In both civil and criminal public nuisance matters the procedure should be simplified and summary procedure should be developed. Certain structural changes should be brought about in

order to allow other relevant authorities, institutions, persons to bring action in a court of law for nuisance matters.

Many public nuisance matters can now be litigated within the broad mandate of the Bangladesh Environment Conservation Act, 1995. However, prior permission of the Department of Environment is required for filing any case under the Act. The Act primarily provides an administrative mechanism to remove public nuisance in the form of envirnomental pollution. While the liability for the public nueisance offences under the penal code is fault-based, under the Environment Conseruation Act, the liability of such offences is strict.

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RIGHTS OF BANGLADESHI WOMEN IN INTERNATIONAL AND MUNICIPAL LAW

DR. TASLIMA MONSOOR

This paper[1] intends to assess Bangladeshi women's rights in International and Municipal Law and will also evaluate the confusions and contradictions which are detrimental for implementation of women's rights in Bangladesh. Before going into details on international standards provided in various International documents and conventions, it is first considered how women were treated by the state and the legislature in the independent state of Bangladesh. In this context women's rights in Bangladesh have been analysed within the constitutional framework showing vividly the internal contradictions within the Constitution between granting sexual equality and making special laws for women. The paper then concentrates on the dichotomy of private and public life, the reservation of Family or Personal Laws and the confusion of imposing the concept of sexual equality in Family Law. This confusion as the paper concludes pushes women more to conservatism and deterioration as it avoids the real needs of women in Bangladesh[2].. The real needs of women in Bangladesh is to be protected from economic deprivation and violence.

The State, Legislature and Bangladeshi Women

After independence, the sovereign Democratic Republic of Bangladesh gave new promises to women, acknowledging their

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1. It is an amended a version of the paper presented at the International Conference on Economic, Social and Cultural Rights held in Dhaka, under the auspices on the HEAB (The Humanist and Ethical Association of Bangladesh), April 20-29, 1995.
2. See for details, Monsoor, Taslima: 'From patriarchy to gender equity: Family Law and Its Impact on Women in Bangladesh'. Ph. D. Thesis, University of London, (October 1994).

contribution in the liberation movement. Speaking to a mass crowd in Dacca in March 1972, the father of the nation who was also regarded as the friend of the nation or '*Bangabondhu*', Sheikh Mujibur Rahman stated:

In the past religion has been exploited in order to enslave our mothers and sisters; this will no more be permitted[3].

He further regretted that, in the past, half of the population of the nation had been confined within the four walls of their homes owing to social prejudices. Acclaiming the appreciable role played by women in the freedom movement, the leader declared that his government would secure that women may enjoy equal rights and privileges with men in free Bangladesh[4]. The stage was, thus, set for an improvement of the legal position of women in the new nation.

The raped women were declared by the leader of the nation, Sheikh Mujibur Rahman, as war heroines, '*Birangona*', to make them accepted in the society. But the majority of them were not accepted by the society and it was a problem for the Mujib government to rehabilitate them. It was rightly stated by Rahnuma Ahmed that the existence of the 30,000 raped Bengali women was an embarrassment to Mujib and his regime[5]. It was reported that the 5% quota of government employment reserved for the rape victims, except for its benefit identified them in society[6]. The Mujib government also provided jobs for the wives of freedom fighters who died or were crippled, but could not improve the overall status of women[7].

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3. Rahman, Sheikh Mujibur: 'Women will enjoy equal rights', *the Bangladesh Observer,* (Dacca, 7 March1972).
4. Id.
5. Ahmed, Rahnuma: 'Women's Movement in Bangladesh and the Left's Understanding of the Woman Question'. 30 The Journal of Social Studies. 48 (1985).
6. For details see Huda, Sigma: 'Women and Law : Policy and Implementation'. Paper presented at a seminar on 'Women and Law' organised by Women for Women, Sept. 13-15, 1987, Dhaka.
7. Ahmed. supra note 5, at 48; Kabeer, Naila : 'The Quest for National Identity : Women, Islam and the State in Bangladesh'. In Kandiyoti, Deniz (ed.) Women, Islam and the State, 125 (London 1991). This article was first published in Institute of Development Studies Discussion Paper. No. 268, 1-33 (Brighton, 1989).

During 1975-1981 the regime of president Ziaur Rahman, starting with the United Nation's international women's year, integrated more women in the development process. Under him a separate full-fledged Ministry of Women's Affairs was set up and reserved seats for women in Parliament were increased from 15 to 30[8] . These reserved seats were not open to election but were filled by nomination of the majority party which was simply another means to increase the powers of the ruling party[9] . There seems to be some agreement in the literature that the real cause for the mobiiisation of women was not only to legitimise elite rule but to acquire more aid from the donor agencies by giving some attention to women[10]. It is argued that not only the government but also the non-governmental organisations (NGOs) used women's issues as a potential source of funding[11]. But the positive impact of this was that women's issues in Bangladesh were slowly coming to the limelight, paving a way for incorporating them, the untapped resources, in the development process. The government under president Ziaur Rahman also wanted to improve the legal position of women and the Dowry Prohibition Act of 1980, for example, was enacted for that purpose.

The rule under president Hussain Muhammed Ershad, during 1982-90 continued the policy of president Zia to incorporate the women in development (popularly known as WID) program by making use of this hidden resource through employment[12]. However, incentives of foreign aid were attached to it. Some legal measures were devised in this period, supposed to advance women's welfare and to deter crimes against women by more severe punishments, particularly the Cruelty to Women (Deterrent Punishment) Act, 1983 and the Family Courts Ordinance, 1985.

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8. Id., at 127
9. White, Sara C. : Arguing with the Crocodile : Gender and Class in Bangladesh. London, 15 (New Jersery & Dhaka 1992)
10. Ahmed, supra note 5, at 49; White, Sara C. : 'Women and Development: A new Imperialist Discourse'. 48 The Journal of Social Studies. 103 (April 1990)
11. White, supra note 9, at 15-16
12. Kabeer, supra note 7, at 128

The democratic government of 1991, under the country's first woman Prime Minister, Begum Khaleda Zia, was following the policy of her predecessors to mobilise more women in the employment market. The present democratic government headed by another woman Prime Minister, Sheikh Hasina who is the daughter of the father of the nation is also following their footsteps. New forms of urban employment in the garment, plastic and pharmaceutical industry in particular, have become available since the 1980s; this gave women more opportunities to enter wage labour. In fact, this new economic order of women being more involved in the public arena has become a problem for the society of Bangladesh to cope with. In the professional sphere, too, women are more involved now, not only as teachers and nurses, which is typically supposed to the more fitted for them, but there were already 52 lady judges in the judiciary in 1992[13]. This shows that there is a pressure for sexuae quality and revaluation of the stereotyped concepts of our society about subjugating women. However, in Family Law this pressure is creating confusions and contradictions as women do not have absolute equality. But in social reality women do not even enjoy those rights already granted under the Islamic and statutory family law. In this context, a radical change outside the Islamic framework, as recently argued for by the radical feminist Taslima Nasreen, will only provoke the male-dominated society to turn towards more conservatism. It is doubtful how much emancipation of women will be achieved by such provocative writing. However, Taslima Nasreen's brave efforts to attack the whole system are giving her publicity and international attention was drawn to it[14]. Conversely, this offers a

13. It was stated by the Law Ministry in a workshop on 'Uniform Family Code and Problems of Enforcement of Equal Rights of Women in Bangladesh: Legal Policy and Social Dimension'. The workship was held on Sept. 22 and 23, 1992 jointly organised by Bangladesh Institute of Law and International Affairs (BILIA) and the Mahila Parishad. Its proceedings here not yet published.

14. To show how wide circles this has drawn see, Rettie, John: 'Bangladesh's Threatened Writer Wins Police Guard but no Champions'. The Guardian. (10 Dec., 1993); 'Fundamentalists Call for Feminist's Hanging', The Leicester

chance for the fundamentalists to make these issues up for their own campaigns to win power[15]. Khaleda Zia's government has banned one of her books, entitled *Lojja*, as it offends Muslim sentiments and fans communalism[16]. This indicates that the government approves, in principle, of gradual change of attitudes in the society towards giving the granted rights to women. But not many effects can so far be seen in practice. Thus, apart from some pro-women legislative activity, there has been no useful progress for the women in Bangladesh in this sphere. The attempts to improve the status of women which were taken by the politicians were only rhetoric and did not reduce the dominance of males in our society.

The constitutional framework of women's rights in Bangladesh

In fulfilment of his promise to women the father of the nation ensured full participation of women in the national life by confirming it in the Constitution of Bangladesh, which came into effect from 16 December, 1972, exactly one year after the independence from Pakistan. It aims to give some effects to enhance the rights of women. Under article 10, one of the fundamental principles of state policy states: Steps shall be taken to ensure participation of women in all spheres of national life[17].

This shows that women's rights were not at par with the men's so far, but apparently some efforts were made by the Constitution to equalise this disparity. Under article 8 of the Constitution, the fundamental principles of state policy are laws fundamental not only

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Mercury. (19 November, 1993); Mc Girk: 'Life in a Cage for Feminists who Dared to Tell the Truth'. The Independent. (2 March, 1994)

15. The Guardian (10 Dec. 1993)

16. Id.

17. This was substituted by the Proclamations Order No. 1 of 1977. The intention of this change from socialism and freedom from exploitation was merely rehtoric. Perhaps the legislators while taking away secularism from the Constitution and establishing Islamic beliefs wanted apparently to give scope to women to balance the equilibrium.

to the governance of Bangladesh but they are also to be applied by the state in the making of laws. However, the fundamental principles are not judicially enforceable or justiciable as fundamental rights.

The fundamental rights granted under part three of the Constitution specifically deal with women. Article 27 states that all citizens are equal before the law and article 21 states that all citizens are entitled to equal protection of law. Article 28 states:

28. 1) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

2) Women shall have equal rights with men in all spheres of the State and public life.

3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.

4) Nothing in this article shall prevent the state from making special provisions in fevour of women or children or for the advancement of any backward section of citizens.

Thus while providing equal rights for women in several respects, although only in the public sphere and not in the private sphere, the legislature could not pull them out of the typical stereotyped image depicting women as the weaker sex in need of protection. They categorised women with children and the backward sections of the population, reserving the rights of the state to make any special provision for the advancement of the backward section of the population.

This paternalistic attitude of the legislature can also be found in other provisions of the Constitution. Article 29 states:

29. 1) There shall be equality of opportunity for all citizens in respect of employment or in the service of the republic .

