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**THE DHAKA UNIVERSITY STUDIES**  
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## **LOCAL GOVERNMENT INSTITUTION AT THE THANA/UPAZILA LEVEL IN BANGLADESH**

**Dr. M. Ershadul Bari**

### **Introduction**

Local Government is almost a universal institution in the present day 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 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. As a tier, local government is at the bottom of a pyramid of governmental institutions with the national government at the top to which it is ultimately accountable and subordinate for exercising the powers of administration and taxation delegated to it by relevant laws. Thus the essential features of a local government are: (a) it is established by law; (b) it is generally an elective body composed of people's representative 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 substantial fund through taxation within its area; (e) it has the authority to prepare its budget; and (f) it is ultimately accountable and subordinate to the national government.

The original Constitution of Bangladesh, which was adopted on 4 November 1972 and given into effect on 16 December 1972, contained two Articles, 59 and 60, in Chapter III (entirely devoted to local government) of Part IV providing for the composition (to be consisted of elected persons) and powers of local government institutions to be established in Bangladesh by an Act of parliament. Apart from these two Articles, original Article 11 of the Constitution provided, as one of the Fundamental Principles of State Policies, 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." This integrated scheme of the original 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 through the omission of Articles 59 and 60 from it and dropping the sentence concerning local government as contained in Article 11. Although the First Martial Law Government (1975-1979) of Bangladesh did not restore these provisions to the Constitution, it (under the leadership of President and Chief Martial Law Administrator Ziaur Rahman) substituted the provisions of original Article 9 concerning nationalism for the provisions to the effect 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." Later the Constitution (Twelfth Amendment) Act, 1991, passed on 18 September 1991 during the Civilian Government of the Bangladesh Nationalist Party, restored the original provisions of Articles 59 and 60 relating to local government 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."

Thus the Constitution of Bangladesh contains detail and comprehensive provisions concerning local government. In pursuance of the Constitutional provisions, eight commissions / committees were formed upto November 1991 to examine and recommend restructuring of the existing local government institutions of Bangladesh.<sup>1</sup> The main object of this paper is to examine the provisions of various laws passed, specially in pursuance of the recommendations of these commissions / committees, providing for local government institution at the thana / upazila level in Bangladesh. Before doing that, an attempt will be made to trace the evolution of local government institution at the thana level during the British period (1765 – 1947) and Pakistani period (1947 – 1971).

#### **Evolution of Local Government Institution at the Thana Level during the British Period (1765-1947).**

The East India Company, which started as a trading concern in India in 1613 ultimately acquired administrative functions in 1765, when it obtained from the Mughal Emperor Shah Alam of Delhi (the then nominal

<sup>1</sup> Following the liberation of Bangladesh in 1971 and upto 1982 seven commissions/committees were formed to study restructuring of old administrative system of the country. Rahman, Md. Shafiqur, "Planning and Development of Upazilas in Bangladesh." (Dhaka, 1991)9. After 1982, another commission was established in November 1991 during the Civilian Government of the Bangladesh Nationalist Party.



ruler of India) a Charter, making the Company the Dewan<sup>2</sup> or Administrator of Revenue of Bengal, Bihar and Orissa<sup>3</sup>. By "the middle of the nineteenth century, the Company emerged as the undisputed ruler of India, while two-fifths of India's territory remained 'independent' under Native Rulers."<sup>4</sup> The Government of India Act, 1858, which was passed after the suppression of the 'Sepoy Mutiny', put an end to the East India Company's rule in India. With the introduction of this Act, Queen Victoria issued a Royal Proclamation on 1 November 1858 and by this Proclamation, the East India Company was dissolved and its Indian possessions came under the control of the Crown.

During the rule of the Crown, sixty-five committees were set up (from 1769 to 1946) to restructure the administration<sup>5</sup> and the local government system for the first time was introduced in the Indian subcontinent through the enactments / passing of various acts e.g. the (Bengal) Local Self-Government Act, 1885 (the Bengal Village) Local Self-Government Act, 1919 and the Local Self-Government Act, 1919<sup>6</sup>. Before discussing the system of local government institution as provided by these Acts, it may be pertinent to mention here that during the British period, the 'district,' divided into two or more 'sub-divisions', was the basic administrative unit. Each sub-division was composed of a number of 'police stations', locally called 'thana'. Below the thana, there were the 'unions' consisting of a number of villages.

It should be stressed here that an intermediate tier of local government at the thana level between local government institutions at the union level and the district level was not at all introduced during the British rule. For,

2 Dewani meant that the East India Company got the entire revenue and financial administration of Bengal, Bihar and Orissa.

3 Bose, Subhas Chandra, *The Indian Struggle 1920-42* (Calcutta) 11-12.

4 *Id.* at 282.

5 Mahtab, Nazmunnessa, "Administrative Decentralization and Rural Development in Bangladesh: A Review of Upazila Administration," XXXI *Indian Journal of Public Administration* (1985) 1300.

6 Of course, the Village Chowkidari Panchayet Act, 1870, was the first Act to introduce local body at the village level in Bengal. It empowered the District Magistrate to appoint a Panchayet consisting of five members (nominated by him) for several villages. The primary function of the Panchayet, was to appoint village watch-men called 'Chowkidars' for the maintenance of law and order. It could also assess and collect taxes from the villagers to pay the salaries of the Chowkidars. Thus the members of the Panchayet were not elected by the people and appointed mainly to serve the British interest and had little to do for the welfare of the village peoples.

the Bengal Local Self-Government Act of 1885, which was passed to give effect to the famous Resolution of Lord Ripon (a liberal Viceroy) the purpose of which was to give the people of Bengal an opportunity to participate in the administration of their own affairs and to provide for the establishment of local self-government on a sound basis, provided for a three-tier local government system: (a) a District Board in each district, (b) a Local Board at a sub-division level and (c) a Union Committee for a group of villages.<sup>7</sup> Thus under this Act, the intermediate tier of local government between a District Board and a Union Committee was Local Board at the sub-division level. The Village Self-Government Act, 1919, which retained three-tier local government system, modified the old structure. The Union Board was formed in place of existing Chowkidari Panchayets and Union Committees.<sup>8</sup> The other-two tiers were Local Board and District Board. Although the Report of the Bengal District Administration Committee (1913-14) headed by Edward V. Leving had recommended replacement of Local Boards at sub-divisional level with Circle Boards at the Thana level, the Village Self-Government Act, 1919 did not implement it. Ultimately the Local Boards were abolished in pursuance of representation by concerning District Boards under the Village Self-Government (Amendment) Act, 1937. During the British rule, it was considered that local self-government "should be completely under the eye and hand of the District authorities."<sup>9</sup> As Hugh Tinker opined:

"Indian local self-government was still in many ways a democratic facade to an autocratic structure. The actual conduct of business was carried on by district officials . . . No proper system of local government . . . had evolved."<sup>10</sup>

7 It is interesting to note that only men who were at least 21 years of age and paid chowkidari tax or cess tax or possessed educational qualifications had the right to vote in the local government election.

8 Siddiqui, Kamal, *Local Government in Bangladesh* (Dhaka, 1995) 38.

9 Government of Bengal, 1 Report of the Royal Commission Upon Decentralization in India (London, 1909) 303-4.

10 Tinker, Hugh, *The Foundation of Local Self-Government in India, Pakistan and Burma* (London, 1968) 70.



### **Evaluation of Local Government Institution at the Thana Level During the Pakistani Period (1947-1971).**

When the transfer of power took place in August 1947 under the provisions of the Indian Independence Act, 1947, and the subcontinent was partitioned by the British into two sovereign states of India and Pakistan, Bangladesh became a province, under the name of East Bengal (later known as East Pakistan), of the newly-established State of Pakistan. After independence, local government continued in Pakistan as a provincial subject and the system of local government – District Board and Union Board – established during the British rule was allowed to remain in force until 1959. In East Bengal, the system of nominating members to the Union Boards had been abolished in 1946 and nomination to District Boards was put to an end by the Ordinance No. 1 of 1956. Adult franchise was introduced in all local bodies in pursuance of a decision of the Cabinet in 1956.<sup>11</sup> Thus there was no government institution at the thana level in former East Pakistan upto 1959.

Although during the Pakistani rule, twenty-eight commission/committees were set-up to recommend restructuring of local government bodies,<sup>12</sup> their recommendations were either partially implemented or were not all given into effect. The Chief Martial Law Administrator and President of Pakistan Ayub Khan, who used to believe that the genius of the Pakistani people was not suited to the Westminster-type of representative government, promulgated in 1959 the Basic Democracies Order (BDO) which introduced a four-tier system of local government consisting of the Divisional Council, the District Council, the Thana Council and the Union council. Thus this Order, which was a central legislation having effect over the entire country in contrary to the provincial character of the local government enactments of the British period and the objective of which was "to organize the people to take care of the problems of their areas and to inculcate in them spirit of self-help",<sup>13</sup> provided for a local

11 Faizullah, Mohammad, Development of Local Government in Bangladesh (Dhaka, 1998) 13; Ministry of Establishment of the Government of the People's Republic of Bangladesh, A Hand Book for Upazila Training (Dhaka, 1985) 30.

12 Quoted in Karim, Md. Abdul, Upazila System in Bangladesh (Dhaka, 1991) 8.

13 Khan, Mohammad Ayub, Friends, Not Masters: A Political Autobiography (New York, 1967) 207.



government tier at the thana level as an intermediate tier, namely the Thana Council. The establishment of the local government tier of Thana Council for the first time was, therefore, a bye-product of the 1958 Martial Law Government of Pakistan.

The Thana Council was consisted of three categories of members, i.e., (a) representative members (Chairman of all Union Councils and Town Committees within the jurisdiction of the thana), (b) ex-officio official members (concerned Sub-Divisional officer, and Development Circle Officer) and (c) such other thana level officers representing Agriculture, Education, Health, Fisheries, Cooperative Department etc. to be nominated by the Deputy Commissioner. The total number of official members of a Thana Council—ex-officio and nominated – could not be more than the total number of representative members. The Sub-Divisional Officer was the ex-officio Chairman of the Council and the Circle Officer (Development) was its Vice-Chairman. Thus there was the predominance of official members in managing the affairs of the Thana Council and it was very much an extension of the administrative hierarchy than a forum of elected representatives of the people.

The main function of the Thana Council was to coordinate the activities of the Union Councils under its jurisdiction. The coordination between the Government officials and the peoples' representatives increased for planning and execution of various development projects. However, it is considered virtually an association of the Union Councils without any power to raise revenue and, as such, was of little benefit to the people.

The Thana Training and Development Centre, one of the four component parts of the Comilla Model of rural development (the other parts are Rural Works Programme, Thana Irrigation Programme, Two-Tier Co-operative System with farmers' Cooperative Society, and Thana Central Cooperative Association) developed by Dr. Akhtar Hameed Khan at the Academy for Rural Development in Comilla, was replicated in the Thana administration of former East Pakistan in the sixties. The plan for the Centre envisaged an especially constructed unit at the thana headquarters which housed the Thana Council and accommodated the various government functionaries. The model discarded the dichotomy between law and order and development administration. It sought to

blend traditional and development administration, emphasizing various components of rural development and coordination between thana level government officials and elected representatives. Thus it appears that the philosophy behind the Thana Training and Development Centre was to make the thana headquarters the nerve centres of development activities in the rural areas.<sup>14</sup>

#### **Local Government Institution at the Thana/Upazila Level in Bangladesh (1971-1996)**

The laws providing for the establishment of local government institution at the thana / upazila level in Bangladesh shall be examined under the heads of the Civilian Government of the Awami League, first Martial Law Government, second Martial Law Government, and the Civilian Government of the Bangladesh Nationalist Party.

#### **The Civilian Government of the Awami League (1971-1975)**

After the emergence of Bangladesh as an independent state on 16 December, 1971, the President promulgated on 20 January 1972 the Bangladesh Local Councils and Municipal Committees (Dissolution and Administration) Order, 1972<sup>15</sup> to dissolve all the existing local bodies inherited as the legacy of the Pakistani rule and to make interim arrangement in this regard. The preambular paragraphs of this order stated that "... immediate dissolution of the Local Councils and Municipal Committees in Bangladesh has become necessary because they do not represent the people and there has been persistent demand from the people for their dissolution. And ... it is necessary to make provision for the performance of functions of the Local Councils and Municipal Committees till such time as new Local Government Institutions are established under the law made by the Legislature of Bangladesh." The President's Order provided that all the Local Councils and Municipal Committees in Bangladesh would stand dissolved.<sup>16</sup> All the persons holding offices as Chairmen, Vice-Chairmen, Members, and Administrators of such Local Councils and Municipal Committees would cease to hold offices.<sup>17</sup> Although the Order made provision, *inter alia*, for

14 Supra note 12, at 8; supra note 8, at 240.

15 President's Order No. VII of 1972..

16 Art. 3(1) (a), the Bangladesh Local Councils and Municipal Committees (Dissolution and Administration) Order, 1972..

17 Art. 3(1) (b), id..



the appointment of a Committee for a Union Panchayat (new name of former Union Council) and a Committee for a Zilla Board (new name of previous District Council) "for the exercise of powers and performance of functions of dissolved Local Councils", no such committee was provided for Thana Council (and Divisional Council).<sup>18</sup> Therefore the Order provided that the assets and liabilities of a dissolved Thana Council would vest in the Zilla Board concerned and the employees of such Thana Council would be deemed to be the employees of such Zilla Board.<sup>19</sup> The Presidential Order – P.O. No. 7 of 1972 was amended by P.O. No. 17 of 1972. By this Order the defunct Thana Council was revived in the name and form of Thana Development Committee with considerably reduced powers and functions and it was further provided that "powers and functions of the Thana Development Committee" should be exercised and performed by the Circle Officer (Development). After about six months, P.O. No. 7 of 1972 was again amended by P.O. No. 110 of 1972. It provided for the appointment of an Administrator in place of the Committee for running the affairs of all the local bodies excepting the Union Panchayet. In the case of a Thana Development Committee, the Circle Officer (Development) became its Administrator.