2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against, in respect of any employment or office in the service of the republic

3) Nothing in this article shall prevent the state from-

a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the republic;

b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;

c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

While providing for equality of opportunity to women, the Constitution under article 29(3) (c) has explicitly given the right to the state to reserve certain employment and office to men alone, as it is in its nature unsuited to women. This urge of the legislature can also be gathered in other provisions of the Constitution. Thus, 15 seats were reserved for women [article 65 (3)] this was increased to 30 seats in Zia's regime. Under article 65(3):

> Until the dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the Parliament in existence at the time of commencement of the Constitution (Tenth Amendment) Act,1990, there shall be reserved thirty seats exclusively for women members, who shall be elected according to law by the members aforesaid[18].

Further, in exercise of these provisions government by notification reserved 10% of all new recruitment in the public sector for women.

These articles of the Constitution perpetuated the conventional view that women are inferior and therefore needed protection[19]. Thus, although generally the Constitution ensures equality of the

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18. Substituted by the Constitution (Tenth Amendment) Act xxxviii of 1990. The effect of this was not to give more power to women but to strengthen the authority of the ruling party.

19. Sarkar, Lotika: 'Status of Women : Law as an Instrument of Social Change'. 25 Journal of Indian Law Institute, 267 (1983).

sexes, there are within it disparities of the sexes[20]. This paternalistic attitude towards protecting women as the weaker sex coincides with the patriarchal attitude of our society.It is apparent from this that the legislature recognises the unequal status of women in Bangladesh, although they outwardly claim that the Constitution ensures sexual equality.

Salma Sobhan rightly observed that,

> The tenor of all these provisions read as a whole makes it obvious that the drafters of the Constitution could not fail to acknowledge tacitly the fact of the inequality present in the status of women[21].

However, the author has blamed the female section of the population to undermine their own potentialities together with the typical social attitudes towards them. By blaming women the author has victimised them more. We are arguing, on the contrary, that this is only a reflection of social attitudes, mainly the male attitude towards women, as they are not conscious of their hidden powers which are not recognised by the society.

One of the causes of the subordination for women is projected to be politics to use religion to police women's behaviour. It necessitates us to see how it affects women when the Constitution itself has a religious colour. Bangladesh, after independence, ceased to have Islam as the official religion and accepted secularism as one of the pillars of its socio-political structure. However, the

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20. See for details Sobhan, Salma: Legal Status of Women in Bangladesh. 4-6 (Dhaka, 1978); Bangladesh: Strategies for Enhancing the Role of Women in Economic Development 18-20 (Washington DC 1990) (A country study of the World Bank); Choudhury, Rafiqul Huda & Nilufar Raihan Ahmed: 'Women and the Law in Bangladesh: Theory and practice'; 8 Islamic and Comparative Law Quarterly. 275 (Dec. 1988); Choudhury, Rafiqul Huda & Nilufar Raihan Ahmed: Female Status in Bangladesh 18-33 (Dhaka 1980); (Bangladesh Institute of Development Studies).

21. Sobhan, supra note, 20, at 5

secular Consitution did not have any direction for a Uniform Civil Code to bring at par all the personal laws as was done under article 44 of the Indian Constitution[22].

The Constitution of Bangladesh was amended in 1977 by President Ziaur Rahman by deleting the principle of secularism from the constitution and replacing it by 'absolute trust and faith in Almighty Allah'. An author has claimed that this replacement was made for financial considerations, basically to have more aid from Arab and Middle-East countries than showing a trend towards Islamisation[23]. In 1988, President Ershad went so far as to islamising the state by a further constitutional amendment to make Islam the state religion by the famous eighth amendment. Under article 2A, it declares:

The state religion of the Republic is Islam, but other religions may be practised in peace and harmony in the Republic.

The part of the eighth amendment which amended article 100 and gave power to the state to decentralise the High Court Division of the Supreme Court was challenged by writ petitions and was declared void by the celebrated judgement of the eighth amendment case[24]. However, the other part of the eighth amendment which declares Islam as the state religion, although contested by women's organisations as contravening the Constitution and United Nations Conventions, was not made void[25]. The women's organisations opposed it as it would make women more vulnerable to discriminatory

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22. Pearl, David: 'Bangladesh: Islamic Laws in a Secular State', 8 South Asia Review. 33 (1978)

23. Guhathakurta, Meghna: 'Gender Violence in Bangladesh: The Role of the State'. 30 The Journal of Social Studies. 85 (1985)

24. See for details, Anwar Hossain Chowdhury v Bangladesh & Others C. A No. 42 of 1988, Jalaluddin v Bangladesh & Others C. A. No. 43 of 1988 & Ibrahim Shiekh v Bangladesh & Others C. P. S. C. A. No. 30 of 1989 arising out of Writ petitions No. 1252, 1176 and 1283 of 1988 'Constitution 8th Amendment case Judgment' In Bangladesh Legal Decisions, Dhaka 1989 (special issue).

25. Kabeer (1989), White (1990), supra note 10, at 95

laws[26]. To them it was also attempt to amalgamate religion with politics to strengthen the authority of the orthodox people to police women's behaviour[27]. It was also reported that the women's organisations were arguing that the Amendment is taking away the spirit of the liberation movement and the guarantees of freedom of speech, thought and women's rights of independent Bangladesh[28]. The women's organisations were fearing that this amendment will strengthen orthodoxy of religion, taking away their rights and putting them in seclusion, back to square one.

Women's Rights and International Standards

In the past two decades UN has taken a number of steps in order to enhance the position of women world-wide. The Charter of the United Nations referred to equal rights of men and women and forbids discrimination on the basis of sex, race, language or religion.

The Universal Declaration of Human Rights also equally proclaimed under article 1 that all human beings are born free and are equal in dignity and rights[29]. The declaration that 1975 is the International Women's Year started a new era for the improvement of the women's status in every sphere of her life. The Nairobi Forward Looking Strategies (NELS) for the advancement of women was adopted by the Third World Conference on women. The conference was held in Nairobi after the UN decade for women. The Conference

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26. An active women's organisation called 'Naripokho' challenged this part of the Amendment in the court but were not successful. Other organisations, such a Mahila Parishad, Democratic Forum, Hindu Boidho Aiko Forum were also against it.
27. Kabeer (1989), supra note at.
28. The Holiday (Dhaka, 19 April 1988)
29. See details for International Instruments prohibiting discrimination on the ground of sex, Zamir, Muhammad: 'Measures of Advancement of Women' Human Rights and the International Law, 127-137 (Dhaka 1994); Morsink, Johannes: 'Womnen's Right in the Universal Declaration', 13 Human Rights Quarterly. 229-256 (1991)

on women reviewed the achievements for women with regard to equality, development and peace in this decade.

Despite enactment of various International Instruments and Documents extensive discrimination against women, the half of the world population, continued to exist. This encouraged the UN to adopt the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 18th December, 1979, which came into force from 3rd September, 1981. The Convention purports to guarantee equal rights to women and to prohibit discrimination against women[30].

The discrimination against women is defined under article 1 as follows :

> 'For the purposes of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, social, cultural, civil or any other field'.

This definition and other articles of the Convention, as for instance article 16, obligate the state parties to take all appropriate measures to ensure equality of men and women in all matters relating to marriage and family relations. This explicitly shows that the Convention extends to private life also. These parts of the Convention which regulates the interpersonal conduct is controversial as it aims to promote change in the cultural attitude of men and women within the family. Conflicts arose as it was an

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30. On this Convention see Tinker, Catherine: 'Human Rights for Women: The UN Convention on the Elimination of All Forms of Discrimination Against Women', 3 Human Rights Quarterly. 32-43 (Spring 1991); Meron, Theodor: The Convention on the Elimination of All Forms of Discrimination Against Women', Human Rrghts Law-Making in the United Nations: A Critique of Instruments and Process. 53-82 (Oxford 1986)

interference to the privacy of the individuals life. While analysing the critical features of the *Convention* first of all it can be said that it did not dichotomies public and private life and did not even limit the parameters of public and private life. Hence it did not open the controversies which prevails in the patriarchal societies of the world. The ratification of the Convention means to accept international norms for equality between men and women, but it might not coincide with national norms. Thus, the *Convention* would have been much more adaptable if it would have considered the major systems or concepts of the world.

International Standards of Women's Rights and Bangladeshi Women

Bangladesh is a signatory to Nairobi Forward Looking Strategy for advancement of women (NFLS) and Convention for Elimination of All Forms of Discrimination Against Women (CEDAW). However, it has reserved the articles which according to the government have potential conflict with the socio-cultural ideology of Bangladeshi Society.

Bangladesh has reserved article 2, 13(a), 16(1) (c) and 16(1) (b). Article 2 undertakes to adopt legislation to ensure elimination of discrimination through sanction and legal protection. Article 16 provides that women and men have equality in all matters relating to marriage and family relations including the same rights to enter inter marriage and the same rights and responsibilities during marriage and at its dissolution. The same situation of reservation of the *Convention* prevails in other countries whose majority of the population are Muslims, as for instance Egypt. The reservation of the Convention of Egypt reads as follows.

> Reservations of the text of article 16 concerning the equality of men and women in all matters relating to mariage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Sharia's provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance

> between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important basis of those rights is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husba[31].

In the legal system of Bangladesh there is duality of general and personal law. Religious law is applied to personal life relating to marriage and family relations. The reservation of article 16 was necessary otherwise the *Convention* could not have been incorporated in the legal system of Bangladesh. However, if the whole system of personal law is deleted from the legal system it would be possible. Although it is never analysed whether the full ratification of the Convention is realistic or feasible in the patriarchal society of Bangladesh. It is also not analysed whether the equality of the spouses in the family will bring harmony and peace in such society.

It is true that discrimination against women in family or personal life is in an alarming state but there is also a wide gap in the rhetoric paper rights in the public life. Yet regulating the personal conduct throuth state and international regulations may violate the privacy and associational rights of the individual and conflict with the freedom of opinion, expression and belief[32]. Thus, the Convention conflicts with

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31. Multilateral Treatise deposited with the Secretary General: Status as at 31 December, 1984. UN Doc. A/40/45 (1985), 153.

32. Meron, (1986), supra note 30, at 62.

the personal laws of Bangladesh. Moreover, sexual equality in Bangladesh is a distant mirage where even the rights granted by the religious personal and statutory laws are rarely enforeced. In a study it was reported that 88% or women in Dhaka metropolitan city did not receive any dower or another study shows that 77% of women from families of two villates did not intend to claim legal share in their parental property to retain better links with their natal family[33]. Thus, unless there is a shift in the general attitudes towares women in the patriarchal society of Bangladesh the rights given under the International amd Municpal Law would be a myth than a reality.

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33. Akhter, Shaheena: How far Muslim Laws are Protecting the Rights of Women in Bangladesh. (Dhaka 1992); Westergaard, Kirsten : Pauperisation and Rural Women in Bangladesh a Case Study. (Dhaka 1992).