It should be stressed here that the Administrative and Services Reorganization Committee (Chaudhury Committee) was appointed by the Government of Awami League in 1972. The Committee in its Report recommended for the constitution of autonomous elected bodies at Thana and District levels.<sup>20</sup> Although the 1972 Constitution of Bangladesh provides that Local Government shall be entrusted to bodies, composed of persons elected in accordance with law,<sup>21</sup> and a commitment was made in the preambular paragraph of the Bangladesh Local Councils and Municipal Committees (Dissolution and Administration) Order, 1972, that "new Local Government Institutions" would be "established under the law made by the Legislature of Bangladesh", no law whatsoever was enacted by the Awami League Government to give effect to these recommendations made, as mentioned above, by the Chaudhury Committee.

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18 Art. 4(1) (b), *id.*

19 Art. 5(1) (b), *id.*

20 *Supra* note 12, at 9. By the time the Report of Chaudhury Committee was finalized, the Awami League Government established one-party rule.

21 Art. 59(1), the Constitution of Bangladesh, 1972.



**Frist Martial Law Government (August 1975 – April 1979)**

During the first Martial Law regime, President Justice Abusadat Mohammad Sayem, who had replaced Khandaker Moshtaque Ahmed as President on 6 November 1975 and assumed for the first time the powers of Chief Martial Law Administrator on 8 November 1975 (despite his civilian status and also being at one-time Chief Justice of the Supreme Court of Bangladesh), promulgated an Ordinance in 1976 (Ordinance No. 32 of 1976) under which Thana Development Committee was upgraded and replaced as Thana Parishad which was to consist of representative members and official members under the Chairmanship of the Sub-Divisional Officer. Later, he issued on 22 November 1976 the Local Government Ordinance, 1976 "to provide for the constitution of local government institutions in rural areas and to consolidate and amend certain laws relating to local government in such areas." The Ordinance for the first time in independent Bangladesh provided for three-tier local parishads: (a) a Union Parishad for a union, (b) a Thana Parishad for a police station, and (c) a Zilla Parishad for a district.<sup>22</sup> The Thana Parishad was constituted with two categories of members, viz (a) ex-officio representative members (Chairmen of the Union Parishads in a Police Station), (b) ex-officio official members - the concerned Sub-Divisional Officer and the Circle Officer - and such other thana level officers as might be specified by the Government. The Sub-Divisional Officer was the Chairman of the Thana Parishad and the Circle Officer was its Vice-Chairman.<sup>23</sup>

Thus the local body at the thana level – the Thana Parishad - was not fully representative in character. Unlike the Union Parishad established under the Local Government Ordinance of 1976, which composed of elected chairman, nine elected members and only two nominated members, the Thana Parishad did not contain any directly elected peoples' representative except the elected Chairmen of the concerning Union Parishad who happened to be its ex-officio (representative) members. In fact, the composition of the Thana Parishad bore resemblance to that of the Thana Council that had been established under the Basic Democracies Order, 1959.

22 Art. 4, the Local Government Ordinance, 1976.

23 Art. 6, id.

However, the functions of the Thana Parishad were coordination of all development activities within the thana, implementation of such development projects in the thana as might be entrusted to it by the Government, preparation of thana development plan, providing assistance and encouragement to Union Parishads in their activities, promotion of family planning programme, making provisions for management of the environment and organizing training for UP functionaries.<sup>24</sup> The Government exercised general supervision and control over the Thana Parishads in order to ensure that their activities conform to the purposes of the Local Government Ordinance, 1976.<sup>25</sup> Furthermore, the Deputy Commissioner was given the power to control the activities of the Thana Parishad<sup>26</sup> and was authorized to give direction to take necessary action for carrying out the purposes of the Ordinance<sup>27</sup>. Thus there was the mechanism of 'controlling authority' and "prescribed authority" for the Thana Parishad. The Parishad enjoyed no revenue raising powers and its funds consisted only of government grants. All executive powers were exercised by the SDO as ex-officio Chairman of the Parishad. Thus the Thana Parishad was not aimed at to be truly self-governing. It functioned till November 1982.

Later in May 1978, a tier parallel to the Thana Parishad was created under a Notification issued by the Ministry of Local Government, Rural Development and Co-operative. The newly created tier was called the Thana Development Committee (TDC) which was given the responsibility of development activities. The Chairmen of Union Parishads within a thana were the ex-officio representative members of the Committee. It was given the authority to co-opt three to eight leading non-officials as its members, but the number of co-opted members could not exceed the number of Union Parishad Chairmen within the thana. The Committee was to elect its Chairman, a Secretary and a Treasurer from amongst its ex-officio representative members biannually. Ultimately the Thana Development Committees were dissolved in November 1982.<sup>28</sup>

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24 Second Schedule, id.

25 Art. 68, id.

26 Art. 69, id.

27 Art. 70, id.

28 Supra note 8, at 64.



**Second Martial Law Government (March 1982 – November 1986)**

The Martial Law Government of Hussain Muhammad Ershad constituted a high powered ten-member Committee for Administrative Reorganization / Reform with Rear Admiral M.A. Khan (the Deputy Chief Martial Law Administrator and Minister in charge of Communications) as its Chairman. Within two months of its constitution, in June 1982, the Committee submitted its Report. The recommendation made in the Report was accepted by the Government in principle and a 'Resolution' on the 'Reorganization of the Administration at the Thana Level' was adopted by the Cabinet in its meeting held on 23 October 1982. In order to give effect to the Cabinet Resolution, the Chief Martial Law Administrator H.M. Ershad promulgated on 23 December 1982 the Local Government (Thana Parishad and Thana Administration Reorganization) Ordinance, 1982. Although the old thanas were redesignated as 'Upgraded Thanas',<sup>29</sup> later on 17 July, 1983 by an amendment the Upgraded Thanas were renamed as Upa-zilla and, as such, the Ordinance was renamed as 'The Local Government (Upa-zilla Parishad and Upa-zilla Administration Reorganization) Ordinance, 1982. Later in 1983, the word 'Upazila' was substituted (by Ordinance No. LXIII of 1983) for the word 'Upa-zilla'. However, the upgradation of thanas into four hundred sixty Upazilas, which had been started on 7 November 1982, "was completed in ten phases by February 1984".<sup>30</sup> (The elections to the Upazila Chairmanship was held on 16 and 20 May 1985). Thus the 'Upazila' replaced the institution of 'Thana' which had been introduced by Warren Hastings on 9 April 1774.<sup>31</sup> Though Upazila, which literally means sub-district, generally corresponds to a thana in terms of boundary, in some places two thanas had been brought under one Upazila.

The Upazila emerged as a focal point of administration under the newly decentralized programme of the government. Its main objective, as it was claimed by the then Cabinet Secretary, "to take the administration nearer to the people and to facilitate their effective participation in administration

29 'Upgraded Thana' meant that not only more power, authority and function were devolved upon the functionaries of the central government and the local government at the thana level but also more offices were created, the status of officers were elevated, development of physical facilities at the thana level were increased and more funds were channelized to the thana directly.

30 Supra note 12, at 32.

31 Haider, Yusuf, Development – The Upazila Way (Dhaka, 1986)1.



and development."<sup>32</sup> In a similar vein, the Chief Martial Law Administrator H.M. Ershad in his address to the nation stated that "the government wanted to transform every Thana (Upazila) of the country into a self-reliant unit where people's representatives would oversee and direct developmental activities performed by the civil servants who would be responsible to the former for their actions."<sup>33</sup> The Upazila system was aimed at bringing rural development into sharp focus of the national plan" and to ensure that local development programmes can "originate at grass-roots level to reflect peoples' needs and aspiration."<sup>34</sup> But Justice Latifur Rahman of the Appellate Division of the Supreme Court of Bangladesh held in the case of *Kudrate-e-Elahi Panir Vs. Bangladesh*<sup>35</sup> that "464 Upazilas were created, and to my mind it appears that the scheme of creation of Upazilas was more a matter of strengthening and mobilizing the strength of the Martial Law Administrator"<sup>36</sup> who indeed himself later involved in active politics.

The Upazila Parishad was composed of : (a) Chairman (directly elected), (b) ex-officio representative members (all chairmen of the Union Parishads and of the Paurashavas within the Upazila), (c) three women members (nominated by the Government from among the women residing in the Upazila), (d) ex-officio official members (as designated by the Government from among the officials in the upazila who would have no voting right), (e) Chairman of the Upazila Central Cooperative Association and (f) one nominated member (a person resident in a Upazila and eligible for election as Chairman of the Parishad to be nominated by the Government).<sup>37</sup>

Thus for the first time the office of the Chairman of the local government body at the thana (upgraded into Upazila) level was made an elective one (first election was held in 1985 and the second election in 1990). The ex-

32 Zaman, M.M., Statement made before the Special Meeting of the Local Consultation Group of Donars held on 24 November, 1983, Cabinet Division, GPRB, (Dhaka 1983)1.

33 Supra note, at 13.

34 Government of the People's Republic of Bangladesh, The Third Five Year Plan, 1985-90 (Dhaka) 124, 137

35 44 DLR (AD) (1972) 319.

36 Id., at 349.

37 Art. 4, the Local Government (Upazila Parishad and Upazila Administration Reorganization) Ordinance, 1982.

officio representative members of the Upazila Parishad, the Chairmen of the Union Parishads – were also directly elected by the people of the Unions within the Upazila. Although the participation of the people's representatives to such an extent in a local government body was unknown both before and after independence of Bangladesh, the Upazila Parishad was not entirely an elected body as it also contained official and nominated members. Despite the fact that the Chairman was the Chief executive of the Upazila Parishad and responsible for the conduct of the day to day administration of the Parishad and had the authority over resource allocation and resource use, he was virtually placed at the mercy of the representative members and sometimes was compelled to pursue the policy of appeasement. For the Chairman was liable to be removed on specific grounds by a resolution passed by the votes of not less than four-fifths of the total numbers of representative members of the Upazila Parishad.<sup>38</sup> The reality sometimes compelled the Chairman to surrender to the majority wish of the representative members of the Upazila Parishad to deviate from the strict compliance with the rules of business of the Parishad particularly regarding resource allocation over which he (the Chairman) had the authority.

On 23 November 1983, the Government by a resolution, divided government functions at Upazila level with 'retained' subjects and 'transferred' subjects. 'Retained' subjects were those functions of government (e.g., civil and criminal judiciary, maintenance of law and order, administration and management of central revenue like income tax, customs and excise land revenue, land tax) which were mostly regulatory in nature. All other subjects (i.e., agriculture extension, livestock, fishery, health and family planning, public health (rural water supply and sanitation), primary education, cooperative (registration and extension) social welfare, disaster relief and rural works programme)<sup>39</sup> were transferred to Upazila Parishad listed as "transferred subject". In order to ensure effectiveness of the Upazila Parishad as the coordinating body for all activities at Upazila level, the officers dealing with 'retained' subjects except the Assistant Judge (called prior to 1987 as Munsiff) and the Magistrate were made 'answerable' to the Parishad. The officers and staff dealing with transferred subjects, who had formally been deputed to

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38 Art. 13, id.

39 Art. 24 and Second Schedule, id.



Upazila Parishad with effect from 1 June, 1985, were placed at the disposal of, and made responsible to, the Parishad for the whole range of their activities including their conduct. These mechanism of 'answerability and accountability' ensured institutional supremacy of the Upazila Parishad. Unlike the Thana Parishad under the Local Government Ordinance of 1976, the Upazila Parishad was freed from the supervision and direction of 'prescribed authority' (i.e., the Deputy Commissioner) and 'controlling authority' (i.e., Government). The Parishad was competent to sanction its budget and was not required to obtain approval from any authority, only a copy need to be forwarded to the Government (Ministry of Local Government, Rural Development and Cooperatives, Local Government Division) and the Deputy Commissioner.<sup>40</sup> Only the development plans of the Upazila Parishad required the sanction of the Government in respect of financing, execution and implementation.<sup>41</sup> A Parishad, with the general or special sanction of the Government, was given the authority to levy in the prescribed manner, various taxes, rates, tolls and fees. It is claimed that the Upazila Parishads largely failed to generate its own income from authorized sources and, as such, most of the Parishads depended mainly on Government grants. In 1986-87 an Upazila Parishad, on an average received Tk. 3.5 million as cash grant and Tk. 4.5 million worth of wheat. Of the total Upazila Parishad receipts, only 5% was derived from its own income from leased property, tolls, fees, taxes etc.<sup>42</sup> Some of the Upazila Chairmen showed reluctance in taxing the people, especially the elites for the fear of losing popularity and risking the victory in the next election. Although the few Upazilas, which endeavored to raise funds from local sources found the existing tax base narrow. For taxes on profession, trades callings, street lighting, and fees for licenses, permits etc. were unlikely to yield substantial revenue. The majority of the Upazila Parishads did not even have considerable jalmahals, hats and bazars to raise revenue from these sources. The lack of experience in tax administration further aggravated the situation i.e. revenue collection. In this regard, the observations made by Chief Justice Shahabuddin Ahmed in Kudrat-e-Elahi's case are worthy of note:

Upazila Parishad "built up in haste in 1982 was given so much power, function and position that the totally inexperienced elected Chairman, even if he had all the

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40 Art. 36, id.

41 Art. 40, id.

42 Supra note 8, at 73.

honesty and sincerity, could not cope with the tremendous responsibility thrust upon him overnight. Again, as the local government at Thana was inextricably mixed up with the central government affairs, run entirely by the Government's officers with governments money, it is in fact a hybrid of the two government entities.<sup>43</sup>

### **The Civilian Government of the Bangladesh Nationalist Party (1991-1996)**

On 23 November 1991, the democratically elected Government of the Bangladesh Nationalist Party abolished the Upazila Parishad by promulgating the Local Government (Upazila Parishad and Upazila Administration Reorganization) (Repeal) Ordinance, 1991 (Ordinance No. 37 of 1991). When the Constitutional validity of the Ordinance was ultimately challenged before the Appellate Division of the Supreme Court of Bangladesh in 1992, the reasons were given for the abolition of Upazila Parishad in affidavit-in-opposition of the respondents (Bangladesh, through the Secretary, Ministry of Local Government, Rural Development and Co-operative, (Local Government Division), Government of Bangladesh, Dhaka and another) submitted before the Court. It was stated that "the Upazila system itself was liable for drainage of Government money in unproductive activities which negated the welfare of the people and the Upazila Parishads were not economically viable as they were more dependent on Government allocation rather than earning revenue from their own sources."<sup>44</sup> The then Chief Justice of Bangladesh, Justice Shahabuddin Ahmed, in like manner gave his overall evaluation about the Upazila Parishad in that case (i.e. Kudrat-e-Elahi Panir's case). He said that "... conceived in suspicion, born in stiff opposition and working through chaos and confusion, it was bound to end in disaster as many people had apprehended."<sup>45</sup> But at the same time he expressed his optimism concerning the matter : "Anyway had this system of local government been worked out over a considerable period on the principle of 'gradual development of self-governing institutions with a view to progressive realization of responsible government, then probably it would have been successful."<sup>46</sup>

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43 Supra note 35, at 330.

44 Id., at 337.

45 Id., at 330.

46 Id.



After dissolution of Upazila Parishads, the Government constituted in November 1991 a high powered 'Local Government Structure Review Commission' (consisting of fourteen members including MPs, academics and senior civil servants) headed by the then Information Minister to review and study the local government of Bangladesh and recommend a suitable, effective, responsible and accountable local government structure for Bangladesh. The Committee ultimately submitted its Report on 30 July 1992 which was approved by the Government. The Commission, in its Report, recommended a two-tier system of local government for Bangladesh comprising Zila Parishad at the district and Union Parishad at the union levels and one coordinating body at the thana level: a Thana Development and Coordination Committee.

The Thana Development and Coordination Committee in each of the thanas (numbering 460) was intended to act as the coordinating units for development activities, between the Union and Zila Parishads and the national government agencies, they would be formed by all the Union Parishad Chairmen of a Thana, members appointed by the Government, the concerned Thana level officers, Thana Nirbahi Officer (TNO, a civil servant in charge of the Thana administration) acting as Member-Secretary and the local MP acting as Advisor. They would be chaired by a Union Parishad Chairman elected anew for each meeting.<sup>47</sup>

Later on 26 September 1993, the Cabinet Division issued an Order which provided for the establishment of the Thana Development Committees. By the end of 1993, the Committees were formed and started functioning<sup>48</sup> with thirty-one members – sixteen central government officers, six non-members and fifteen Union Parishad Chairmen.

The main defect of the Thana Development Committee is its rotating chairmanship which deprives him of the sense of commitment, continuity, permanency and authority. The Committee has failed to establish itself as an effective authority for it does not actually manage resources at the thana level and has no independent means of information and monitoring. Thus it assumes a consultative status and serves as a sounding-board for the central government administrators and the representatives of the Government implementing agencies.

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47 Barenstein, Jorge, *Overcoming Fuzz Governance in Bangladesh* (Dhaka, 1994) 114.

48 *Id.*, at 115.

### Conclusion

The foregoing discussion reveals that local government consisting of elected members is a tier at the bottom of a pyramid of governmental institutions which is aimed at to ensure local-level participation in the formulation, planning and implementation of development programmes and delivering prompt basic civil services to the people of the locality. It is also an integral part of the 1972 Constitution of Bangladesh. The Constitution provides that local government is to be constituted in an administrative unit and is to be composed of elected persons. The provisions of the Constitution concerning local government which had been omitted by the Constitution (Fourth Amendment) Act, 1975 were restored in 1991 by the Constitution Twelfth Amendment) Act. One hundred and one (sixty-five during the British rule, twenty-eight during the Pakistani rule and eight after independence) committees / commissions were set up both before and after independence of Bangladesh to recommend a suitable local government structure but seldom their recommendations have been implemented or given due consideration. Local government institution at the thana / upazila level composed of directly elected members has never been established. Although the local government system for the first time was introduced in the subcontinent during the rule of the British Crown, no middle tier of local government at the thana level between local government institutions at the union level and the district level was at all established. Local Government institution at the thana level, called Thana Council, for the first time was introduced in Pakistan by the Martial Law Government of Ayub Khan through the promulgation of the Basic Democracies Order in 1959. The Thana Council, as a tier of local government, was thus a by-product of the Martial Law regime. No provision was whatsoever made to include in the Council any member directly elected by the people. After the independence of Bangladesh, this Council was abolished by the civilian Government of the Awami League (1971-75) on 20 January 1972. Later the defunct Thana Council was revived by the Government in the name of Thana Development Committee with considerably reduced powers and functions and Circle Officer (Development) was placed in charge of the Committee. Later the first Martial Law Administration (1975-1979) promulgated an Ordinance in 1976 (Ordinance no. 32 of 1976)



under which Thana Development Committee was upgraded and replaced as Thana Parishad. The Local Government Ordinance, 1976, issued on 22 November 1976 by the Martial Law Government of A.M. Sayem, for the first time in independent Bangladesh provided for three-tier local parishads and Thana Parishad was one of these three tiers. Following the example of the Basic Democracies Order, 1959, the Ordinance did not provide for the inclusion of any directly elected peoples' representatives in the Thana Parishad. The Second Martial Law Government of Hussain Muhammad Ershad (1982-1986) issued in 1982 an Ordinance under which existing thanas were upgraded into four hundred sixty Upazilas and Upazila Parishads for the Upazilas were constituted. For the first time the office of the chairman of the local government body at the thana (upgraded into Upazilas) level was made an elective one although no members of the Upazila Parishad was to be directly elected by the people.

Therefore, it is noticeable that it were the three Martial Law regimes not the civilian administrations, which took legal steps for the establishment of local government institutions both before and after the independence of Bangladesh. This reality prompted Justice Mustafa Kamal of the Appellate Division of the Supreme Court of Bangladesh to observe in the Kudrat-e-Elahi's case that "various autocratic regimes at various times vigorously persisted with the idea of an unrepresentative national government at the Centre but waxed eloquent on grassroot – level democracy solely for the purpose of building up a power base."<sup>49</sup>

On 23 November 1991, the Government of the Bangladesh Nationalist Party abolished the Upazila Parishad by promulgating the Local Government (Upazila Parishad and Upazila Administration Reorganization) (Repeal) Ordinance, 1991. Almost simultaneously it set up a high powered Local Government Structure Review Commission in the same month to recommend appropriate local government institutions for Bangladesh. Commenting on the repeal of Upazila system and the formation of the Commission, Justice A.T.M. Afzal in the Kudrat-e-Elahi's case said, "it may be said that by enacting the Repealing Ordinance / Act, the Government has taken one step backward only to take a more worthy

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49 Supra note 35, at 343.

steps (as professed) forward in the matter of Local Government. As far as the policy behind such move is concerned, it cannot be disputed that the same cannot be a matter for the court to enter into. The system of Local Government as such has not been done away with for good but a review has been undertaken to evolve a better system dismantling a tier at the thana level.<sup>50</sup> However, the Commission recommended a two-tier system of local government – Zilla Parishad at the district and Union Parishad at the union levels – and one coordinating body at the thana level : a Thana Development and Coordination Committee. In 1993, the Thana Development Committee was established which did not consist of any member directly elected by the people although chaired by a Union Parishad Chairman elected anew for each meeting.

It is to be noticed that successive governments felt the necessity to abolish the existing local government institutions and start afresh, perhaps to create political base in accordance with its own choice and preference. This has adversely affected the uninterrupted, unhampered and smooth development of the local government institutions in a positive direction in Bangladesh. The noble words of Winston Churchill have not been reflected in the laws enacted by the various Governments of Bangladesh concerning local government. "To change is to improve, to change often is to improve often, to change continuously is human endeavour for perfection." The local government institution at the Thana / Upazila level consisting of people's representative in line with the spirit and provisions of the 1972 Constitution of Bangladesh should be established so that it becomes a worthy and permanent vehicle of progress and prosperity for the people it will serve.

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50 Id., at 339.



## **LIMITING CHILD LABOUR : THE IMPACT OF PROTECTIVE LEGISLATION IN BANGLADESH**

**Dr. Sumaiya Khair**

### **Introduction**

The problem of child labour has been tackled mainly through protective legislation at both the national and international levels. Among the various international policies on child labour, the most extensive standards on the topic are those adopted by the International Labour Organisation (ILO) which has been advocating against the practice of child labour since its inception in 1919. In this regard the ILO's most significant policy is the Minimum Age Convention of 1973 which encourages member states to prohibit child employment by establishing a minimum age at which children's labour is allowed. Although Bangladesh has not ratified the aforesaid Convention, it has provisions within its domestic legislation which prohibit the employment of children in factories below a certain age. The growth of industries during the last quarter of the 19th century encouraged the colonial rulers in the Indian sub-continent to enact, as early as 1881, a Factories Act which prohibited the employment of children below a recommended age in any factory<sup>1</sup>. Since then the Act has been amended or re-enacted on several occasions. The most recent of these statutes is the Factories Act 1965. The provisions of this Act regarding the admission of children into factory work are, in essence, reflective of the ILO standards on the subject.

Hence, existing legal provisions (both at the national and international levels) on the question of child labour are essentially restrictive in their approach. The present paper, however, argues that legislation prohibiting child labour is unenforceable in the majority of cases. Apart from this, its prohibition presents a paradox that makes it hard to actually protect child workers from exploitation. By making the practice of child labour illegal, the vulnerability of children is heightened through their preclusion from whatever defences and legal rights adult workers may have (for instance, right to organise, right to minimum wages and so forth). The paper

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1 Halim, Abdul 1993 : *Social Welfare Legislation in Bangladesh*, Oihik, Dhaka, at p. 55.

therefore suggests that law should acknowledge children as capable workers and grant them rights in order for them to gain recognition and to 'voice' their needs.

While not denying that a child needs to be protected from 'economic exploitation' (Article 32, Convention on the Rights of the Child 1989), the paper cautions against importing universal standards in defining the needs of children without first taking into account existing socio-cultural norms of the society. The study draws its observations from an empirical analysis of the situation of waged female child workers in Bangladesh's garment export industry after the introduction by Senator Tom Harkin of an American legislation, the Child Labour Deterrence Act 1993, also known as the Harkin Bill<sup>2</sup>. This Bill actively seeks the elimination of child labour from export industries in developing nations under threat of trade sanctions.

The paper argues that legislation like the proposed Harkin Bill for the 'liberation' of children from factory work may actually add to their miseries on account of dominant socio-economic and cultural factors in Bangladesh. The Bill, therefore, actually manifests itself 'in the form of false generosity' towards child workers<sup>3</sup>. Moreover, the mixing-up of human rights and trade policies may undermine the real issue in question : the interests of child workers. Ironically, the Harkin Bill has had far more impact in Bangladesh than any international legislation on the issue of child labour in the garment industry. This is because, unlike international law, the U.S. boycott carried the threat of trade sanctions in the real sense against Bangladesh.

However, while the core argument here is not against the enforcement of international labour and human rights standards for the protection of children, it does argue against homogenising children as a 'target as well as a metaphor of oppression'<sup>4</sup>. The paper opposes the complete

2. See Khair, Sumaiya 1995 : *Changing Responses to Child Labour : The Case of Female Children in the Bangladesh Garment Industry*. Unpublished Ph. D. Thesis, University of East London, Essex.
3. Freire, Paulo 1986(reprinted) : *Pedagogy of the Oppressed*, Penguin Books, England, at p. 21.
4. Nandy, Ashish 1984-5 : 'Reconstructing Childhood. A Critique of the Ideology of Adulthood', *Alternatives. A Journal of World Policy*, Vol. 10, part 3, Winter, pp. 359-75, at p. 368.



prohibition of children's employment without taking relevant cultural contexts into consideration. Moreover, it is difficult to develop universal standards where 'oppression' or 'exploitation' may take culturally different forms. This is particularly true in the gender-biased society of Bangladesh where the girl child is bound by traditional cultural prescriptions that are reflective of two major principles : The segregation of the sexes and the dependence of women on men. These two factors essentially proceed from the dominant traditional and socio-cultural norms that revere men and their inherent authority and relegate women to an inferior and subordinate position. It follows therefore that the problems faced by girl children during their lifetime tend to be quite different from those faced by their male counterparts. Consequently, remedies to such problems tend to be different as well. It is argued in this regard that in order to ascertain their needs and demands, it is important to listen to the 'voices' of those children whom restrictive legislation seeks to 'protect'.

### Limits of the Concept of Protection

Al though children constitute a large category of human beings, they are among the most powerless. The perceived needs of children for protection is based on their physical and mental immaturity<sup>5</sup>. Socio-cultural realities culminate in attempts to identify children's needs or what is considered best for them. Children's needs are usually determined at the behest of adults and social policy. For instance, as Reder et al. state :

Traditionally, a child is considered to carry the hopes and aspirations of the parents . . . [T]he vicissitudes of family life always colour the picture and many factors can influence the meaning that parents attribute to children generally . . . As a result of these influences. . . the child acquires an undeclared 'script' or 'blueprint' for his/her life that is consistent with the themes of the family but may submerge his/her personal characteristics. This has been described . . . as 'being an actor in someone else's play'.<sup>6</sup>

Therefore, children often have no 'voice' to express their own needs. Although their needs are assumed to be obvious, for example, food, clothing and education, children will contrive upon occasion to identify

5. Ennew, Judith and Milne, Brian 1989 : *The Next Generation. Lives of Third World Children*, Zed Books Ltd., London, at pp. 12-13.