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VIOLENCE IN THE HOME : BREAKING THE CYCLE IN BANGLADESH

MS. NUSRAT AMEEN

Introduction

Every marriage ordinarily involves a transplant. A girl born and brought up in her natural family when given in marriage, has to leave the natural setting and come into a new family. Of the couple, particularly the wife requires to be adapted in the new family with the interests of its members through so much care and tolerance. However, breaking the cycle of marital connections is not rare in Bangladesh. The purpose of the paper is to delve into realities of marital breaking and in so doing, it will aim at married women's vulnerability of family violence bringing out legal shortcomings for remedies possible under the traditional as well as statutory laws in Bangladesh.

Family violence why and what for

When a girl is transplanted from her natural setting into an alien family, the care expected is bound to be more than in the case of a plant. When a tender plant is shifted from the place of origin to new setting, great care is taken to ensure that the new soil is suitable and not far different from the soil where the plant had hitherto been growing, care is taken to ensure that there is not much variation of the temperature, watering facility is assured. Plant has life but the girl has a more developed one. Human emotions are unknown to the plant life. In the growing years in natural setting the girl; now a bride has formed her own habits, gathered her own impressions, developed her own aptitudes and got used to a way of life. In the new setting some of these have to be accepted and some to be surrendered.

This process of adaptation is not and cannot be one sided. When the bride is received in the new family she must have the feeling of

welcome and affection, grace and generosity, attachment and consideration that she may receive in the family of the husband, she will get into new mould, the mould would last for her life. She has to get used to a new act of relationship – one type with her husband, another with the parents-in-law, a different one with the younger ones in the family. For this she would require loving guidance. The elders in the family, including the mother-in-law are expected to show her the way. The husband has to stand as mountain of support ready to protect her and espouse her cause where she is on the right and equally ready to cover her either by pulling her up or protecting her willingly taking the responsibility on to himself when she is at fault. The process has to be a mutual one and there to be exhibition of co-operation and willingness from every side. Otherwise, how would the transplant succeed.

However, this transplant often fails, especially in a country like Bangladesh where women are vulnerable to exploitation, oppression and physical violence from men in a society where tradition and law sanction women's subjugation to men in all spheres of life. And therefore, violence becomes an obvious factor in a family. We live, as we always have done, in a violent society, of which the family is a true microcosm. Indeed, more violence takes place within the family than in the outside world.[1] In developing countries evidence exists from most part of the Commonwealth, that domestic violence is a serious and widespread problem. In Canada, based on statistics from doctors, lawyers, social workers and police records, it has been estimated that one woman in ten is abused by her partner, while studies from the United States suggest that the figure is more likely to be one in six.[2] This abuse may either be physical or psychological.

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1. Jahan, Roushan : "Family Violence and Bangladeshis Women : Some Observations", in Akhanda Latifa and Jahan, Roushan (ed.) Women for Women, 4(1983).

   Rosa, Kumudhini: Bangladesh. In Women of South Asia. 9,10,11 (1995).

2. Confronting Violence : A Manual for Commonwealth Action. Women and Development Programme. Commonwealth Secretariat. London (15 May, 1987).

It is certain that actual incidence of family violence will never be fully quantified, as such violence occurs within the privacy of the home and, often, for reasons which include shame and humiliation, a victim is unprepared to complain about her situation. Even communities deny the problem, fearing that an admission of its existence will amount to an assault on the integrity of family, and few official records are kept. Current method of estimating the number of spousal assaults are questionable. The statistics are based on reported incidents of abuse obtained from police, doctors, welfare agencies.

Statistics from these sources show that family violence does exist, but they are notorious for under representing the problem. Victims are often reluctant to report the violence; they may feel ashamed of being assaulted by their husbands, they may be afraid, they may have a sense of family loyalty. Nevertheless, when women do report the abuse, the statistics may be lost because the official fails to record the incident or records it in a way that is meaningless for research purposes.[3] Criminal statistics although could be a major source of comprehensive data on violence against women in home, frequently fail to indicate the sex of the victim and of the assailant and rarely record the relationship between the two. In these circumstances, it is impossible to distinguish wife assault from any other assault and thus for statistical purposes, wife abuse becomes invisible. Self-reporting surveys also present problems. Women who have been abused may prefer to keep the face to themselves. When they do respond, they may overestimate or, more commonly underestimate the amount of violence they have suffered.[4] In Bangladesh murders of wives by husbands accounts for 50% of all murders. In 1992, UNIFEM produced a factsheet on gender violence summarising statistical evidence on the incidence of wife abuse

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3. Miranda, Davies: Women and Violence. Zed Books Ltd. London and New Jersey. 2-4 (1994).

4. Id. at 4.

world-wide. This revealed that wife abuse is common in Bangladesh, Barbados, Chile, Colombia, Costa Rica, Guatemala, India, Kenya, Norway and Sri Lanka.[5]

Nevertheless, despite the fact that the problem of quantification of this offence can never be accurate, it must be acknowledged that violence is part of the dynamics of many family situations. The research that does exist, which stems mainly from the developed Commonwealth, indicates that women are murdered, sexually assaulted, threatened and humiliated within their own homes by men to whom they have committed themselves and that *this is not uncommon or unusual behaviour.*[6]

Wife as a victim of violence:

It is assumed that, practice of wife beating or wife abuse is particularly hard to tackle because many traditional and transitional cultures have a blind spot about this issue[7]. It remains hidden and invisible, not necessarily in the sense that it is covered up by victims and ignored by society, but in the sense that people believe that a man has the right to control his wife, to be the head of the family, the 'boss'. Evidence of this can be found in all patriarchal society. In Bangladesh, the male dominance of women has been reinforced by religious sanctions favoring men, that is, polygamy; men's right to divorce unilaterally; the husband's right to guardianship and also right to mild physical chastisement; the son's right to inherit a double share of that of a daughter and so on.

A woman's first and worst experience of violence thus often begins within the family, while the family continues to be the strongest basic unit which determines a woman's life. The other areas where she encounters violence is within the society at large; her workplace, the community and the state. These are reflected in the

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5. Id.
6. Supra note 2, at 12.
7. Miranda, supra note 3.

form of sexual violence, social and economic discrimination through child marriage, dowry, polygamy, unequal wages, custodial rape and violence, and violence prevalent during armed conflict including terrorism.

The law supports and is supported by patriarchal order. As such the legal position of women reflected and still reflects sexual inequality[8]. The link between violence towards women and sexual inequality finds support in recent cross cultural research on family violence. In a study of 90 small-scale societies world-wide Levinson (1989) found that violence between family members is rare or non-existent in 16 of them[9].

More specifically, the legal remedies available to battered women have been slow in coming, are limited in scope and cumbersome to operate. The legal resolutions which have been made available at various times have been constrained by a number of factors :

i) The weak economic position of women affected,

ii) The reluctance of police to become involved in marital disputes,

iii) The problem of providing protection against husbands seeking 'revenge',

iv) a lack of alternative accommodation and assisting agencies e.g. doctors, social service departments who have tended to emphasis 'reconciliation' and 'compromise' rather than separation and divorce. Battered women have been and still are a forgotten statistics and according to Dobash and Dobash (1977), as quoted by Bankowski,

"Despite overwhelming evidence that crimes of violence occur disproportionately in the home, there exists a considerable

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8. Bankowski, Zenon and Geoff Mungham: Essays in Law and Society (London, 1980).

9. Buzawa, Eve S. And Carl G. Buzawa: Domestic Violence; The Criminal Justice Response. (London,1990).

reluctance to define such acts as criminal, to legislate against such acts, and most of all, to enforce the laws which do exist."

Within the family unit, in British society, there is a socially determined and acceptable hierarchy. In social, economic and political terms the power and authority is now and always been vested in the man-patriarchy; indeed insists upon this.

Women are one of the casualties of a patriarchal society, and in discussing family violence we would be wise not to forget that women are battered not because of factors peculiar to the family, but because they are in some sense victims of a society in which inequalities are deep-rooted. As observed by Dobash and Dobash (1977), women are not victims because of various structural and stress factors, they are battered because their subordinate status has made them the '*appropriate*' victims of family violence.

This inequality is rampant in a developing country like Bangladesh. In Bangladesh, the practice of Purdah is segregating women and sanctioning strict gender-based division of labour, have made women especially subsevient and economically dependent on their male relatives . The country-wide poverty and scarcity of resources further limit women's access to opportunities for economic independence from families. Divorce and criminal proceedings, the only recourses open to married women suffering from violence, are thus, nonviable options for the majority of them, especially the poor and uneducated ones. Until recently, Bangladeshi legal system, based on the Common Law, deferred to religious personal laws in family matters, thereby doing little to diminish married women's vulnerability to family violence. Moreover, family matters are held by custom to be private and while Muslim marriage is not sacramental, relatives and friends always advise the woman to try to endure abuse and save a troubled marriage. Moreover, all these factors kept the incidence and seriousness of spouse abuse or family violence a seldom discussed and rarely acknowledged problem in Bangladesh. The above mentioned social, cultural and economic factors

combined compel Bangladeshi women to play the role of silent victims of violence.

Legal Provisions against Family Violence:

In Bangladesh, women possess rights under the Constitution and under the law. The Constitution promulgated in 1972 has granted equal rights to both men and women, forbidden discrimination against women [Article 27, 28 (1), 31 and 32]. But in fact, the lacuna in law as well as the social customs, ignorance, misinterpretation of religious and the various socio-economic factors are the main obstacles for the women to be beneficiaries of the existing laws. Moreover, the Convention on the Elimination of All Forms of Discrimination Against Women, 1984 which added emphasis to improve the legal status of women all over the world has been adopted in Bangladesh; but with few reservations owing to the Muslim Personal Law.

Polygamy:

Research shows that family violence is often led by offences related to marriage. The offences relating to marriage is dealt under sections 493 to 498 of penal code. Polygamy has become one of the most burning issue of the times. Supporters of this institution believe that polygamy is sanctioned by the Quran, and therefore it cannot be restricted by any human legislation. This misconception renders the wives vulnerable to a situation where husbands are deserting them alongwith the children and this number is increasing day by day. Legislation, however, tried to minimise this abuse by introducing in section 6 sub-section 1 of Muslim Family Law Ordinance, 1961, that,

"no man during the subsistence of an existing marriage shall except with the previous permission in writing of the Arbitration Council, contract marriage, nor shall any such marriage contracted without such permission be registered under this Act."