6. Reder, Peter, Duncan, Sylvia and Gray, Moira 1993 : *Beyond Blame. Child Abuse Tragedies Revisited*, Routledge, London et al., at p. 52

and establish their needs as perceived by themselves. Woodhead surmises :

If needs can be identified with children's nature, with universal qualities of their biological and psychological make-up, then the evidence of scientific enquiry can provide the basis of social and educational policy and practice. But, if on the other hand, needs have to be seen as cultural construction, superimposed on children 'in their best interests' as future adult members of society, personal values and cultural ideologies have a much bigger part to play and the politician's practitioner's authority is substantially diminished.<sup>7</sup>

The question of protection requires special attention in the context of children of less developed countries where poverty intensifies the powerlessness of children. Children are particularly vulnerable to the effects of poverty where food, clothing and shelter are crucial to their survival. Poverty also has serious consequences upon children's educational and intellectual development. Ennew and Milne suggest that every modern society makes some kind of legal provision for children simply because they are the next generation<sup>8</sup>. The form this takes depends partly on the resources available but mainly on ideas about how society should function. The authors observe that most modern governments base their policies on children less on the needs of the children and more on what the future society of adults should be. They argue that legislation for children does not always account for all the needs they may have or all the situations in which they find themselves.

In the same vein, policies on child labour are oriented towards what children will become in the future rather than what they are or what they do in their daily existence. The problem of child labour confronts us with the need to reassess and analyse existing assumptions which are motivated by moral outrage and panic against the apparent exploitation of working children. These moral attitudes tend to both cloud the analysis and lead to recommendations for action which are often unrealistic, unenforceable and / or counterproductive<sup>9</sup>.

7. Woodhead, Martin 1990 : 'Psychology and the Cultural Construction of Children's Needs' in James, Allison and Prout, Alan (eds.) : *Constructing and Reconstructing Childhood. Contemporary Issues in the Sociological Study of Childhood*, The Falmer Press, London et al., pp. 60-77, at p. 64.

8. Ennew and Milne op. cit., 23.

9. Goddard, Victoria and White, Benjamin 1982 : 'Child Workers and Capitalist Development : An Introductory Note and Bibliography', *Development and Change*, Vol. 13. pp. 465-77, at p. 466.



The irony of legislation prohibiting child labour is that it does not prevent children from working. When adults fail to earn enough money and family resources are inadequate, children drop out of school and work at home, or outside, in conditions that are more dangerous and exploitative than the industries from which they are formally excluded. Ennew and Milne comment :

Once minimum-age legislation is in force, unless it is backed by adequate family allowances for unemployed parents, the result is a group of unprotected children. They are forced to go out to work in company with others who are excluded from protected legal employment : the old, the sick, women and illegal migrants<sup>10</sup>.

While the problem of child labour is indeed a global one, not particular to any country or culture<sup>11</sup>, it is probably right to regard it as an ordinary part of the life of the poor. The institution cannot be isolated from the complexities prevalent in any given society. As Vittachi observes: 'child labour shows up, in exaggerated form, a labour problem deeply woven into the fabric of an unequal society'<sup>12</sup>. White concludes :

The issue of child labour (like many other issues involving the world's children) is a highly emotive one, and the emotions aroused tend to be coupled with very strong views both on what is the 'child labour problem', and on what ought to be done about it. There is nothing wrong with emotions and strong views as such . . . however, emotions and strong views should not be allowed to get in the way of a calm and open-minded analysis of the problem.<sup>13</sup>

Thus, it is not the assumed inequity of child labour itself but the fact that children are more effectively subordinated than adults, and are probably in greater need, and as such are likely to be subjected to greater forms of control and exploitation that should be the core argument in the debate over child labour. Furthermore, it should borne in mind that in Bangladesh the girl child is susceptible to various forms of inequity due to existing gender disparity. Consequently, the girl child is relegated to an inferior and exploited position in almost every aspect of her life.

10. Ennew and Milne op. cit., 76

11. Lee-Wright, Peter 1990 : *Child Slaves*, Earthscan Publications, London, at p. 264.

12. Vittachi, A. 1989. *Stolen Childhood : In Search of the Rights of the Child*, Polity Press in association with North-South Productions and Channel Four, Cambridge, at p. 89.

13. White, Ben 1994 : *Children, Wok and 'Child Labour' : Changing Responss to the Employment of Children*, Inaugural address delivered on June 16 at the Institute of Social Studies, The Hague, at p. 3.

### **Who Defines the Best Interests of the Child?**

The basic questions that arise with regard to the enactment of protective legislation for children and child labour are : what are the best interests of the child and whose responsibility is it to decide what is best for the child? Although there may be basic distinctions between legal systems, the paramount responsibility of making sure that everything that happens to a child happens in its best interests, devolves on adults.

A question arises as to whether restricting children from remunerative work in factories is necessarily in their best interests, particularly when, in the circumstances, the very survival of these children and their families is threatened. The most recent occurrence with regard to restrictive legislation in this respect is the proposed imposition of sanctions, by the U. S. government, on the import of products made with child labour from some developing nations. The Harkin Bill actively seeks to tighten and enforce prohibition on child labour in developing countries like Bangladesh although the United States itself has ratified neither the ILO Convention No. 138, Recommendation No. 146 of 1973 relating to the minimum age of employment for children, nor the 1989 Convention on the Rights of the Child which seeks to protect children from economic exploitation (Article 32).

Keeping the Harkin Bill as a model, the present section seeks to demonstrate how concern for children's welfare in developing countries is distorted by the imposition of politically motivated interests of other countries. Under the circumstances, the best interests of the child are compromised when measures are taken to steal a child of her/his livelihood with promises of a better life, a life that never materialises. Moreover, it is argued that threats such as those generated by the Harkin Bill only succeed in encouraging exporting countries like Bangladesh to conceal the employment of children altogether. The result is the extension of the plight of working children. As a non-existent category of workers, children are either denied their dues completely, or, if thrown out of their work, seek employment in more exploitative areas on the streets, which are not covered by any law. If the law deprives children of their wages by obstructing their access into the factory, the loss of their income will have to be compensated in other ways. In such a case,



children will probably be in a worse condition, or at least no better off than before.

The Harkin Bill had considerable impact within the Asian nations which came under the American trade ban. The effect was especially noticeable in the carpet and garment industries -- two of the major exporters to the United States. The introduction of the Bill was met with frenzied reaction in the Bangladeshi garment industry. The reason behind this was simple -- the garment industry in Bangladesh employed a large number of underage children. Estimates of the number of child workers in garment factories across the country varied -- the Bangladesh Garment Manufacturers and Exporters Association (henceforth referred to as BGMEA) claimed that child labour constituted 3-4 per cent of the total labour force; the Bangladesh Institute of Development Studies estimated it to be around 13.2 per cent while the newspapers hazarded a wild guess bordering on 10 per cent of the total workforce.

Some factory owners responded to the U.S. pressure by sacking child workers virtually overnight. In order to escape potential retribution, employers began drastic retrenchment measures. From the businessman's point of view, the reaction was only to be expected. The garment industry is the largest formal industrial sector in the country in terms of earning foreign exchange. Moreover, this sector is heavily dependent on the U.S. market. According to the BGMEA, Bangladesh holds the 5th position in garments exports to the U.S. In 1991-92, the garment industry earned about Taka 4075 crore (equivalent to U. S. \$ 101 crore 87 lakh and 50 thousand at the approximate rate of Taka 40 per dollar), of which 52 per cent came from the U.S. Fearing heavy losses as a result of trade sanctions, the entrepreneurs were galvanised into rapidly dismissing scores of children from the garment factories. This has been a source of deep concern for the child workers of the garment industry and their families.

### **The Rhetoric and the Reality**

Although the Harkin Bill has received support from many sectors in Bangladesh including some trade unions and NGOs, it has also sparked off heated debates among different sections of the community with regard to the welfare of the children directly affected by the legislation. While it is true that the Harkin Bill, by raising a long-neglected issue,

finally forced people to pay attention to child labour, it appears to have failed to take into account the social reality of developing nations like Bangladesh. One of Senator Harkin's main concerns is 'about breaking the cycle of poverty by getting these kids out of factories and into schools' (Harkin, in his introduction of the Child Labour Deterrence Act 1993). The Harkin Bill, in Section 2(A). Subsection 7, states that the employment of children under the age of 15, commonly deprives children of the opportunity for basic education.

On the contrary, in developing nations like Bangladesh where the need determines the actions, it is not a matter of a choice between education and work for the poor and the underprivileged. In other words, it does not necessarily follow that the children who are thrown out of their jobs will go to school. 99.8 per cent of the child workers (out of 507 children) interviewed in my study dismissed the possibility of availing school in the event of the termination of their factory jobs<sup>14</sup>. Although primary education is supposed to be free in Bangladesh, in reality the situation is quite different. The sale of school text books, officially supplied for free by the government, by the concerned school authorities to the students for a price is commonplace. Moreover, the level of disparity between male and female education in the country is indicative of the difficulty in achieving education for all children. Although education is essential to equip one with cognitive and social skills, it continues to elude the female population of the country.

In Bangladesh, against a national literacy average of 23.8 per cent, male literates number 31.0 per cent and females trail far behind with a literacy rate of 16.0 per cent<sup>15</sup>. This literacy percentage has been calculated on the basis of population aged five and above. A UNICEF update on these figures reveals a slight rise in the literacy levels of males and females in 1990 : 47.0 per cent and 22.0 per cent respectively.

Research on school enrolment in Bangladesh reveals that not only do few children of both sexes attend school but a good proportion of those who do attend eventually drop out. It has been reported that in 1991 the enrolment of children between 6-10 years into primary school stood at

14. See Khair, Sumaiya 1995 : *Changing Responses to Child Labour : The Case of Female Children in the Bangladesh Garment Industry*. Unpublished Ph. D. Thesis, University of East London, Essex.

15. Bangladesh Population Census 1981 in the Bangladesh Bureau of Statistics 1992.



75.6 per cent out of 17.020 million children<sup>16</sup>. Out of 17.020 children the enrolment rate for boys and girls in the same year was 55.0 per cent and 45.0 per cent respectively. The major concern, however, is the high rate of dropouts. In 1991 and 1995 the dropout rates for both boys and girls were 59.7 per cent and 47.8 per cent respectively.

Drop-out rates are higher among females than males<sup>17</sup>. The majority of the girls who enrol in primary school leave school after a brief stay. In 1984-85 out of the total primary age group of girls, 62 per cent were out of school against 27 per cent of boys of the same age<sup>18</sup>. According to a survey in Savar, Dhaka, only about 14 per cent of all girls who are enrolled in grade 1 reach grade 5, the corresponding figure for boys being 33.5 per cent<sup>19</sup>. The dropout rate for girls in 1991 was 57.9 per cent of the total dropout and in 1995 the drop out rate came down to 46.5 per cent<sup>20</sup>.

The intellectual development of the female child is greatly impaired through a systematic process of discrimination. Female children tend to have their educational privileges curtailed earlier than their male counterparts, because cultural practice demands that they are initiated into housework and child-minding from a very young age. The general expectation is that girls will marry young and will depend on their husbands for their economic needs.

Female education faces major constraints on account of a number of factors. Among the most common are, *first*, the negative attitude of the society and *second*, dependence on child labour. Rural economic tradition also has a negative effect on the possibilities of educating the female child. The different perceptions of the economic value of sons and daughters are reflected in the partial attitude of parents towards the schooling of their children. In the subsistence agricultural economy of

16. In *Education for All. National Plan of Action*, 1995, Primary and Mass Education Division, Government of the People's Republic of Bangladesh, Dhaka, at pp. 15-18

17. Unicef 1991 : *Impressions of Women and Children in Bangladesh*, Dhaka, at p. 59.

18. Khan, Salma 1988 : *The Fifty Percent. Women in Development and Policy in Bangladesh*, University Press Ltd., Dhaka, at p. 4

19. Islam, Mahmuda 1978: 'Female Primary Education in Bangladesh' in Ahmed, Parveen et al. (eds.): *Women and Education*, Women for Women Research Group, Dhaka, pp. 61-76, at p. 75.

20. *Education for All. National Plan of Action* op. cit., 16.

Bangladesh, women play a most significant, even if invisible, part. The daughter of the house is expected to assist her mother in all household activities including the care of younger siblings. As the daughter is groomed from an early age to fit in with the role of a wife and a mother, it is assumed that such an occupation needs no formal education. Whatever knowledge is necessary for this purpose, is quite easily imparted by the mother and other female members of the family. This attitude greatly retards the potential for schooling of the female child.

Marriage, as mentioned above, is another reason why education for girls is viewed with disfavour in the rural context of Bangladesh. Generally, very few men are willing to marry a girl with an educated background or a girl with an educational qualification higher than his own. Parents consider it difficult to marry off their daughters if they are educated because of the deep-rooted aversion by the majority of prospective bridegrooms to marriage with 'enlightened' girls. Moreover the sum demanded by the groom and his family as dowry is often steep in case of educated girls. For many parents, therefore, there seems little point in investing in the education for their daughters.

There is a strong belief that an educated girl is less amenable to the control of her in-laws and her husband. These perceptions have serious implications when female-in-laws in the family also share the same view. While the qualities most valued in girls in the Bangladeshi society are modesty, acquiescence and a readiness to serve, education for females is, therefore, often seen as a potential threat to these so-called virtues. As education breeds assertiveness and independence, the virtues of a young girls, critical for marriage prospects, are deemed to be jeopardised by education. Moreover, it is deemed inappropriate and indecent for girls to remain in school just before attaining puberty because of their exposure to male teachers and the general public en route to school. In such situations, girls are inclined to have their reputations compromised by gossip and innuendo. Taking them out of school therefore, appears to be the only option. As the ultimate goal for a girl is to become a 'wife', parents do not hesitate to take their daughter out of school. The girl child, as a result of the naturalisation of such ideologies within the social framework, is exploited and cheated out of her right to education and mental development. In view of the foregoing



discussion, it is, therefore, debatable whether a ban on child labour would automatically entitle children to the benefits of education, at least in the medium term, without a very comprehensive education policy indeed.