If he fails to oblige with the said Act, he is liable to a fine or imprisonment, and to the repayment of dowry to his previous wife

[MFLO, section 6(5)]. In addition, any of his wives may claim maintenance or demand a divorce on ground of inequitable treatment (MFLO, sections 9 & 13 respectively). However, a polygamous marriage contracted without the necessary permission remains valid; this coupled with the man's right to unilateral divorce, forces many women to silently suffer the humiliation and indignity of such a relationship, given that the only alternative is destitution.

Sometimes the women are prey of cruel husbands who threat of divorcing them if they do not give consent—this is a common wife abuse in Bangladesh.[10] Aleya, a housewife aged 25 of Bagherhat was beaten by her husband for not giving her consent for the second marriage and consequently died (July 2, 1990, Dainik Sangbad).

Divorce:

In Bangladesh, a woman can seek divorce from her husband under the dissolution of Muslim Marriage Law of 1939, amended in 1961, whereby, she can seek divorce on several grounds including that of physical and mental abuse by the husband. However, this right can be exercised only where the wife has been given the power of divorce (*Talaq-e-Towfiz*) at the time of marriage.

The legal system thus allows a wife who is subject to violence by her husband even if such violence does not amount to physical ill-treatment, to dissolve her marriage through divorce.

Similarly, a Christian woman has the right to dissolve her marriage and judicial separation on the ground of cruelty by the husband. Unfortunately, in Bangladesh a Hindu woman does not possess the right of divorce on the ground of cruelty, she can only claim the right of separate residence from the husband temporarily.

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10 Munir, Shaheen Akhter : Violence Against Women : Legal Provisions and Its Implications. Report of the Workshop on Platform of Action. 1-3, December 1994. Bangladesh National Preparatory Committee Towards Beijing NGO Forum '95 (Dhaka July, 1995).

Child Marriage:

The system of child marriage is another factor which contributes to wife abuse. Although the government has amended The Child Marriage Restraint Act of 1929 in the year 1983 and raised the minimum age for a girl to get married from 16 to 18 years, breach of which is punishable; research shows that minor girls are still being married off by their guardians. However, this legal provision is not implemented and no case has so far been filed against the guardians. On the other hand, the guardians are taking the plea of the Holy Quran that a girl who attains the age of puberty (that starts from 9 years) can get married. But this concept is a misinterpretation as Quran has only indicated that a girl's reproductive system starts through gaining puberty.

Thus, child marriage is a common feature in rural areas of Bangladesh. The main reason for this is mostly poverty. The sooner the guardians can get the girl (child) into marriage the better because the amount of dowry would be less. With the burden of poverty, the poor parents are also burdened with the fear of social violence, such as child abuse, molestation, rape, kindapping, forceful sexual relation, etc.

Provision of Criminal Law:

Except for the sexual offences, the Bangladesh Penal Code does not draw a distinction between violence against women and men. Furthermore, the Penal Code does not have any specific provision penalising violence in the family. Therefore, the only offences which the criminal process acts to meet the definition are : assault, hurt, grievous hurt and murder etc.

Wife Abuse:

Evidence exists to indicate that wife abuse occurs at all levels of society, no evidence suggest that the conduct is distributed equally among all groups in society. For example, there is some evidence to

suggest that rural women are at greater risk than urban women, a survey undertaken in Bangladesh revealing that women are victimized more in the villages than in the urban centers[11] and it well may be that there is more wife abuse in families with lower incomes or where the husbands has received less education. However, despite variations that may exist, all research has produced the key result that violence against wives is prevalent throughout the economic and social structure and appears to have no cultural barriers. All that can be said is that there is no typical victim of abuse and no typical perpetrator, except in so far as the victim is, overwhelmingly, female and the perpetrator male.

Wife abuse is thus a common phenomenon, especially in the rural areas of Bangladesh. However research indicates that, wives are not coming forward to take action against their husbands owing to the lacuna in legal remedies. As it can be seen that, according to the Bangladesh Penal Code the term 'assault' does not specifically indicate wife abuse.

The murder cases which are resulting from beating often escape penalty. This is so either because of lack of evidence, or for non-trial as the husband remains absconded (45 DLR 1993, p75 : The Detective, May, 1984, pp 131-135).

Dowry Related Violence And Law:

The concept of dowry in Bangladesh probably originated from an ancient Hindu custom, an approved marriage among Hindus has always been considered to be a *kanyadaan* i. e. gift of the daughter. According to *Dharmashastra* (code of religion) the meritorious act of *kanyadaan* is not complete till the bridegroom is given *varadakhshina* in the form of cash or kind. This was out of love and affection and in the honour of the bridegroom. The quantum varied in accordance with the financial position of the bridegroom. The quantum varied in

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[11] . Shamim, Case Study from Bangladesh (Dhaka, 1987).

accordance with the financial position of the bride's father. Similarly, articles were given to the bride which constituted *stridhan* i. e. property of the bride. These were meant to provide financial security to the couple in adverse circumstance. However, no compulsion whatsoever was exercis by the bridegroom and his family to obtain *varadakhshina* and *stridhan*. In course of time, these two aspects of Hindu marriage assumed the name of dowry. [12]

The social interpretation of dowry today is that, whatever is presented under demand, compulsion or social pressure as consideration for the marriage can be said to be dowry. The concept of dowry has not only spread rapidly among the Hindus but also to other communities in the sub-continent.

Dowry as defined in Bangladesh by the Dowry Prohibition Act of 1980 means any property or 'valuable security' given or agreed to be given either directly or indirectly.

a) by one party to a marriage to the other party to the marriage; or

b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person; at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or mohar in the case of persons to whom the Muslim Personal Law (Shariat) applies. Dower is one of the essentiel part of Muslim marriage which the wife is entitled to receive from the husband in consideration of marriage.[13]

Muslim Law does not make any provision for payment of dowry. But social custom, imported mainly from the Hindus and getting nourishment from the dependence of women on men and the attitude of men towards women, has firmly established the institution of dowry amongst the Muslims also. The nature of the dowry shows

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12 . Anjum, Javed : 13 Delhi Law Review. 179-183, (1991) and Shrinivasan Parvati : The Menace of Dowry, in Raj Sebasti L. (ed.) Quest for Gender Justice, 91 (1991).

13 . Mulla, D. F. : Principles of Mohammadan Law, 277 (17 ed.).

that it is a present to the son-in-law rather than to the daughter. So firmly established is this institution in the society that there are instances of husbands divorcing their wives simply because the father-in-law would not or did not pay the promised dowry.[14]

The practice of dowry, therefore, has to be looked at in the context of marriage.

A set of values connected with marriage appears to have aided dowry to assume its present form. Dowry usually refers to property that a woman receives from her parents and other kin as a part of her marriage settlement. An implicit and explicit element of coercion has gradually crept into the social transaction of dowry. Thus, dowry as a social phenomenon has aroused much public concern in Bangladesh, specially due to its compulsions and harmful effects.

Dowry deaths and violence against women because of dowry demands has become an everyday affair (Shamim, 1986). To check these crimes the Government of Bangladesh enacted The Dowry Prohibition Act of 1980. The Cruelty to Women (Deterrent Punishment) Ordinance of 1983 was promulgated to provide for deterrent punishment for all types of cruelty to women and for matters connected therewith.

The lacuna in these two laws proved it to be ineffective in providing any legal remedy to the aggrieved. The latter law only increased the punishment by providing death penalty to the husband or his relations if the woman dies or grievously injured for demanding dowry; leaving the defect in the definition of dowry of the former law.[15]

The government recently passed another law with deterrent punishment to eradicate violence against women as the previous

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14. Ahmed Sufia and Jahanara Chowdhury : Women's Legal Status in Bangladesh. In the Situation of Women in Bangladesh. Women for Women : A Research Study Group 309 (Dhaka, 1979).

15. See for details in Abu Bakar Khandaker : The Dowry Prohibition Act, 1980 and Cruelty to Women (Deterrent Punishment) Ordinance, 1983. 2-40 (Dhaka, 1991).

laws proved to be insufficient. This law was passed in the Parliament and received the consent of the Honourable President in July 16th, 1995. This law may be called Repression Against Women and Children (Special Procedure) Act, 1995. Section 4 of this Act provides punishment of death penalty to a person whoever causes death to any woman or child using poisonous or corrosive substance. Section 5 further makes any offence causing hurt or grievous hurt using poisonous or corrosive substance to any part of the body of a woman or child with a penalty of minimum 7 years imprisonment to maximum death penalty. It is to be noted here that, the Act does not specify the term 'woman' with 'wife'-thus including women of all category. The Act also covers the offence of dowry. Section 10 and 11 deals with dowry related offences and provides maximum penalty of death for dowry deaths. After this Act came into effect, the Cruelty to Women (Deterrent Punishment) Ordinance of 1983 has been repealed; but all cases pending under the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 and the appeals shall be dealt with under same Ordinance as if it has not been repealed.[16] However, it is to be noted here that, although the government has from time to time enacted several laws for establishing women's right, it has failed to take notice of the most frequent and common offence directed towards women—and that is wife abuse! Unfortunately, there is no specific law to tackle this evil.

Provision of Civil Law:

The Civil Law in Bangladesh is somewhat silent in providing relief in cases of wife abuse. There are no specific provision under which women victims of spousal violence can resort to. The only remedy open to them in case of abuse is to seek divorce under the Dissolution of Muslim Marriage Law of 1939. Whereby a Muslim woman can seek divorce on the grounds of physical or mental cruelty

16 . See for details Bangladesh Gazette Noification (17 July 1995).

by the husband. Divorce, thus being the ultimatum. Thus under the mentioned law the wife can pray for divorce in the court under several causes; physical or mental torture being one of them.

However, as discussed earlier this right can be exercised only where the wife has been given the power of divorce (*Talaq-e-Towfiz*). Case studies in the City Corporation in Dhaka shows that, most of the divorce are enforced under the Muslim Family Law Ordinance of 1961 (Ordinance 8) Section 7 (1) and by invoking the Kabinnama whereby the wives are entitled to divorce by delegated power given by the husband.

Besides physical abuse, the most common abuse is desertion by the husband and non-maintenance of the wife by him. Here it is to mention that, the law holds a husband bound to maintain his wife so long the wife remains faithful to him and obeys his reasonable orders. If the wife refuses hesrelf to her husband or otherwise wilfully fails in her marital obligations she has no right to claim maintenance from the husband.

If any solvent husband neglects or fails to pay maintenance to his wife or legitimate or illegitimate children, the criminal court also holds him liable under the criminal law (Section 488 of Criminal Procedure Code of 1898); subject to the proof of such neglect or refusal and order payment of subsistence allowance not less than Taka 400 per month. In case of non-payment of the above amount the court may sentence the husband to fine or jail for a month.