Thus, it is evident from the aforesaid discussion that the determination of the best interests of a child becomes a difficult task in situations where cultural constraints are coupled with economic vulnerability. It is also useful to remember that impoverishment does not necessarily bring about any change in attitude with regard to gender roles. The girl child in Bangladesh faces major constraints in areas of education and labour, not to mention household resource allocations, on the basis of her gender alone. Where traditional ideology demands that she remain within the boundaries of her home, it becomes difficult for her to cross over the public/private divide and enforce her rights. Moreover, although poverty affects a child's ability and interest in school in many ways, the frequent self denial by the Bangladesh girl child in the enjoyment and the exercise of her rights brings home another reality. The girl child suffers from the second stigma of being a minor. Age hierarchies within the family compel the girl child not only to bow before the dominant male in the family, but also to 'adults' in general. This results in a further subordination of the girl child.

Patterns of low enrolment in schools in general demonstrate that the incidence of child labour is related to the human condition of destitution and economic hardship. Destitution often dictates human behaviour in way which affects the child unfavourably. Therefore, although the poor may be aware that education is an important factor for the welfare of their children, poverty compels them to withdraw particularly the girls from schools and send them to work in the family or gainful occupations.

While education is essentially premised on the best interests of the child, socio-economic and cultural factors often cause children to be away from school. Various factors influence parents in Bangladesh in keeping their children out of school. By so doing parents are under the impression that they are acting in the best interests of the family as a whole. It is further stressed that social and cultural ideologies restrict education for girls in Bangladesh. Therefore, the whole gamut of socio-economic and cultural perceptions rebut the expectation that education is an effective measure

for elimination child labour. If anything, it is an unrealistic goal for the immediate future.

### Conclusion

Given the socio-economic reality in Bangladesh, it is more likely that children retrenched from factories as a result of protective legislation will head for other forms of paid work, where they may be exposed to worse conditions. Industries producing for local markets, while remaining outside the jurisdiction of the Harkin Bill and similar restrictive legislation, now host an even larger work-force consisting of children who may be forced to work in far more exploitative conditions than they have been used to.

The presence of children in the labour sector including the garment industry proves to a great extent the inadequacy of not only the legal system but the educational and economic systems. As long as the concerned systems remain ineffective and uninterested in the children's cause, legislation such as the U.S. Child Labour Deterrence Act 1993 will be ineffectual. Instead, there is the possibility that this type of legislation may just push children from the frying pan into the fire -- in this case, from the garment and other export-oriented industries into more exploitative work.

Approaches seemingly in the 'best interests of the child' like the Harkin Bill can, in fact, act against the interests of children. Reforms which impose restrictions on children 'for their own good' are routinely turned against the very people they are meant to protect<sup>21</sup>. As Myers rightly points out :

Conceptual cliches can be detrimental to the children involved, not only because they obscure individual differences, but also because they may misdiagnose the problem and lead to inappropriate societal actions that aggravate rather than ameliorate the situation<sup>22</sup>.

In this context, Bangladesh has to spread whatever resources it has, over a number of areas. Being at a low stage of economic development, Bangladesh needs the space within which to discover and decide on ways for balancing its needs and determining its priorities.

21. Kitzinger, Jenny 1990 : 'Who Are You Kidding? Children, Power and the Struggle Against Sexual Abuse in James and Prout (eds.) op. cit., pp. 157-83, at p. 167.

22. Myers, William 1989 : 'Urban Working Children : A Comparison of Four Surveys from South America', *International Labour Review*, Vol. 128, No. 3, pp. 321-35, at p. 321.



It has been argued in the present paper that, social and economic perspectives have to be considered before imposing measures that conflict with realities in any given society. Universalisation of children's rights may be possible if existing socio-cultural norms are also taken into account. King, for example, elaborates in this regard by alluding to deliberations over the Convention on the Rights of the Child. He describes how the Senegalese delegation argued that 'the child has a duty to respect his parents and give them assistance in case of need' as this was a 'cultural value of Africa and Asia'<sup>23</sup>. Although this suggestion was described by others as 'tantamount to a call for child labour', the final article, 29(c), which was adopted, now reads : 'State Parties agree that the education of the child shall be directed to . . . the development of respect for the child's parents. . . .As King comments :

Clearly, this is a compromise which, while it was acceptable to all the delegates, does nothing to encourage or discourage either the traditions of African countries where children are expected to support their ailing parents or the values of Western countries where such support could well be interpreted as exploitation and as damaging to the child. This type of rather vague, neutral wording, which typifies much of the Convention, can hardly be seen as reflecting universal values.<sup>24</sup>

Therefore, the need to respond to particular situations is not completely absent in international human rights legislation. Measures like the Harkin Bill similarly require to be tuned to the particular needs of children without isolating them from their family and wider community. As Fyfe comments :

The real need is to devise strategies which recognize the reality that in the foreseeable future most children, in most societies, will still need to work to support themselves and their families. The international community must go beyond the hand-wringing response of moral outrage to a calm and objective assessment of practical and realizable objectives. This means devising ways of humanizing the work of children by combining it creatively with education, health and welfare services.<sup>25</sup>

It is recognised that culture and tradition play a more dominant role in the daily lives of Bangladeshi people than so-called universal values. In the

23. King, Michael 1994: 'Children's Rights as Communication : Reflections on Autopoietic Theory and the United Nations Convention', *The Modern Law Review*, Vol. 57, No. 3, pp. 385-401, at pp. 394-5.

24. *ibid.*, 395.

25. Fyfe, Alec 1989 : *Child Labour*, Polity Press, Cambridge, at p. 9.

circumstances, the issue of child labour in the garment industry of Bangladesh requires careful consideration instead of a rush to enforce a law, followed by feverish retrenchment measures, that is bound to adversely affect the immediate needs of the concerned children. In Bangladesh the problem of child labour is not an isolated phenomenon. Various socio-economic and cultural factors influence the lives of working children. Moreover, when the problem boils down to the basic issue of survival, one universal measure does not necessarily provide the desired solution. It has been pointed out with regard to the Harkin Bill that more chaos is created if half-a-million people are led out into the streets like a piper; one has to be more respectful of the realities of the communities in which one attempts to protect children.<sup>26</sup> Nothing could be nearer the truth with respect to child labour in the export sector of Bangladesh.

26. Bruce Stokes quoting Jeffery F. Newman, President of the National Child Labour Committee in *The National Journal*, June 25, 1994.



## THE STATUS AND STATE OF RIGHT TO FORM ASSOCIATION DURING THE COLONIAL RULE IN INDIA

Dr. Borhan Uddin Khan

In ascertaining the status of the right to form an association during the colonial period, we propose to begin our discussion by focusing on the status of right of association that was prevalent at the time of establishment of the International Labour Organisation (ILO), followed by recounting the impetus for the creation of the All India Trade Union Congress and recognition of the right to form an association under the legislative framework.

### 1. Confusion Over the Status of Right of Association

After its establishment in 1919, when the ILO adopted its first Convention on the Right of Association i.e., the Right of Association (Agriculture), Convention 1921 (No. 11), it presupposed the existence of such a right among the industrial workers in member states.<sup>1</sup> At this juncture we shall not proceed to debate how far the ILO was right in such a presumption but proceed to submit that so far as the colonial India was concerned, previous to the passing of the Trade Unions Act, 1926,<sup>2</sup> the legal position as regards worker's right of association was uncertain. The following passage from a speech delivered in the Indian Legislative Assembly by Mr. Joshi,<sup>3</sup> the mover of the resolution which eventuated in the adoption of the Trade Unions Act, 1926, clearly illustrated this general uncertainty :

What is important is that the status of the trade unionists and the trade union officials and trade union organisations must be determined and fixed in the eyes of the law. At present the position is very doubtful. In England some years back the trade union organisation were illegal. I do not know what the position in India is. I am not a lawyer; but I take it that here a *trade union is a legal organisation*.<sup>4</sup>

1. Article 1 of the Convention reads as follows :  
"Each member of the International Labour Organisation which ratifies this Convention undertakes to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture".
2. Act No. XVI of 1926.
3. Member of the Legislative Assembly.
4. *The Legislative Assembly Debates*, Delhi 1921, Vol. 1, Part 1, p. 487. Italics for emphasis.

Mr. Joshi correctly observed that the position was doubtful but in the absence of any positive sanction behind the formation of associations it is debatable how far he was correct to assert that a "*trade union is a legal organisation*". There did not exist any express legal provisions on the requirements and formalities for establishing an association but the definition of the term 'association' and 'unlawful association' were laid down in the Criminal Law Amendment Act, 1908. Section 15 of the Act provided :

- (1) 'association' means any combination or body of persons, whether the same be known by any distinctive name or not; and
- (2) 'unlawful association' means an association-
  - (a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or
  - (b) which has been declared to be unlawful by the State Government under the powers hereby conferred.

The term association as defined in the Act was very wide and could virtually cover any combination of two or more persons acting in any capacity either formally or informally. Similarly, the definition of 'unlawful association' was very wide which *inter alia* meant and included any association which had been declared to be unlawful by the State Government under Section 16 of the Act. Section 16 of the Criminal Law Amendment Act, 1908 empowered the State Government to declare an association as unlawful in the following terms :

If the State Government is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the State Government may, by notification in the official Gazette declare such association to be unlawful.

The above restrictive provision had four features, namely : a) it conferred arbitrary powers on the State Government to ban an association on its subjective satisfaction; b) no machinery had been provided for revision or any other mode of review of action taken by the Government; c) it provided no provision for hearing the association before taking the action, and d) there was no fixed period for the ban, the ban being virtually absolute and permanent. An association apart from being declared unlawful as described above could also be subject to the charge of criminal conspiracy under Section 120A and 120B of the Indian Penal Code, 1860. Section 120A defined criminal conspiracy as follows :



When two or more persons agree to do, or cause to be done-

- (1) an illegal act or
- (2) an act, which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

In view of the above provisions an agreement by any two members of an association to pursue other workmen to break their contract with their employer could be considered as a criminal conspiracy punishable with imprisonment under Section 120B of the Penal Code.<sup>5</sup>

The question of civil liability of persons engaged in associations arose in 1920 out of a labour dispute in Madras. In October 1920, Mr. B.P. Wadia, who was the President of the Madras labour union was put under injunction by the court for his inducement of some workers of the Buckingham Mills to commit a breach of their contract.<sup>6</sup> The dispute which will be discussed later<sup>7</sup> suggested that trade union activities were not free from civil liabilities.

From the above discussion it is apparent that at the time of the establishment of the ILO, the workers of India did not have any positive guarantee of the right of association rather they were subject to the restrictive provisions of criminal and civil law. Thus, it can be concluded that the state did not prevent any individual from establishing and joining an association provided the association and its members conformed to the ordinary law of the country. In other words an association of persons was not illegal merely because it was an association. Apart from this, the position was not at all clearly defined. However, despite confusion and

5. Section 120B reads as follows :

Punishment for criminal conspiracy- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

6. See, Lokanathan, P. S., *Industrial Welfare in India*, Madras 1929, pp. 183-84; Das, R. K., *History on Indian Labour Legislation*, Calcutta 1941, p. 245.

7. See below, at p. 40.

uncertainty as to legality of the formation of association, the workers of India exercised their right of association as will be evident in the discussion below.

## **2. Exercising the Right : Creation of the All India Trade Union Congress**

From the Indian view point the establishment of the ILO was of special importance. Under the 1919 Treaty of Versailles (Article 389), the labour organisations in member countries were given the power to select their representatives to the ILO Conference, subject only to the confirmation of the Government of those countries. In the absence of such organisation, the Treaty of Versailles gave Governments the power to nominate labour representatives. Since at that juncture there was no central labour organisation in India, the Government nominated representatives of labour to the first International Labour Conference without consulting the workers.<sup>8</sup> This was much resented by the workers as unconstitutional.<sup>9</sup> The Government argued that it was justified in nominating the worker's delegate without consulting any of the labour leaders, in as much as there did not exist at that time any organisation truly representative of the workers.<sup>10</sup>

However, the workers of India did not fail to realise the importance of the right that was bestowed upon them and the harm that would be done if they did not organise in order to exercise that right. Therefore, the immediate impetus for the formation of the AI India Trade Union Congress came when the nomination of workers representatives to the ILO was disputed. Thus, it was in 1920 that India's first central organisation of labour namely, the All India Trade Union Congress (AITUC) was formed to :

Co-ordinate the activities of all labour organisations in all trades and in all the provinces in India, and generally further the interests of Indian labour in matters economic, social and political.<sup>11</sup>

Thus, the AITUC had, no doubt, a greater aim than sending representatives to the ILO. The creation of the AITUC was a hasty step

8. Giri, V. V., *Labour Problems in Indian Industry*, London 1959, p. 496.

9. Id.

10. Revri, C., *The Indian Trade Union Movement*, New Delhi 1972, p. 85

11. *Report of the All India Trade Union Congress*, 5th Session, 1925, p. 59



in order to secure representation of the Indian labour at the ILO Conference at Geneva.<sup>12</sup> There was however nothing fundamentally wrong in a central organisation being started first and in branch associations following under its inspiration. At that time, however, there were some leaders who believed that the establishment of an all-India organisation was premature and that the state of labour organisations did not warrant its creation. On this point, Mr. V.V. Giri during the course of his presidential address to the sixth session of the AITUC spoke the followings words :

Our distinguished patriots and countrymen, L. Lajpat Raj as the president of the first session of the AITUC considered, perhaps with justification then, that the time was not ripe in the year 1920 to give an All-India name to this organisation and the further opined that it would take many more years of activity before one could possibly think of having anything like a Congress which can speak with any semblance of authority on behalf of all the workers in India.<sup>13</sup>

Similarly, commenting on the activities of the AITUC in 1929 Lokanathan observed :

Whatever be the justification for the early establishment of a central labour organisation in India, there is little doubt that it has revealed the defects of its quality. For the first four or five years the Trade Union Congress was a mere annual show and very few unions really cared to affiliate themselves to it. Its purpose was to meet and recommend delegates to the International Labour Conference.<sup>14</sup>

Thus, the establishment of a permanent International Labour Organisation with its annual Conferences, to which delegates from all member countries are sent and at which questions affecting the life of working class come up for discussion is one reason why labour organisation like the AITUC once formed did not die.<sup>15</sup> The increased status which the ILO has conferred on labour could only be maintained by keeping the association alive and the need for labour to recommend delegates annually to the conference induced labour to organise itself and speak in a representative capacity.<sup>16</sup>

However, it may be right to conclude that the AITUC which was established in 1920 was not as a result of a genuine demand on the part of the labour unions for a co-ordinated action but was prompted by the

12. Sharma, G. K., *Labour Movement in India : Its Past and Present*, Delhi 1963, p. 80.

13. See above, note 11, 6th Session, 1926 at p. 8.

14. See, Lokanathan, P. S., above note 6, at p. 168.

15. Ibid, p. 162.

16. Id.

desire to recommend to the Government of India for sending workers delegate to the International Labour Conference.

### 3. The Right Under a Legislative Framework

The need for legislation on trade unions became apparent in the aftermath of the Madras labour dispute which we have mentioned earlier.<sup>17</sup> The Madras case was not proceeded with because Mr. Wadia had privately settled the dispute.<sup>18</sup> But the interim injunction against Mr. Wadia for his trade union activities, suggested that in the absence of legislation even legitimate trade union activity was attended by considerable peril. The interlocutory decision of the case rendered the position of workers and union officials highly insecure. It was generally felt that if the legitimate functions of the trade unions were to be carried on, immunity from certain civil and criminal liabilities should be conferred on unions and their officers. Accordingly, the question of trade union legislation came up before the first session of the reformed legislature,<sup>19</sup> in consequence of a suit arising out of a trade dispute in Madras and prompted Mr. N. M. Joshi to move the following Resolution in the Legislative Assembly :

This assembly recommends to the Governor-General in Council that he should take steps to introduce, at an early date, in the Indian legislature, such legislation as may be necessary for the registration of the trade unions and for the protection of trade unionists and trade union officials from civil and criminal liability for bona fide trade union activities.<sup>20</sup>

When discussion on the the Resolution began, Sir Thomas Holland, the Minister of Industries, accepted that trade unions were inevitable and observed :

Trade unions are not only inevitable but our treaty conditions with Germany and Austria demand that we shall recognise the right of association for all lawful purposes by the employed as well as by the employer. We can not go back on our obligations, obligations incurred by treaties that have been ratified on behalf of India as well as on behalf of other parts of British Empire.<sup>21</sup>

17. See above, at p. 37.

18. See, Loknathan, P. S., above note 6 at p. 184.

19. Since the introduction of the constitutional changes under the Montague-Chelmsford Reforms as incorporated in the Government of India (Amendment) Act, 1919, the central legislature had the power to legislate in respect of all labour subjects, while provincial legislatures had power to legislate only in respect of those labour subjects which were classified as provincial and that too only with the sanction of the Governor General.

20. See above, note 4 at p. 486.

21. Ibid, at p. 491



However, there were some who viewed the Resolution to be premature<sup>22</sup> and by accepting such a Resolution the Government was going to take responsibility of organising strikes against capitalists.<sup>23</sup> Mr. J. N. Mukherjea a member of the Legislative Assembly moved an amendment to the effect that the words "from civil and criminal liability for bona fide trade union activities" be omitted.<sup>24</sup> Since it asked for protection of trade unionists and trade union officials from civil and criminal liabilities for bona fide trade union activities, according to him it meant the termination of all civil and criminal administration in the country.

Sir Thomas Holland went further and asserted that in the case of trade union activities, the so-called bona fide activities, was source of very great danger. In support of his contention he gave an example which though exaggerated as he admitted, was as follows :

A trade union official who is protected in this manner because of his bona fide activities on behalf of the union might escape being charged with the murder of his employer if the trade union official was sincerely convinced that the murder would lead to a rise in wages or say, the conclusion of strike, and that he had no malice whatsoever against the employer.<sup>25</sup>

Accordingly, he suggested the following Resolution which was adopted by the House :

This Assembly recommends to the Governor General in Council that he should take steps to introduce, as soon as practicable, in the Indian Legislature, such legislation as may be necessary for the registration of trade unions.<sup>26</sup>

Hence, the adoption of the Resolution was the first step towards recognising the right of association of the Indian workers. Nevertheless, it was suggested by one of the members of the Legislative Assembly<sup>27</sup> that time has not arrived in India for encouraging the growth of trade unions, by means of legislation.<sup>28</sup> The Resolution was adopted on March 1, but the Government of India did not publish tentative proposals for

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22. Ibid, at p. 496.

23. Ibid, at p. 499

24. Id.

25. Ibid, at p. 505.

26. Ibid, at p. 506.

27. Mr. Khan Bahadur Chaudhuri Wajid Hussain.

28. See above, note 4 at p. 504.

legislation until September 1921,<sup>29</sup> and thus provoked a large mass of opinions.<sup>30</sup> Discussing these later in the Legislative Assembly Sir Bhupendra Nath Mitra, who introduced a Bill to provide for the registration of trade unions and in certain respects to define the law relating to registered trade unions in British India, informed the House in the following terms :

The opinions expressed in response to our invitation are remarkable for their diversity. There are some who considered the proposed legislation to be premature and who would prefer that we should not proceed with it at all. There are some others who, while recognising the need for the proposed legislation, apparently considered trade unions to be dangerous and pernicious growths whose activities should be controlled rigidly so that they may not eventually overwhelm the Commonwealth<sup>31</sup>.

During the course of debate, one member of the Assembly<sup>32</sup> recalled India's obligation under the Treaty of Versailles emphasising the need for and importance of the proposed legislation. He observed :

My contention is that you are pledged to the principle of this legislation. Under Article 427 of the Peace Treaty every subscribing nation is pledged to the recognition of the right of association. You cannot go back on that. That right is inherent and it is because that right is inherent that we are claiming that you should introduce this legislation.<sup>33</sup>

The Bill, after being debated at great length in the Legislative Assembly, was passed in March 1926 as the Trade Unions Act, 1926 and came into effect from 1 June 1927. The preamble of the Act provided that it was an Act to provide for the registration of trade unions and in certain respects to define the law relating to registered trade unions. It appears that the Act presupposed the existence of such unions and intended to put them under a legal framework. Once a trade union was registered, then to define the law governing the course of action and conduct of the said registered union was the other object achieved by the Act. This resulted in one inevitable conclusion, that all unregistered trade unions remained unaffected by the several restrictive and beneficial provisions of the Act.

Explaining the standpoint of the Government of India, Sir Thomas Holland, made a rather bold statement during the course of debate :

29. ILO, *Freedom of Association*, Vol. 5, No. 32, Geneva 1930, p. 330.

30. See, *Report of the Indian Statutory Commission*, Vol. 5, London 1930, p. 1498

31. *The Legislative Assembly Debates*, Vol. 5, Part I, Delhi 1925, p. 78.

32. Mr. Chaman Lall.

33. See above, note 31 at p. 755.



However, it is clear to the Government that registration should be optional, it is equally clear to the Government that unregistered trade unions should not be allowed to participate in the protective provisions of the Bill, *for any other course would defeat the object of the Bill which is to foster the growth of trade unions on healthy lines.*<sup>34</sup>

This categorical statement leaves no doubt about his concern of the Government which was to foster the development of the Indian Trade Union on 'proper lines', as understood by the Government

The term trade union was defined in Section 2 of the Act as meaning :

Any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or of imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more trade unions.

An analysis of the above definition shows that in order to constitute a trade union, first, there should be a combination of workmen or of employers. Secondly, the purpose and object of combination should be either to regulate relations between the parties as specified or to impose restrictive conditions on the conduct of any trade or business. Ordinarily understood, trade unions are combinations of workmen only. But the definition as provided in the Act extended such meaning to employer's association as well.

Formation of trade unions under the Act was purely permissive in nature. Any seven or more members could apply for registration of a trade union (Section 4). It did not provide for compulsory registration nor in any way declared that unregistered trade unions be illegal. One of its greatest lacuna was that it did not provide any clause by which employer's would remain bound to recognise a union which would be registered under the Act. In a Circular Letter dated 12 September, 1921 addressed to local Governments and administration in pursuance of the resolution adopted on 1 March, 1921, the Government of India without giving any reasons expressed :

In the opinion of the Government of India it is neither desirable nor possible to compel employer's to recognise all unions.<sup>35</sup>

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34. Ibid, p. 473. Italics added.

35. See above, note 29 at p. 330

Hence, employers could refuse recognition of a union even when registered under the Act. It is very interesting to note that during the course of debate on the Trade Union Bill, not a single member raised the question of recognition and it appears that they accepted Government's stand on the issue.

Considering the acute shortage of trade union leaders from the rank and file, the framers of the Act made a special provision enabling non-workers to take part in the organisation and management of trade unions. According to Section 22 of the Act, 50% of the total office bearers of a union might consist of persons who were not actually employees or engaged in the industry with which the union was connected. Except for this clear-cut provision, no other rigid condition was imposed on outside leaders; they could be officers on a full time or on a part time basis; with or without remuneration from the union. It was at that time a good step indeed. Because a key requirement of efficient unionism is a sufficient supply of qualified leadership and this was one in which the Indian movement was seriously deficient from the rank and file of workers as many of them were illiterate and had low levels of education. Paradoxically, the qualifications needed for union leadership in India were unusually high since English was the principal language of unionism and labour relations. Labour laws, government reports, adjudication proceeding, employer-union correspondence were overwhelmingly in English though it was not the vernacular used by the working people.

The most important immunity conferred by the Act<sup>36</sup> on the officers and members of a registered trade union was the immunity from punishment under Section 120B of the Penal Code.<sup>37</sup> If this provision had not been incorporated in the Act there would have been no immunity for trade unionists and like others they would have been subject to the charge of criminal conspiracy punishable with six months imprisonment or with fine or with both. Section 18 provided that no suit or other legal proceeding shall be maintainable in any civil court against any registered trade union or any officer or member in respect of any act done in contemplation or

36. Section 17 of the *Trade Unions Act, 1926*.

37. For provision of Section 120-B, see above, at p. 37.



furtherance of a trade dispute to which a member of a trade union was a party on the ground that such act induced some other persons to break a contract of employment. Hence it is evident that there was protection for acts done in furtherance of an industrial dispute. An important type of action which this clause prevented was a suit arising out of the persuasion of others to join in strike amounting to a breach of contract on the part of workmen.

The Trade Unions Act, 1926 did not contain any clause regarding or prohibiting strikes. As it made an important omission on the subject, so the position could be explained as that the workers of registered trade union had the right to strike. Even during the discussion in the Legislative Assembly on the Resolution which led to the adoption of the Act, Sir Thomas Holland expressed :

Workers have perfect right to strike, whether they are under Government or under private employer they have an absolute right to strike.<sup>38</sup>

However, in course of time the Government changed its notion and passed the Trade Disputes Act, 1929 which under Article 15(1) provided restrictions<sup>39</sup> for strikes in public utility services.<sup>40</sup> This in fact caused a serious handicap in the exercise of the right of association as 'public utility services' wide range of establishments. Even those leaders who were considered acceptable by the Government such as N. M. Joshi who was a member of the Royal Commission on Labour in India, characterised the Trade Disputes Act, 1929 as "reactionary and mischievous" contending that it would "help the employers and not labourers".<sup>41</sup>

Immediately after the passing of the Trade Disputes Act, 1929 the Government of India on 24 May 1929 appointed a Royal Commission on

38. See above, note 4 at p. 493

39. Any person who, being employed in a public utility service, goes on strike in breach of contract without having given to his employer, within one month before so striking, not less than fourteen days previous notice in writing of his intention to go on strike before he expire thereof, shall be punishable with imprisonment which may extend to one month, or with fine which may extend to fifty rupees, or with both.

40. According to Section 2(g) 'public utility service' meant : i) any railway service which the Governor-General-in-Council may by notification in Gazette of India, declare to be of a public utility service for the purpose of this Act; or ii) any postal, telegraph or telephone service; or iii) any industry, business or undertaking which supplies light or water to the public; or iv) any system of public conservancy or sanitation.

41. Karnik, V. B. *Strikes in India*, Bombay 1967, p. 176.

Labour in India under the chairmanship of Rt. Honorable Mr. J. H. Whitley, known as Whitley Commission. The Commission submitted its report in June 1931. Some considered the report to be a Magna Carta of labour in India<sup>42</sup> and it formed the basis of the future labour policy of the Government in the years to come.<sup>43</sup>

The Commission made far reaching recommendations, any detailed analysis of which is beyond the scope of this research. However, following the publication of the Commission's report there was a spate of legislation. Out of 24 labour enactments adopted by the Central and Provincial Legislatures during years 1932 to 1937 as many as 19 were implemented as per Commission's suggestions.<sup>44</sup> However, though the Commission recommended recognition of unions by employers,<sup>45</sup> nothing was done to implement that recommendation.<sup>46</sup>

On the contrary, the situation was such that at the 1933 International Labour Conference in Geneva the Indian worker's delegate asserted that there was 'unmistakable evidence' that the authorities were willing to act in combination with employers in order to silence the workers, and deprive them of their legitimate means of protection, namely, the right of association and of strike.<sup>47</sup> However, at a Conference of Government representatives, employers and workers, held at New Delhi in August in 1942, it was decided to establish a permanent tripartite labour organisation in India, composed of an annual Conference and Standing Committee, on the model of ILO.<sup>48</sup> This decision made an important step

42. Menon, V. K. R., "The Influence of International Labour Convention on Indian Legislation", in *International Labour Review*, Vol. 73, 1956, p. 556.