According to Section 9 of the Family Courts Ordinance, 1985 (XVIII of 1985), a wife is entitled to maintenance; although no limit has been specified by the Arbitration Council to be paid as maintenance. The expression 'adequately' conveys the standard of living to which the wife may be accustomed. The word 'equitable' connotes that in the event of co-wives, the maintenance shall be paid to each wife according to the standard to which each of them is accustomed and also her social status.[17]

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17 . Chowdhury Obaidul Huq : Hand Book of Muslim Family Laws, 79-82 (DLR, 1993).

But the social milieu and cumbersome court procedures make it difficult for the wife to have maintenance through the court or the arbitration council. The reluctance of women to go to court is reflected in the field research of Sobhan and Roy.[18] The women in Roy's research confirmed this by admitting that wife beating is the norm in married life. The women had no desire to understand the cause of the beatings. Since their husbands assured them food, clothing and shelter they felt it unnecessary to complain about their predicament.

However the facts remain that this remedy under the Family Court remains open only to Muslim women ignoring the other religion. Selina Begum filed a claim for maintenance under the Criminal Procedure Code having been deserted by her husband following his second marriage, and her refusal to accept the return of the dowry. Her husband argued that she could not resort to the remedy under the Criminal Procedure Code following the establishment of the Family Courts Act, which had been invested with exclusive jurisdiction to hear, *inter alia*, maintenance matters. The court held in his favour stating that women are no longer entitled to a choice of remedy for maintenance (Abdul Khaleque vs. Selina Begum, DLR 1990, p 450). These courts are only concerned with family disputes under Muslim Law. Ironically, making the more effective statutory remedy open to non-Muslims leaving only the civil remedy in the Family Court open to a Muslim woman.[19]

The law, it may be re-emphasised, does not exist in a vacuum. A social atmosphere must be created in which the disadvantaged could restore their faith in the society's sense of justice and that their rights are of concern to the society. The defence of their rights by the due

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18. Sobhan, Salma and Kamal Sultana : The Status of Legal Aid Services to Women in Bangladesh (Dhaka, July1992).

    Roy Rita Das : Battered Spouse Syndrome. (Dhaka, September, 1992).

19. Hossain Sara: Equality in the Home; Women's Rights and Personal Laws in South Asia, in Rebecca J. Cook (ed.) Humm Right, of Women : National and International Perspectives 482 (Philadelphia, 1995).

process of the law whould not appear to them to be unattainable fantasy. In practice, women—owing to their ignorance of law and their general powerless position, pre-determined by their socio-cultural circumstances—are not in a position to get protection from the law even when protection is available. It was felt in reseach by Sobhan that, there is a certain reluctance to seek judicial relief in marital violence. A woman was brought to the researcher by a social worker. Her body was bruised and swollen. Beating was a regular feature in her 2/3 years of marriage. The day she was brought to the researcher, she could not speak properly a she was stamped on by her husband on that very day. This was the first time she had spoken to a third person about her husband's behaviour. She was given medical assistance and told to rest. She refused to stay and said she would return the next day. The next day her friend called to say that she had decided not to take court action as this would lower her family's prestige. To her the family "honour" was more precious than her life.

In this regard, few recommendations may be suggested; the foremost requirement is to make women and children aware of their social and legal rights, to bring amendments in the existing laws (Family Laws/Penal Code which are discriminatory), establish an independent Family Court and enforce Uniform Family Code.

Conclusion:

Reality to violence in the home causing breaking of cycles is that so long there will be no attitudinal change of males or females there will be no environment for women to be free from exploitation. To all intents and purposes, a legal regime with special treatment to women's rights should prevail unless and untill they are self-conscious of remedies against infringers of their rights. Otherwise, wives cannot get rid of being victim of family violence. Law must be enforced to its entirety for peace and order at all level and thereby making women in Bangladesh self-oriented to their rights against violence in the family.

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ADMINISTRATION OF JUSTICE UNDER ISLAMIC LEGAL SYSTEM : AN OVERVIEW

MD. ANWAR ZAHID

I. Introduction

From the early period of civilization people required protection against wrong-doers and their mutual disputes were required to be settled. To cater to this need, 'administration of justice' was necessary. It is the basis of the betterment and progress of humanity. In its absence human society is bound to be devoured by disorder, chaos and anarchy. Administration of justice, therefore, retains utmost importance in every human society.

Islam has its own justice system. In addition to the common functions of justice, that is, the protection of the weak and punishment of the wrong-doer, aims of Islamic justice system are the establishment of peace on earth, concord among humanity, advancement of society, and safeguard of social interests. It is a well-acceptable system of justice for all times. But people are in general least informed of this and therefore, they question its adaptability in present day. An attempt has been made in this article to draw an understandable picture of Islamic justice system showing its independent and impartial character and its adaptability in modern time.

II. The Concept of Islamic Justice

The Arabic word 'Al-Adl' used in the Holy Quran stands for justice which refers to fairness. To act with fairness is an absolute duty of every Muslim. It is the demand of the Almighty Allah that men must stand forth in justice, as He says,

> "We sent aforetime Our messengers with clear signs and sent down the Book and the Balance (of Right and Wrong), that men may stand forth in justice; And We sent down Iron, ... "[1]

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1. Al-Quran, 57:25.

Here "(t) hree things are mentioned as gifts of Allah. In concrete terms they are the Book, the Balance, and Iron, which stand as emblems of three things which hold society together, viz. Revelation, which commands Good and forbids Evil; Justice, which gives to each person his due, and the strong arm of the Law, which maintains sanctions for evil-doers"[2] Thus 'Balance' "does not signify in the Quran a pair of material scales but a measure as signifying any standard of . . . judgment"[3] No one is allowed to manipulate the 'Balance' in deciding cases or in mutual dealings as common Muslim.

As regards the common Muslims 'Adl' or justice is the minimum standard of behaviour. Islam rather expects some higher quality from them. That is Ehsan or goodness proper. "'Adl' simplicity, according to the Islamic concept, is the doing of good for good but Ehsan is the doing of good even where 'Adl' does not strictly demand it and where there is no question of receiving any reciprocal benefit."[4] This quality of course inheres in highly developed souls. This may not be expected of general people. But no concession has been given by Islam in the case of Adl. In this regard Allah Ta'la says-

> ". . . and he has set up the Balance, in order that you may not transgress (due) balance. So establish right with justice and fall not short in the balance"[5].

Therefore, as a minimum, the Muslims are required to do justice in their mutual dealings. None of them must act to deprive others of their rights (huqooq). They must be straight and fair in their day-to-day dealings so that a just and orderly life can prevail in society.

But if the due balance is transgressed in mutual dealings or State law is breached and the matter is brought before the court, it is then

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2. Ministry of Hajj and Endowments, K. S. A. The *Holy Quran: Meanings and Commentary*, 5313
3. M. Ali The Quran, 1029.
4. Mahmood Ur Rahman, The Concept of Justice in Islam', in S. M. Haider (ed.) *Shariah and* Legal *Profession*, 170 (Pakistan, 1985)
5. Al-Quran, 55 : 7-9.

the duty of *qadi* (judge) to decide the case with justice. The Almighty Allah instructs- "When you judge among men, judge with justice."[6] That is, Allah instructs judges to give each party to a suit his due. Everyone must be treated equally and without a tinge of bias or partiality. This point has been emphasized in the Quran which says-

> "O true believers, observe justice when you appear as witness before Allah and let not the hatred of others to you induce you to do wrong : but act justly; this will approach nearer unto piety, and fear Allah, for Allah is fully acquainted with what you do."[7]

> " O you who believe! be maintainers of justice when you bear witness for the sake of Allah although it be against yourselves, or your parents, or your near relations : whether the party be rich or poor."[8]

> "In the Islamic legal system the *qadis* are to judge according to the commandments of *Allah Subhanahu Wa Ta'la* Who is the fountain of justice. To quote the Holy Quran- "And judge between them by that which Allah has sent down:..."[9] "And whoever judge not by that which He has sent down then they are the infidels."[10]

> "I (the prophet) am commanded to judge justly between you in accordance with the Book which Allah has sent down and in which I believe."[11]

Islamic justice is administered with reference to the laws of the Quran, the traditions (Hadiths) of the prophet (*Salla Allahu Alaihi wa sallam-SM*) and the general consensus of the followers, especially of the first four caliphs (*Ijma*) and *Qiyas* (exercise of private judgment). All these sources of Islamic law being directly or indirectly from the Almighty it is accordingly said that Allah is the fountain-head of Islamic justice and not any Caliph or King.

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6. *Id.* at 4 : 58.
7. *Id.* at 5:8.
8. *Id.* at 4 : 135.
9. Al-Quran 6:49.
10. Id. at 6:44.
11. Id. at 42:15.

III. Administration of Islamic Justice: Meaning and Significance

The Islamic legal terminology which is used to mean administration of justice is *qada* which means, *inter alia,* to give an order and judgement[12] . Thus the *fuqaha* (Islamic jurists) have used it in the sense of diciding the disputes by a judge. The person who performs this work is called *qadi* by them.[13]

Qada or Administration of justice holds a highly dignified position in Islam. Sarakhsi says. "To render justice constitutes one of the most noble acts of devotion."[14] According to Kasani, it is one of the best acts of devotion and one of the most important duties, after belief in God".[15] For this lofty importance of *qada*, the Prophet (SM) himself decided cases in his life time, awarded punishments to the defaulters and engaged competent persons with the task of *qadi.* e. g. the prophet sent Ali ibn Abi Talib to Yamen as a *qadi.*[16] As regards the nature of obligation with regard to *qada* the *fuqaha* are of the opinion that it is a collective obligation-*fard* or *Wajib Kifayah*. This means if someone from amongst the Muslim Community performs the obligation of *qada*, it will be deemed to be accomplished by all; but if none of them accomplishes the obligation, the whole community will be sinner or liable.[17]

IV. Administrators of Justice (Qadis/Judges)

(a) Qualifications of a *Qadi*

The requisite qualifications of a *qadi* are not articulated in a single Quranic verse or Hadith. The *fuqaha* have referred to them through

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12. Shahir Arsalam, Al-Qada Wa 1-Qudat, 19,20 cited in Ghulam Murtaza Azad, *Judicial System of Islam*, 3 (Pakistan, 1987).
13. Id. at 4.
14. Sarakhi, Mabsut, 16: 67, cited in Muhammad Muslehuddin, *Philosophy of Islamic Law and the Orientalists*, 103 (Lahore, 1980).
15. Kasani, *Badai al-sanai*, 7:4, loc. cit.
16. Sunnan, *Tirmidhi*, 1: 171.7: 4, *loc. cit*.
17. Azad, supra note 12, at 7.

inferences and deductions. According to Hanafi Schools to be a *qadi*, a person must possess the qualifications of a witness. That is, he must be free, sane, adult, a Muslim, and unconvicted for slander. "The reason lies in the fact that the rules with respect to jurisdiction are taken from those with respect to evidence, since both are analogous to authority which signifies the passing of or giving effect to a sentence or speech affecting another (with or without consent).[18] In addition, al Marghini, a Hanafi Jurist, refers to the qualification that a *qadi* should be *mujtahid*. But he mentions it as a preferable condition, not as an indispensable condition. Even an unlettered person is eligible for appointment as a *qadi*.[19] Of course, al-Shafi differs from this view of the Hanafis.[20]

On the basis of al-Hedaya G. M. Azad draws the following conclusions:[21]

1. That a minor who has still not attained the age of poberty cannot be a *qadi*,
2. That a non-Muslim is not eligible for holding the office of *qadi*,
3. That an insane person cannot be a *qadi*.
4. That a person convicted of *qadhf* (slandering with commission of adultery) loses his competency for the office of *qadi*.
5. That a *fasiq* (profligate) is competent to become a *qadi* though the appointing authority (sultan) should not select a *fasiq* for the office of *qadi*.
6. That a woman may be appointed as *qadi* in those cases wherein her evidence is admissible. [22]

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18. Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World*, 482 (Delhi, 1986).
19. Azad, supra note 12, at 9-10.
20. Qadri, Supra note 18.
21. Azad, Supra note, at 10.
22. Evidence of a woman is admissible in every case except in case of punishment or retaliation.

In addition to the above, there are some other qualities which should also be taken into consideration in time of appointment of *qadis*. Hazrat Ali Karmallah Wajho is worth quoting in this respect. He writes in his letter to Malik Ibn Haris Ashter, the Governor designate of Egypt, as follows:[23]

"You must be very judicious in selection of officer for dispensation of justice among your people. For this purpose you should select persons of excellent character, superior calibre and meritorious record, i. e. from among the best available in merits and morals.

They must possess the following qualities:

i. They should not lose their temper either at the complexity of the problem nor at the pressure of abundant number.

ii. When they are convinced that they have given a wrong judgement they must not consider it beneath their dignity to correct it or undo the wrong done;

iii. They must not be greedy, corrupt and covetous;

iv. They should not be satisfied with superficial enquiry or simple scrutiny of a case till everything for and against it has been thoroughly examined; when confronted with doubts and ambiguities they must pause, go for further details, clear the points and then give the decision;

v. They must attach highest importance to evidences and reasonings and should never get tired at litigant's lengthy arguments; they must exhibit patience, perseverance in scanning the details, in examining points and shifting fact from fictions, and in this way when the truth is discovered they must

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23. Quoted from A *Classic Administrative Policy Letter of Hazrat Ali* (*RA*), Department of Forms and stationeries, Government of the People's Republic of Bangladesh, (1976) 12-13. Orginal letter in Arabic may be seen in *Nahijul Balagha* published by Sheikh Gholam Ali & Sons Lahore (1976).

be able to deliver the judgement without fear or favour and thus put an end to the dipute.

vi. They should not be amongst those who develop vanity and conceit when compliments and praises are offered or who are puffed up by flattery and who are misled by persuasion and cajolery.

But unfortunately, you will have few persons with these virtues and qualities. When you have found and selected such men make it a point to go through some of their judgements critically and check the proceedings. You should at the same time fix for them handsome emoluments so that all their legitimate needs are satisfied and they are not compelled to beg or borrow from others, nor required to resort to corruption.

Ensure for them such a prestige and status in your Government and give them such nearness to yourself that none of your officers and courtiers dare lord over them or overawe them.

Judiciary must be free from all kinds of executive pressure and influence, must be above intrigue and corruption; it must act without fear or favour.

Ponder well and take particular note of this aspect of the matter, for before your appointment this state was under the domination of corrupt, lustful opportunists. These greedy and mischievous people had exploited the state for personal gain and used it as the means for attaining wealth and other worldly objects."

(b) Appointment of *Qadi*

Appointment of *qadi* is *fard* (obligatory). To quote al-Kasani-"The appointment of a *qadi* is one of the indispensable needs of the appointment of the Imam. Hence it is obligatory.[24] Again in the words of al-Mawardi, "To entrust someone with the work of judgment is

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24. Cited in Azad, Supra note 12, at 56.

obligatory for the Imam—Caliph-because it is a part of his general duties and powers."[25] Thus as part of its obligation State selects persons to appoint in the office of *qadi*. One who seeks the office of *qadi* should not, according to one Hadith, be appointed as *qadi*. should not appoint incapable persons to such office, lest injustice will prevail. On appointment acceptance of the post is not however, obligatory, as held by the *fuqaha,* except in a situation when there is none other eligible and competent for the post.[26] Shafi-i jurists provide that "a Muslim who feels himself specially capable of exercising the functions of a judge should solicit those functions . . . When one considers oneself not inferior to another in juridical capacity, one may, it is universally agreed, accept the position of a judge; it is even commendable to solicit it where, being learned but obscure, one hopes in this way to be able to work one's light shine for the good of humanity or create for oneself a respectable social position."[27]

(c) Remuneration of *qadi*

On remuneration of the *qadis*, there is no specific provision of law. However, during the caliphate of Umar (R) a *qadi* was *paid* one hundred dirhams and an amount of wheat compatible with his needs per month. The same practice continued in the period of Uthman and Ali (R). Qadri suggests that "the *qadi* cannot recompense for his work but is entitled to living expenses or maintenance. For this reason, persons in affluent circumstances are to be appointed to the office.[28]

(d) Removal and dismissal of *qadi.*

A *qadi* can be removed from the office for some causes, e. g., blindness, deafness, loss of reason and apostasy. If a *qadi* is just at

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25. Al-Mawardi, *Adab al-Qadi*., 1: 137 *loc. cit.*
26. Azad, Supra note 12, at 56-57.
27. Cited in Qadri, supra note 18, at 482.
28. *Id.* at 483

the time of appointment but becomes unscrupulous afterwards, he should be dismissed. Besides, he may be dismissed by the appointing authority for some cogent and convincing reason. The death of the sovereign, however, does not render the *qadi's* post vacant. (Fatwa-i-Alamgiri).[29]

(e) Independence of Judiciary

Once Caliph alone was the head of the executive and the judiciary. With the development of Islamic Law and jursprudence, judiciary was separated from the executive. At the apex of judiciary remains the chief *Qadi* / Justice. Below him, there may be a number of judges with different jurisdictions. The judges work under the control of chief Justice or *Qadi al-Qudat.* In judicial matters even the chief executive has nothing to interfere. Judiciary enjoys complete independence. Once during the caliphate of Hazrat Ali (R), a dispute between the caliph himself and a Jew came to the court. Ali claimed his ownership over an armour he found in possession of a Jew who falsely denied the claim. Then the *qadi* asked Ali to prove the case and Ali presented his slave and his son as witnesses on his part. But the *qadi* refused to accept testimony of his son saying that "the evidence of a son is not admissible in favour of a father" "The judgment was given in favour of the Jew. At the independence and impartiality of the judiciary the Jew exclaimed "I testify that there is no god but Allah, I testify that Muhammad is the apostle of Allah and that this armour is thy armour.[30]

It is also reported that in a case Hazrat Ali (R) was sitting by the side of the *qadi.* The *qadi* told Hazrat Ali (R) to go to the dock and called him as "father of Hasan."When the case was over Hazrat Ali (R) took seat by the *qadi* who asked Hazrat Ali (R) whether he was

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29. Mohammed Ullah Ibn S. Jung, *The Administration of justice of Muslim Law*, Idarah-I-Adabiyat-I-delhi, 8 (Delhi, 1977)

30. H. S. Jarret, *History of the Caliphs by Jalaluddin A'S-Suyuti* (Bibliotheca Indica) 188.

displeased with him for telling him to go to the dock. Hazrat Ali then replied that he would have been angry if he was not asked to the dock as when the case brought before the *qadi* he was to be treated equally. He further added that one *qadi* should have called him by his name, not as "father of Hasan" which meant that *qadi* showed some respect to him.[31]

v. Principles Followed in the Administration of Islamic Justice

Judges in an Islamic legal system administer justice keeping some beliefs and principles in mind. Those may be reproduced in short in the following:

Firstly, *qadis* are committed to uphold Shariah law. If any law is made contrary to Shariah, the judiciary must declare it void. Thus the principle of judicial review operates in Islamic legal system.

Secondly, every one is equal before law[32] and must be dealt with in accordance with such law. An equality case is stated as that Jablah bin Al-Aiham was the ruler of a state in Syria. He accepted Islam. One day he was going to Haj and part of his gown was trampled over by a poor Arab. Jabalah gave him a slap and he did the same in return. Jablah went to caliph Umar with complaint but Umar told him that he got justice. Jablah said that the Arab would have been hanged if he was in his country. The caliph replied that a poor man and a prince were equal in Islam. So the Beduin did not commit any wrongful act.[33]

Thirdly, Islamic judiciary applies the principle that no body should be condemned unheard. This principle emanates from the fact that Almighty Allah Himself asked Satan to explain why he did not bow

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31. Abdul Matin Khan Chowdhury, 'Independence of judiciary in Islam'in *Law and International Affairs,* IX Bangladesh Institute of Law and International Affairs, 42 (1986)
32. Al-Quran, 10: 15, 2: 285, 2: 123.
33. Gul Muhmmad Khan, 'Concept of Justice in Islam, in *Shariah and legal porfession, op. cit*, 215.

down before Adam. Again, He gave an opportunity to Adam to be heard before he had to vacate *Jannat* to come onto earth in consequence of violation of the command of Allah. There are verses in the Quran relating to this principle, e. g.,

a. "On the Day when their tongues, their hands and their feet will bear witness against them as to their actions."[34]

b. "And the Earth will shine with the light of its Lord: The Record (of Deeds) will be placed (open); The prophets and the witnesses will be brought forward; And a just decision pronounced between them; And they will not be wronged (in the least)."[35]

c. "On that Day will the Earth declare her tidings; . . . . . .
On that Day will men proceed in groups sorted out, To be shown the Deeds that they (had done). "[36]

Besides the above, there are other principles contained in the Holy Quran which are generally followed in deciding cases. The following are the most important of them:

i. One is innocent unless proved guilty.[37]

ii. No offence without *mens rea*.[38]

iii. No offence can be created retrospectively.[39]

iv. There is no offence if an act is done under compulsion.[40]

v. The punishment should be commensurate with the offence and not more.[41]

vi. Self defence is no offence.[42]

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34. Al-Quran, 24:24.

35. *Id.* at 39: 69.