43. Vidyarthi, R. D., *Growth of Labour Legislation in India Since 1939 and Its Impact of Economic Development*, Calcutta 1961, p. 39.

44. See, Menon, V. K. R. above note 42, at p. 557.

45. *Report of the Royal Commission on Labour in India*, London 1931, p. 326.

46. However, the Trade Unions (Amendment) Act, 1947 provided recognition of unions by employers but it never came into force as it required Gazette Notification by the Government which was lacking.

47. "When the workers of the Madras and Southern Maharatta Railway workshops went on strike sometime ago, as a protest against the overriding by the chief executive of the Railway Company the terms of an agreement he had come with the Trade Union concerned as regards reduction of staff, the Government turned down his request and supported the Railway executive in its action. In the Indian Textile Industries the employers have started a war of attrition against the workers. The mill owners are making a joint and systematic attempt to reduce wages in mills individually, and the workers affected in each mill are prevented by police action from organising demonstrations or from combining with the workers in other means in a general strike". - Extract from *Proceedings of the International Labour Conference*, Geneva 1933, p. 203.

48. ILO, "The Institution of Tripartite Labour Organisation in India: the Influence of the ILO," in *International Labour Review*, Vol. 47, 1943, p. 1.



in the evolution of the machinery of industrial relations in India. No doubt it was a development which had been facilitated to a greater extent by India's association with the ILO.

It was exactly the same year, under pressure of increased production for the allies' war supplies in the Second World War and to ensure that relations between employers and workers did not get strained and thereby upset the machinery of production in industries engaged on war work, the Government of India in January 1942 added Rule 81-A of the Defence of India Rules empowering the Central Government to prohibit strikes or lock-outs and to refer any dispute for conciliation and adjudication. Soon the Rule was modified by an order passed under the Rule in August 1942 which provided that 14 days notice should be given to the employer within one month before striking, and when a dispute referred for conciliation and adjudication the workers would be prevented from going on strike until the expiry of two months after the conclusion of the proceeding upon such a reference.<sup>49</sup> Wartime experience, however, had led the Government to feel that Rule 81-A of the Defence of India Rules was extremely useful and that its incorporation in the permanent labour law of the country would do much to quell the industrial unrest which was gaining momentum owing to the stress of post-war industrial readjustments. The main provisions of the Defence of India Rule in regard to the public utility services were, therefore, retained intact in the Industrial Disputes Act, 1947, which replaced the Trade Disputes Act, 1929.

#### 4. Conclusion

The history of the development of labour legislation in India reveals that the enactment of various labour statutes was done as and when warranted by circumstances or under circumstantial pressures. A consistent and planned labour policy was conspicuous by its absence. Under conditions of stress, created by the Second World War and more particularly the need for greater production for war purpose the Government of India realised that the problem of labour could be best tackled on the basis of a carefully drawn plan.<sup>50</sup> Accordingly, in 1946 the Central Ministry of

49. Government of India, *Labour Investigation Committee, (Main Report)* New Delhi 1946, p. 68.

50. Vaid, K. N., *State and Labour in India*, Bombay 1965, p. 218.

Labour worked out a Five Year Programme for the amelioration of labour conditions through legislative and administrative measures.<sup>51</sup> This Five Year Programme Could be said to have formed the basis of future labour legislation and reform. The Programme did not get enough time to be implemented since the year 1947 witnessed the split of British India. In order to determine the state of right to freedom of association in the closing years of the British rule in India the Report of Labour Investigation Committee may be quoted which submitted its report in 1946 observing :

From such evidence as we were able to obtain during the course of our enquiries, we found that, barring a few honorable exceptions such as municipal and port trust administrations and a few individual employers, freedom of association exists only in name.<sup>52</sup>

The Committee further emphasised :

It is not to say, however, that the workers in this country are not permitted to organise themselves into trade unions and, in point of fact, in the year 1943, there were in the country as many as 693 registered trade unions. Very few of these unions have, however, been recognised by the employers and even where they are, the relations between the two are far from cordial. Moreover, excepting a few enlightened employers, most others in the country are inclined to look upon trade unions as no better than necessary evils.<sup>53</sup>

From the above observations it is evident that the situation had not changed from that of 1927 when in contradiction of the Government's claim that there was full right of association enjoyed in India, the workers' delegate to the International Labour Conference Mr. V. V. Giri declared :

Speaking on the question of freedom of association, I might just mention that we have not much of it, and even organised association in India are practically suppressed and gagged when the real issues between employers and the employees arise.<sup>54</sup>

Hence, it will be right to comment that the stimulus given by the legislative enactments to the right to form association resulted not so much from any right that it created as from the enhanced status given by the recognition of the trade unions in the Statute Book.

51. Government of India, *The Indian Labour Year Book*, Simla 1947-48, p. 95.

52. See above, note 49, at p.372.

53. Id.

54. ILO, *Record of Proceedings, International Labour Conference*, 10th Session, Geneva 1927, p. 99.



## THE IMPERILLED BANGLADESHI GIRL CHILD : A REVIEW

Dr. Shahnaz Huda

Children's rights and the abuses and injustices committed against them have provoked debate and criticism in contemporary society. Protection of children's rights is a relatively new concept. Previously the rights of the child was not a matter considered to be of any importance, nor given much thought especially in third world contexts. However with increasing abuse and infringement, and publicity of such violations, it has become a matter of grave seriousness which society can no longer ignore.

### Harmonising Child Rights Within the Cultural Contest :

In Bangladesh, as in other underdeveloped and third world countries, the definitions of child, what constitutes childhood, the ramifications of such concepts are necessarily different from Western concepts. Like other aspects of human rights, they also need to be perceived and treated differently. Faced with deprivations of such basic nature such as lack of food, clothing and shelter; education, literacy and other less pragmatic rights assume lesser importance. In practical terms the first three are priorities no one deny. Societal conditions such as poverty, inadequate housing, poor maternal and child health care, and lack of nutritional resources contribute powerfully to child maltreatment or seriously compromise the survival and well-being of children. These are however beyond individual parental control and are usually common to all members of the family<sup>1</sup>. Again, cross-cultural variability :

in child rearing beliefs and behaviors makes it clear that there is not a universal standard for optimal child care nor for child abuse and neglect<sup>2</sup>

As in the case of other human rights, children's rights cannot also be ascribed a universal meaning and value:

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1. Korbin, Jill E. (1991). Cross-cultural perspectives and research directions for the 21st century" in *Child Abuse and Neglect, The International Journal* Vol. 15, Supplement 1 1991, pp. 67-77 at p.69.

2. Ibid at p. 68.

because such concepts are rooted in historically specific cultures and societies, and can only be understood and enacted in those contexts<sup>3</sup>

While acknowledging the above, there are parameters of conduct which are, whatever the setting, unacceptable. Keeping in view therefore the cultural, religious as well as economic diversities of various communities, certain patterns of behaviour must be outside what should be legally or socially permissible. Blanchet for example challenges the view that human rights are a luxury which a poor country, or poor people can ill afford.<sup>4</sup> Children belonging to certain segments of society are acclimatized to being ill-treated. According to Blanchet:

society builds inequality by instilling in some categories of children a sense of their inherent inferiority, while others are taught very early to command and to act as masters<sup>5</sup>.

### **Child and Childhood for the Female Child :**

Gender preferences contribute substantially to abuse and maltreatment. Son preference, for a variety of reasons, result in abuse of female children. For the poor Bangladeshi villager the everyday struggle to meet the needs of his/her family is a constant one, and in the scarcity of resources that is perennial, it is usually the female child who faces the greatest deprivations. The woman who has a succession of daughters, and no son, is viewed with almost the same amount of pity as a woman who is barren. Beginning with the absence of *azzan* (call for prayer) at the birth of a daughter, to various aspects of their socialization process, difference in treatment due to their gender is perceived almost generally. So deeply ingrained is the concept of their inferiority that the girl-child, and later the woman, rarely feels the unfairness of the prejudicial treatment that she receives. Such acceptance is taken advantage of and helps perpetuate a system of continual dominance of the female by the male. The greatest human rights abuses that occur in Bangladesh are those which the girl child, and the woman face and which become more dangerous due to the tendency to accept such abuses as facts of life connected with the sex of the person.

3. Blanche, Therese (1996). *Lost Innocence, Stolen Childhoods* : University Press Limited, Dhaka, p.22.

4. Ibid at p. 4.

5. Ibid



From early childhood girls are made to feel fully conscious of the feeling that unlike their brothers who are assets to the family, they are liabilities. Girls are taught two virtues--- patience and sacrifice<sup>6</sup>.

Bangladeshi culture and religion play a major role in strengthening the attitudes of subservience that has characterized the woman's role in society. According to Aziz and Maloney<sup>7</sup> :

Bangladeshi culture re-enforces biological, gender differences more than most cultures.

Due to these culturally reinforced prejudices the exploitation of the female child is much more marked. Social and religious norms prescribe specific and different roles to females and males. The culture of seclusion or *purdah* which inhibits women's equal participation in all spheres of life affects the girl child from an early age. Various customs or rituals which have become incorporated in the Bangladeshi way of life in some way or other also reinforces the system of patriarchal domination. It is doubtful if assimilation of such customs, rules and rituals would have been so easily possible if they weakened, in any way, the patriarchal system of society. Even as regards the rules of Muslim family laws which apply to the majority of the citizens of Bangladesh, it has always been the most difficult to change those laws which in any way curtail the rights of the male.

The exploitation of the girl-child begins from a very early age. She faces deprivation as to the care provided by her family, the way she is educated, and the way she is treated. In India the recent use of scientific methods by which the sex of the child is pre-determined shows how, even in this day and age, when women's issues are at the forefront; in reality there has been little change. Whatever has been achieved has only been for a very small portion of the entire female population.

In Bangladesh (when I speak of Bangladesh I refer to the majority of the people i.e. those who live in the villages) up to the ages of 5/6, the children themselves are less aware of the differences in their treatment. It is from the ages 6 to 10 that the differentiation in behavior becomes

6. Jahan, Rounaq (1975). "Women in Bangladesh " in Women for Women ; University Press Limited, Dhaka at p.3.

7. Aziz, K. M Ashraf and Maloney, Clarence (1985). *Life Stages Gender and Fertility in Bangladesh*; ICDDR B, Dhaka at p.39.

obvious and by the time the children become adolescents they are acutely aware of the different types of behavior that is expected because of the difference in their sex.

The abuse of the girl child is the topic of this articles --- it is not intended to convey that boys are not abused. However, perhaps it would be true to say that girls are more vulnerable. Some would argue that this vulnerability and recognition of such vulnerability affords some sort of protection whereas in the case of the boy- child such abuses come less to light. A Bangladeshi psychiatrist says that abuse of the girl-child is proportionately higher (about 65% to 35%)<sup>8</sup> . The sexual exploitation of the girl child is a major problem, made more acute by the fact that the victims often face more blame than the perpetrators. This, in turn, ensures that in the majority of cases the abuse remains a secret.

The abuse of the girl-child may be attributed first and foremost to economic factors. Although poverty is not the only cause, it often puts the girl child in the position where she is likely to be abused--again if the child had been male instead of being female, he would have had less chances of being in such a position.

There are hundreds of thousands of children who are the victims of exploitation and abuse. At an age when they should be playing, the majority of the children become aware of the hard facts of life-- the worst of which are the lack of food, shelter, clothing. Lack of these basic necessities force them at an early age to take on adult responsibilities. The number of children who are working has risen dramatically over the years. They are exposed to abuse and exploitation from very early on. Many girls go to work as domestic servants and look after children of their own age. One wonders if they ever dream of exchanging places with their charges. Blanchet found that many middle class women think that the young girls they employ as maid servants understand and develop a maturity about domestic work much earlier than their own daughters<sup>9</sup>. If the child is lucky he or she will be treated relatively well. But it would not be wrong to state that the majority of the working children are expected to perform adult jobs at extremely low wages and sometimes at no wages at all. 76% of the children interviewed by Blanchet received no salary<sup>10</sup>.

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8. Personal interview with Dr. Rezwana Quaderi.

9. Supra note 3 at p.62.

10. Supra note 3 at p. 102.



Many employers prefer children as domestic servants because they work for less, work without complaint and have less option of leaving. It is at the informal sector that the exploitation is at its most dangerous because unless some horrific crime gains publicity they go on undeterred.

Apart from economic reasons behind the abuse of children, there is a curious mixture of so-called religious, moral, cultural and sociological factors, which act and react with each other to determine the relationship of children and adults. The family ties and the warmth that exists between the members of a Bangalee family are legendary. Such ties and the strength of the family institution in recent times often causes the Western world to envy us, especially when the breakdown of the family is causing so much concern in that part of the world. On the other hand this closeness may spell danger for the child. The factors mentioned above often produce a sense of 'ownership' in their children. Like a husband who beats his wife and who finds it inconceivable as to why he has to answer for his actions to outsiders, parents or guardians of children also feel that it is no one's business how they act with their offsprings or those in their charge. Whether with children working in the *bidi* factories, domestic servants or child brides: the right of parents to decide the occupation and life path of their children has been seen to be widely acknowledged by children and adults alike, while being strongly sanctioned by the samaj as well as state agencies<sup>11</sup>. Therein lies the danger. Abusers of children are not always outsiders. In fact:

With growing complexities of life, children of all ages are constantly being physically abused and exploited by their parents, siblings, kin groups, neighbors-known persons more often than strangers<sup>12</sup>.