36. *Id.* at 99: 4-6.

37. *Id.* at 24: 12-13

38. Id. at 33:5, 6: 54.

39. *Id.* at 44: 22, 8:38, 5:96, 2: 275.

40. *Id.* at 16 : 106.

41. *Id.* at 2: 194, 10:27, 22:60, 40:40, 42:40, 16:126.

42. *Id.* at 2: 41.

vii. An abettor is also guilty.[43]

viii. No one can be held responsible for offence of others.[44]

ix. The aggrieved party is entitled to compensation.[45]

x. Decide according to the evidence produced.[46]

VI. Functions And Jurisdiction of Judges

This part of discussion may best be started with the text of a letter written by Hazrat Umar during his regime to judge Abu Musa al-Ashari as the functional and jurisdictional obligations of the office of *qadi* are stated in it. The letter reads as follows:

> "Now, the office of judge is a definite religious duty and a generally followed practice.
>
> Understand the depositions that are made before you, for it is useless to consider a plea that is not valid.
>
> Consider all the people equal before you in your court and your attention, so that the noble will not expect you to be partial and the humble will not despair of justice from you.
>
> The claimant must produce evidence; from the defendant an oath may be exacted.
>
> Compromise is permissible among Muslims, but not any agreement through which something forbidden would be permitted or something permitted forbidden.
>
> If you gave judgment yesterday and today upon reconsideration, come to the correct opinion, you should not feel prevented by your first judgement from retracting for justice is primeval, and it is better to retract than to persist in worthlessness.
>
> Use your brain about matters that perplex you and to which neither the Quran nor the Sunnah seems to apply. Study similar cases and evaluate the situation through analogy with those similar cases.

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43 . *Id.* at 16: 25.

44 . *Id.* at 42: 16, 39:7.

45 . *Id.* at 17: 33.

46 . *Id.* at 4: 105.

If a person brings a claim, which he may or may not be able to prove, set a time limit for him. If he brings proof within the time limit, you should allow his claim, otherwise you are permitted to give judgment against him. This is the better way to forestall or clear up any possible doubt.

All Muslims are acceptable as witnesses against each other, except such as have received punishment (stripes) provided for by the religious law, such as are proved to have given false witness, and such as are suspected (of partiality) on (the ground of) client's status or relationship, for God, praised by he, forgives because of oath and postpones (punishment) in face of evidence.

Avoid fatigue and weariness and annoyance at the litigants. For establishing justice in the court of justice God will grant you a rich reward and give you a good reputation. Farewell.[47]

Besides the above the following is an enumeration of the functions and jurisdiction of judges:

(a) Judges were primarily concerned with settling suits between litigating parties applying the relevant laws.

This function includes fixation of date of hearing and further hearing, passing *ex-parte* orders in default of the appearance of the plaintiff or his witnesses, reviewing the decided cases for correction of error and performance of other duties relating to adminstration of justice. A *qadi* had to decide cases relying on the evidence of the parties and he had no power to add his opinion to such evidence. Side by side passing contested decree, a judge made attempt to bring the parties to a compromise.

(b) Besides disposal of suits brought on private initiative of the parties, judges could take public interest matters into cognizance at their own.

(c) *Qadis*, with different territorial jurisdictions, may have both civil and criminal jurisdictions. There were some special qadis in charge of deciding insolvency cases, marital disputes cases, waterways and guardianship cases etc.

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47. Cited in Qadri Supra note 18 at 485-86.

(d) In addition to settling of suits, certain general concerns of the Muslims were included within the scope of functions of a *qadi*, e. g., supervision of the property of insane persons, orphans, bankrupts, supervision of wills and religious endowments, supervision of public roads and buildings, etc.

(e) The *qadis* were entrusted with the task of interpretation of the law by analogical deduction so as to cover the growing needs of society. In the interpretation of law, reason is "subject to analogy" which keeps the discretion of the judge within bounds and also preserves the law both in its ideal form and stability, "while the Rule of Necessity and Need serves as a supplement to accommodate the change and to meet the growing needs of society"[48]

vii. Porocedure in The Administration of Justice

A. Civil Matters.

(a) Choice of forum:

At the outset court of right jurisdiction has to be chosen. The jurisdiction of the court is determined by the powers of the judge provided in his letter of appointment. Also the residence of the plaintiff and his witnesses is taken into consideration. The suit lies in the court within the jurisdiction of which they reside, even if the defendant resides in or the subject-matter of the suit is situated within the jurisdiction of another *qadi*. Here preference is given to the plaintiff's place of residence as the plaintiff is the aggrieved party.[49]

(b) Claim before the court:

The claim is called *Dawa*. When a person demands a thing and it is disputed by another, it is *dawa*. The person who puts forward a claim is called *muddai*, i. e. claimant or plaintiff, and the person who denies or disputes the claim is called *Mudda'a alah* or defendant.

The plaintiff may state his claim in writing or make oral statement in respect of his claim. If orally made, an assistant of the court is required

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48. Quoted in Muslehuddin, Supra note 14 at 275.

49. Husain Wahed, *Administration of Justice During Muslim Rule in India*. Idarah-i-111 (Delhi, 1934).

to reduce his statement in writing. The plaint contains (a) the name of the parties, their parentage and address, (b) the same particulars regarding witnesses; (c) sufficient particulars of the claim; of it is for movable articles, the plaint must specify the value, quality, genus and quantity of the commodity; if it is immovable its four boundaries, the place where it is situated, the name of its owner and possessor, (d) the nature of the claim, cause of action and relief prayed for.[50]

(c) Hearing and Trial of the Case:

(1) *issuance of summons and processes.*

After the plaintiff has presented his plaint, the *qadi* looks into its *prima facie* character and if satisfied, will summon the defendant. Where the defendant is suffering from illness and is unable to appear or is a purdah observing lady, summon will not be sent, rather a commission will be appointed who shall record the statement of such person. But if that person so exempted appoints a representative (*wakil*), the procedure shall proceed in its normal course and no commission shall record the statement.

On being summoned if the defendant appears and admits the claim, the case will be decided in the plaintiff's favour. But if it is denied, the plaintiff is given an option to put the defendant on oath or produce evidence in support of his case. The defendant may however, dispute the plaintiff's claim without admitting or denying it and may put his own case. For instance, in a suit for realization of debt the defendant may dispute the claim by saying that the debt was due but has been paid.

(2) *Ex parte judgment*

Normally a claim cannot be judicially decided in absence of the defendant or the opposite party. But if the defendant is not available, the *qadi* may decide it *ex parte* provided, according to the Hanafi School, a representative is appointed to observe the interest of the

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50. *Fatwa-i-Alamgiri.* V. IV, chapter on claims.

defendant and the proceedings of the court. The condition of appointment of representative is, however, unacceptable to the Shafi'i School.[51]

Ghulam M. Azad has added a condition that in case of an *ex parte* decree, the plaintiff shall be ordered to furnish sureties lest the defendant appear in future and prove his cause.[52] But this seems to undo the purpose of the law of limitation. If the defendant fails to defend the case within a fixed period of time, the case should be decided *ex parte*, otherwise multiplicity of litigation will be the consequence. To quote Qadri-

> "the law of limitation has an application in the procedural laws governing adjudication of disputes. To the older jurists, a person's rights were not barred by the lapse of time and thus the *qadi* was obliged to hear the claim under the law. However, the law took into account the principles of human welfare in order to suppress undue litigation and thus different provisions were developed to meet the requirements of the changing time. The limitation of time was recognized by the process of *Figh* and the claims could not be heard after the different fixed periods of limitation."[53]

(3) *Compromise:*

When in a case that has taken place between relations, or there is an expectation that two parties are inclined to compromise, the judge advises and warns compromise. If they are willing to do so, he makes the compromise in accordance with the precepts written in the books about compromise and if they are not willing, he completes the trial.[54]

(4) *Pronouncement of judgment*

When a suit is contested the judge hears both the parties and pronounces his judgment. If however, judgment is given in absence of one party and he comes up with a good rebuttal of the plaintiff's

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51. Qadri, Supra note 18, at 495-6.
52. Azad, Supra note 12, at 71.
53. Qadri, Supra note 18, at 499.
54. Arti 1826 of the Mejelle, *Durr-ul-Mukhter III*, 434 cited in Qadri, id. at 496.

claim, it is heard and decided. But if an action is not brought in rebuttal of the claim or if it is done but it is not a good rebuttal of the claim, the judgment given is put into execution and is carried out.[55] Such a suit being once decided cannot, as the doctrine of *res judicata* applies, be re-decided in future nor can it be produced as evidence in the court of law.

(d) Execution of decrees

The court which has passed the decree should execute the same. If a *qadi* passes a decree and subsequently ceases to hold the office, his successor shall execute, maintain and enforce the decree passed by him subject to revision.[56]

(e) Review

A *qadi* has the power to review his judgment or decree correcting thereby accidental or clerical error or arithmetical mistakes. Again, if he finds that his judgment has been given in violation of the principle of Sharia, he can revise it.[57] Such authority follows from Hazrat Umar's (R) advice given to Abu Musa al Ashari quoted earlier. Here the relevant portion may again be reproduced:

> "If you gave judgment yesterday and today, upon reconsideration, come to the correct opinion, you should not feel prevented by your first judgment from retracting: for justice is primeval, and it is better to retract than to persist in worthlessness."[58]

(f) Appeal and Revision

The authority regarding preference of appeal has been laid down in a long hadith in which Hazrat Ali (R) is reported to have said to the disputants whose case was decided by him:

> "Hold fast to my judgment ad *interim till* you appear before the Messenger of Allah (SM) and he decide your case."[59]

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55. Arts. 1829 to 1836 of the Mejelle, Minhaj, 505f, cited in Qadri, id. at 497.
56. Azad, Supra note 12, at 83.
57. Durroul-Mukhta, III: 231f; Minhaj, 505f, cited in Qadri, Supra note 18, at 497.
58. *Supra* note 47.
59. Waki, Akhbar al-Qudat, 1: 97, cited in Azad, Supra note 12, at 84.

From this hadith it may be inferred that (1) *ad interim* injunctions are valid and (2) a case may be referred to higher authorities if it does not fall within the jurisdiction of the trial court or if it deems fit to be decided by the higher authority.[60]

Besides, there are certain jurists according to whom a *qadi* of higher court has the power to usually revise the decision of hte subordinate court on a point of law[61]

B. Criminal Matters.

a) Trial of Cases

Judges in Islamic legal system may have as said above, both civil and criminal jurisdiction or there may be separate criminal courts. The court may award either kind of punishments- *hadd* or *tazir. Hadd* punishment is fixed by the Quran, Sunnah and I jma while tazir depends on the discretion of the qadi. Hadd being stern punishment guilt of the accused must bestrictly proved. If the guilt is not so proved, the *qadi* may award punishment applying his discretion. Thus one Abdullah bin Sahl was murdered by the Jews of Khaybar and, Muhesa, the deceased's cousin, filed a complaint (in Arabic *istighathah*) before the Prophet (SM). But as no eye-witness of the deed was produced, the prophet did not interfere but allotted 100 camels from the treasury, bait-ul-mal, as blood money.[62]

A case of had or qisas (nearly same as hadd) can be proved either by evidence of witnesses or by the confession by the accused provided all conditions of testimony and evidence are duly completed. Hearsay evidence is not admissible and similar are cases of oath or by testimony of woman.[63]

Again in such cases admission of the guilt by the lawyar is inadmissible. In the cases of fixed sentencing, it is the duty of the

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60. Azad, id.
61. *Hedaya* III: 67, 69, 83.
62. This case was reported in Shahi *Bukhari* and *Nisai*..
63. Qadri, Supra note 18, at 291.

court to secretly investigate the case, and, ordinarily, should not satisfy itself with the evidence furnished by the witnesses.[64]

According to Abu Hanifa, bail is not permitted in hadd and qisas cases and the author of Hedayah says that it is not valid with respect to any right of which the fulfillment is impracticable by means of it in such cases because proxies are not admitted in case of corporeal punishment. But bail for the persons of the criminals under sentence of such punishment is lawful. In crimes where damages are to be paid, the accused can be compelled to furnish surety.[65]

b) Appeal and Revision:

Under Islamic legal system judgment of criminal cases may be preferred to appeal and revision. Thus in a case where while four persons from the tribes of Yaman were on hunting, a lion fell in a well and one of them slipped. When he was about to fall into the well, he caught hold of second one who caught hold of the third and the third the fourth. Ultimately all the four hunters fell into the well and being easy preys to the lion all died. The tribes of the latter three persons claimed blood money from the tribe of the first person. But his tribe was prepared only to pay the same for one person whom he caught hold of. This matter was brought to Hazrat Ali (R) who was then in charge of judiciary at Yaman and he issued an ad interim decision till they came to the Prophet (SM) They all agreed. Ali, hearing the case, ordered that a full blood money of all the deceased be brought together and decreed that the heirs of the lowest one in the well be given $\frac{1}{4}$, of the second one 1/3, of the third one $\frac{1}{2}$ and of the last one the full amount. They agreed to obey the ad iterim order and appeared before the Prophet in the season of Hajj. The Holy Prophet (SM) upheld the decision of Ali (R).[66]

The right of appeal emanates from the Holy Quran which reads:

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64. *Id.* at 292.

65. *Hedaya*, II: 585.

66. Waki, I; 95-97, cited in Azad, Supra note 12, at 98-99.

"O you who believe
Obey Allah, and obey the Messenger
And those charged with Authority among you.
If you differ in anything among yourselves.
Refer it to Allah and his Messenger . . . .[67]

VIII. Arbitation[68]

Under Islamic law a case may be referred to an arbitrator for arbitration. It is called *Tahkim*. The arbitrator is required to have the essential qualities of a *qadi*. The arbitrator, appointed by the parties according to their choice, has the power to examine witnesses and administer oath like a court. He gives award accofding to the facts of the case and in accordance with the law to which the parties are subject. If the parties accept the award, the decision of the arbitrator will be binding upon the parties and will have the force of decree. But if a party does not accept the award and refers it to the *qadi* for its revision (*marafia*), the latter has the power to interfere and set it aside if the award is not in accordance with the law; otherwise, the *qadi* will pass a decree confirming the award. An award in favour of the arbitrator's parent, wife and child, like the decrees of a *qadi*, is null and void.

It is important to note that the office of arbitrator differs from that of a *qadi* in that a woman may be appointed an arbitrator and a non-Muslim party may appoint a person of his faith as an arbitrator, in which case the qualifications of *qadi* need not inhere in the arbitrator.

xi Proof of Cases[69]

Proof of cases attaches supreme importance in the process of administration of justice. The burden of proof lies on the plaintiff. If the defendant denies the plaintiff's claim, he will have to take an oath.

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67. Al-Quran, 4; 59.
68. Wahed, Supra note 49, at 132-133.
69. Id, at 118-123,

But if he does not take the oath, the case is to be decreed, and if he takes the oath, plaintiff has to prove his case.

In the Shariah law, a fact may be established by admission, evidence or oath.

Admission:

To decide a case in the plaintiff's favour the most strongest proof is the admission by the defendant of the plaintiff's claim. A person is bound by his own admission. In this regard Allah instructs that "O you who believe, be maintainers of justice when you bear witness for the sake of Allah, even though it goes against yourself."[70] and the Prophet (SM) also directs, "Speak the truth even though it be against yourself.[71]

It is a rule of admission that a claim once admitted cannot be contradicted. Thus, if in a suit the defendant has admitted that the property claimed by the plaintiff belongs to him (the plaintiff), he cannot say afterwards that the property belongs to himself. This is the doctrine of estoppel (*Tanaqus*).

Evivence:

If the defendant denies the claim of the plaintiff, it is incumbent on the latter to provide evidence. Important provisions relating to evidence may be summarized in the following:

i) It is the general principle that evidence should be made by at least two men or one man and two women. In criminal cases the evidence of two men, but in whoredom, of four men, is necessary. But the court may accept the evidence of one witness provided it is convincing and unapproachable.[72] In certain cases falling within female area, e. g., child birth or virginity evidence of one woman is sufficient. According to

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70. *Supra* note 8.

71. Suyuti, *Jami, Sighir*, No 5004 cited in Qadri 502.

72. *Al-Faruq-ul Hukumia*, 48 cited in Wahed 121.

Imam Shafi' such cases of course require the evidence of four women.

ii) Evidence of an eye witness is preferable to hearsay evidence.

iii) Opininons of experts and the persons specially versed in some particular branch of science is admissible.

iv) Documents executed in presence of two witnesses, official and judicial records, and books of accounts maintained in the course of business may be accepted in evidence if they are proved.

v) Circumstantial evidence is admissible provided it is of a conclusive nature.

vi) Keeping separate, the witnesses should be examined and cross examined so that one cannot hear the statement of the other, after the deposition of witness has been recorded the *qadi* should read out the evidence to the witness and put his seal on it.

Oath:

On denial of the plaintiff's claim by the defendant if the plaintiff fails to advance evidence, he (plaintiff) may ask that the defendant be required to deny the claim under oath. An oath, according to one Hadith, must be taken only in the name of Allah. "The process of oath is accepted only in property and related cases but not in violation of poublic rights or rights of God in penal cases.[73]

x. Court-Fee and Stamp Duties

Justice under Islamic legal system is administered without cost and, therefore, there is no need of levying court fee or stamp duties. The underlying idea is that justice should not be sold. The cost of maintaining court and the judiciary should be paid from the state Treasury. In India during Muslim rule, however, it was found that the

73. Qadri, Supra note 18, at 506.

successful party was required to pay a portion (e. g. a fourth, tenth or fifth part) of the porerty recovered through the court.[74]

xi. Court Officials And *Wakils*

In Islamic judicial system there are different court assistants. Of them legal assistants were entrusted with the maintenance of order while the court was in session. There were also court clerks and interpreters. Supplementary judicial functions were given to officials called *A'wan*. Th *Katib* (writer) sitting near the *qadi* recorded the evidence and other statements of the parties. The *Muzzaki* was entrusted with the responsibility of investigating the character of *Shuhud* (witnesses). The *Qasim* supervised the division and apportioning of goods. *Amin al-Hukm* took into custody, for safe keeping, the assets of legally incompetent persons, orphans, absentees, etc. and the *Khazin Diwan al Hukm* was in charge of safe keeping the court archives.[75]

The institution of *Wakalah* (advocateship) has been gradually recognized by Islam. According to Imam Abu Hanifah, of course, a party to a case may *appoint* someone as his *Wakil* to fight his case against the other party obtaining the latter's consent thereto. "This opinion rests on the reason that the advocates are more eloquent in arguments and the other party may suffer from one-sided strong presentation. Now a days this fear is purged because both the parties to a case do engage well versed and experienced counsellors who extend their invaluable help not only to the litigants but to the court a well and to the society at large".[76]

According to the opinions of Abu Yusuf, Muhammad al-Shaybani, and al-Shafi, one may engage some one as his *Wakil* to contest his case in the court of justice without consent of the

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74. Wahed, Supra note 49 at 27.
75. Vide Qadri, Supra note 18, at 488.
76. Azad, Supra note 12 at 112.

opposite party. He can do so as of right and consent of his adversary is not required.[77]

Thus it is well settled that *Wakalah is* lawful and it was in practice in Islamic legal system. Bahiqi points out that the fourth Caliph (Hazrat Ali) used to appoint' Aqil as Vakil to conduct cases, and when he became very old, Abdullah bin Jafar Tayar was appointed in his place.[78] During Emperor Aurangzib's rule there was practice of *Wakalah* in *qadis'* courts."[79] Thus "the practice of professional lawyer was in vogue from remote time. This practice is no innovation in Islam."[80]

xii. Conclusion

Islam is a complete code of life. No aspect of human life falls outside its periphery. It has its own economic, social, political and legal systems. A survey of its justice administration system, as undertaken above, shows that it is mostly similar to the secular system of modern time, of course, with the basic differences between them, e. g. the concept of state sovereignty, nature and sources of laws applied in the respective systems. But the excellence of Islamic system lies in that it is based on *Taqwa* or fear of Allah. As every individual involved in the dispensation of justice fears Allah, he does not follow the lusts of his heart and sincerely tries to award justice. Here the following statement is very relevant-

"Islamic justice is something higher than the formal justice of Roman Law or any other Human Law. It is even more penetrative than the subtler justice in the speculations of the Greek Philosophers. It searches out the innermost motives, because we are to act as in the presence of Allah, to whom all things, acts and motives are known."[81]

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77. *Hedaya,* II, 178.
78. *Sharh-i-Vaqaya*, V. III chapter on Vakalata cited in Wahed, 130.
79. Ibn Sung, *op. cit*, 77.
80. Abdus Salam Nadvi, *Al-Quza fil Islam*, 19 cited in Wahed, Supra note 49, at 78.
81. The holy Quran, (Supra note 2).

This is the internal beauty of Islamic justice system while external beauty is its independent and impartial character. Such a system can meet the needs of all times. So, it may be adopted to fit in modern time developing or borrowing new methods and techniques of law, if necessary, which of course must commensurate with Shariah. For this what is most important is the preparedness of our mind to accept the judicial system and as a whole the life system prescribed by Islam.