Quaderi et al<sup>13</sup> in a study on childhood sexual abuse in Bangladesh found that most abusers were close relatives (grown ups), others were private tutors, including 'huzurs' (religious teachers) neighbours and house-- servants.

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11. Supra note 3 at p. 128.

12. Shamim, Ishrat and Chowdhury, Quamrul Ahsan (1993). *Homeless and Powerless-- Child Victims of Sexual Exploitation*; Bangladesh Sociology Association, DU, Dhaka at p.1.

13. Quaderi, Rezwana; Begum, A and Poddar, B. R. R (1995). *Childhood Sexual Abuse in Adult Psychiatric Patients DSM-III(R) Diagnosis and Pattern and Analysis of twenty cases*; Paper presented at Annual General Meeting of the Bangladesh Association of Psychiatrics, 1995 on 19.12.95 at p.1.

There have been no known case of prosecution for child abuse against a relative of the child in Bangladesh. The police in this matter are helpless without the help of the concerned relatives. Again the police, it cannot be denied, are potential abusers themselves, especially so, if the family of the child belongs to the poor income bracket. The Bangladeshi mothers, unsure of their own position and vulnerable as well, overlook aberrant behavior say in the case of their husbands. The whole question of status and empowerment of the woman is deeply involved with the condition and situation of children. In a male dominated society like Bangladesh, patriarchal attitudes from very early on fashion the attitudes of both the oppressor and the victim.

**Parental abuse or abuse by the guardian :** The feeling of ownership, mentioned above, gives the Bangladeshi parent extensive rights over their children. They are rarely answerable to anybody. Most parents in Bangladesh are unaware that their children have rights; that they have a duty to treat them in a certain manner, a duty to maintain them etc. Whatever mode of conduct exists, it is patterned by the natural affection that they have for their offspring and the fear only of social condemnation. Social condemnation, however, usually extends only to unnatural or excessive cases e. g. incest or sexual abuse. Child abuse can take many forms--- and need not necessarily only involve physical abuse, battery etc.

Child sbuse is usually divided into three major types: physical abuse, sexual abuse, and emotional maltreatment and/or neglect<sup>14</sup>.

It may be possible only in the case of physical abuse to recognise the existence of abuse--- that also only in cases which require treatment, leaves scars or when the abuse is severe. Sexual abuse can also be identified only when it causes physical injuries. But there may be other less obvious forms of abuse. It may involve continuous verbal abuse, threats of physical violence etc., or physical punishment which does not require medical attention <sup>15</sup> .Corporeal punishment is used extensively by Bangladeshi parents to discipline their children. There is use of such violence or of less physical forms of punishment e.g. constant

14. Kewalramani, G.S (1992). *Child Abuse*; Rawat Publications, Jaipur at p. 11.

15. Ibid at p. 11.



disparagement, belittling or threats. For a child such verbal abuse may be almost as bad as physical abuse. The reasons parents abuse their children may differ. The child may just be used as a scapegoat; the mother may be abused or beaten by her husband and may take it out on the child, lack of resources and poverty may cause frustration, the parent might have been abused as a child. According to D. A. Wolfe<sup>16</sup> parental abuse may be due to unmet emotional needs that signify discontent, anger or irritability, an inability to balance the child's own needs and capabilities with parental expectations, or emotional scars from their own abusive or deprived family background affecting their ability to care for their own offspring<sup>17</sup>. A poor Bangladeshi farmer with a large family and with no land, no resources finds it close to impossible to feed and clothe his children and this incapacity to provide may be taken out on his wife and children whom he knows he has a responsibility to maintain but cannot. Family planning programmes have been given priority by all governments. The need to reduce the size of the family in order to improve the standard of living is undeniable. In some roundabout way it can be said to be a method to reduce the incidences of child abuse-- the parents in a family less in want are less likely to take out their frustrations on their children. Of course child abusers who have something psychologically wrong with them will not be deterred.

#### **Child Marriage and Abuse of the Child Bride :**

Child Marriages continue unabated in spite of laws which have been in force for decades. Although the age of marriage has risen, such increase is due mainly to economic causes rather than the law. When in 1929, with the British in power, the Child Marriage Restraint Act, 1929 (setting the age of marriage at 14 for the girl) was enacted, there was a spate of child marriages. Both the Hindus and the Muslims protested against such laws as going against what was permitted by their religions. The Government fearing the strength of the opposition could not declare such under age marriages void--- only punishable. This meant that the marriage, whatever the age of the parties, would be valid. Even after the British left, the Pakistani Government could not declare such marriages invalid. In 1961

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16. Wolfe, D.A. (1987). *Child Abuse: Implications for Child Development and Psychopathology*: Sage Publications, London at p.45.

17. Supra note 14 at p. 14.

the age of marriage was raised by the Muslim Family Laws Ordinance to 16 for the girl. In 1984, the Government of Bangladesh, as part of their family planning programmes as well as in recognition of the dangers of early motherhood and so forth increased the age still further to 18 for the girl and 21 for the husband. There has been, through the years, an increase in the age of marriage even though it does not correspond with the legal minimum. The increase that has occurred is mainly due to causes other than the laws relating to the age of marriage. One of the major drawbacks which hinders the enforcement of the law on a minimum age of marriage is the almost total lack of records relating to age. Ask a villager the age of his children or the year of his/ her marriage and you will get strange responses. Most often they blame their own illiteracy for such ignorance. The fact remains that dates have no significance for them and therefore the laws relating to the age of marriage are of no importance. Pre-puberty marriages are on the wane but marriage a year or two after menarche is still in vogue. The fact that it is not only menarche that determines adulthood is rarely understood or taken into account. As soon as a girl reaches puberty she is perceived as being in a potentially dangerous state. The sooner she can be handed over into the care of her husband and his family the better. One of the greatest worries that a girl's parents face is the thought that they will have to provide a dowry for their daughter. This concern is the major cause at present that makes the birth of the daughter so unwelcome apart from traditional reasons such as the thought that the property in part will go outside the family. Bangladeshi parents face penury in order to provide a dowry for their daughters (the practice continues in spite of the Dowry Prohibition Act of 1980). It is inconceivable for them to think of using this sum of money on the maintenance or education of their daughters so that they can eventually support themselves. As long as girls are viewed as burdens who are to be married off as soon as possible, their self-perception will be tainted. Although the legal age of consent is 14 according to the Penal Code, the age of marriage according to the CMRA, 1929 is 18. The inconsistencies of the law fail to provide any sort of check on the abuses that young girls face. Logically the age of consent should be raised to 18. As far back as 1929 the legislators had to deal with the difficulty of enforcing the age of consent within marriage and were forced to enact the Child Marriage Restraint Act. The time has come to deal harshly with



the situation so that the abuse of young girls in the name of marriage comes to an end.

The institution of dowry has become widespread and it makes no difference what law says. Although the amount of it may vary, very rarely do marriages take place without the parents of the girl having to pay dowry. As regards inheritance, according to the personal laws of the Muslims, the daughter takes half of what her brother takes. Most women however forego whatever rights they might have to their parental property in order to keep peace with their brothers. The justification behind the unequal distribution to property is that the woman, once she is married, will also get a share of her husbands property. The presence of a husband is therefore taken for granted as an essential requisite of a woman's life. The law does not take into consideration that a man will also get a share of his wife's property and thereby stands in the end to get a much larger share than his sister whether she is married or not. Staying single is not an alternative that a woman has, and the sooner that a girl is taken off her parents hands the better it is for the parents.

#### **Exploitation And Abuse Through Child Labour :**

Child labour in the context of Third World countries cannot be treated the same way as in developed countries. Children in Bangladesh take part in wage earning activities in order to survive. As Peter Tacon said, for them formal education and play becomes luxuries where the maintenance of life itself is at stake<sup>18</sup>. It would be presumptuous for a person, organisation or country to talk of abolishing child labour without providing some sort of viable alternative which is in the best interests of the child. Until such time, the only way to stop abuse and exploitation of children is by ensuring that they have at least the basic rights which they have a claim to. By making sweeping rules abolishing child labour, the end result is only to make further and worse exploitation possible because it takes on secret forms which are practically impossible to bring an end to. The much publicised Harkin Bill tried to stop the use of underage labour by threatening to stop the export of garments produced in factories where child labour was involved. Although it is true that the garment industries employ a large number of child workers, and in the formal sector it is

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18. UNICEF (1991). *Impressions of Women and Children in Bangladesh*; UNICEF, Dhaka.

probably the largest employer, nevertheless the only results of the Bill were firstly that a large number of children were sacked and secondly the factories that continue to employ children do so secretly. Employers can argue that with the amount of unemployment in Bangladesh, they could easily employ an adult on the same wages instead of a child. What is necessary is that the state recognises that child labour is a phenomenon that exists, and the only method of ensuring that children are not exploited is to make laws which put the employers under strict responsibility to maintain certain standards. By refusing to recognise the existence and extent of the phenomenon, the State acts like an ostrich and causes more harm than good to the segment of the population it is trying to protect.

In the rural areas, where the majority of the population live, the children are expected to help their parents and many of them perform adult jobs. The girl child starts early and works as a helper to her mother looking after young siblings or cooking for the family. In the household, female children participate much more than the boy child. They mostly participate in activities which are home based and require large amount of labour input within the home<sup>19</sup>. The parents of the children prefer to set aside time for their sons in order that they get an education but are less eager when it comes to the daughter. No economic value is put on the labour of a girl child and she is always viewed as a sort of temporary resident who is to leave the parental home upon marriage. Although she is treated prejudicially at home, it is outside the home that the child labourer faces the greatest abuse, deprivations and exploitation. Whether it is a girl working in the house of a wealthy farmer or whether the child is employed in the urban areas as a maid, she is exposed to greater risks and her chances of exploitation increase. According to UNICEF there is a larger number of girl children working as domestic workers and they get less wages than boys<sup>20</sup>.

These children usually begin to work very early and carry on till late in the evening. In exchange they get food and clothing and sometimes a small amount of wages. There is no fixed wage rate or prescribed terms and conditions of employment for domestic labour. (sic) There is no holiday in this occupation, unless they fall ill or want to go home<sup>21</sup>

19. Salahuddin, Khaleda (1981). Aspects of Child Labour in Bangladesh" in *Disadvantaged Children in Bangladesh: Some Reflections*; Women for Women, Dhaka.

20. Supra note 18.

21. Supra note 19 at p. 106.



Lack of viable alternatives assures the supply of domestic workers. When these children go back home, they compare themselves to the other children and consider themselves more fortunate since they have clothes and food. Consequently they put up with abuse because for them the only other alternative is starvation. If a child, unable to cope, goes back home she is usually sent back by her parents who feel that she will at least have food and clothing which they themselves cannot guarantee. It is only when the abuse reaches such proportions that the child can no longer bear the abuse or when she is being so brutalised that the law enforcement agencies or the press becomes involved, that the true plight becomes obvious. The abuse that Bangladeshi children face is therefore different in some respects from the abuse children face in more developed countries. Abused Bangladeshi children have no options; they get little support from family members or the State.

Ishrat Shamim<sup>22</sup> says these children seek strategies for survival in these informal sectors of work and

become vulnerable to exploitation of various nature of which sexual abuse and violence is one manifestation of the power relation between the haves and have-nots, between the rich and the poor<sup>23</sup>.

The garment industry in some ways (although opening up doors to newer types of abuses) has provided an option for the girls. They prefer jobs in factories where they usually have better wages than they would have if they had worked as domestic servants, they have some holidays and a lot more freedom. Although the ILO Convention and The Employment of Child Act (1938) Prohibits employment of children under 15 and 16 respectively, in reality much younger children are employed. Once again the lack of records as regards age is a great barrier toward the implementation of any law regarding age. The traditional umbrella of protection afforded by their families are absent and the employers often have a vested interest in engaging children whose labour is the cheapest, their hours can be the longest and their bargaining power non-existent<sup>24</sup>.

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22. Shamim, Ishrat (1992). Slavery and International Trafficking of Children: Its nature and Impact" ---Paper presented at NGO Forums on Children's Rights and in South Asia at p. 34.

23. Ibid at p. 34.

24. Supra note 18.

### **Immoral Trafficking of Children :**

Although abuse of children is not confined only to the lower strata of society, poverty is one of the major causes which is directly related to the vulnerability of the child. Hopes of a brighter future and the prospect of escaping poverty often leads to children being placed in positions where they face extreme forms of abuse. Young girls or their parents often unknowingly put their trust in procurers who promise them lucrative jobs in the cities or abroad. These procurers intend only to secure a huge profit from trafficking in these girls and their greatest security is the fact that the poor parents have no means of tracking down their daughters once they have disappeared. Procurers are often known people; friends, relative or neighbours; sometimes the girls are kidnapped. There have been cases where the parents have knowingly sold their daughters for price. Such trafficking is mainly for prostitution, sexual abuse, cheap labour, slavery, marriage and sex tourism<sup>25</sup> : According to estimates of human rights activists 200 to 400 young women and children are smuggled every month<sup>25</sup>. It is only some incident, like their being apprehended, which makes known the plight of these girls. Once apprehended they languish in foreign jails with little initiative on the part of the Government to secure their release and return. Even if such release is secured, once they are back their chances of reintegration within society is difficult, for once again the children i.e. the victims become the guilty party.

### **Legal Measures Against Child Abuse:**

#### **International legislation:**

The Geneva Declaration of the Rights of the Child of 1924 was followed in 1959 by the *Declaration of the Rights of the Child* adopted by the General Assembly.

#### **The United Nations Convention on the Rights of the Child :**

In 1989 the General Assembly adopted the *Convention on the Rights of the Child*. Bangladesh was one of the first countries to ratify this Convention which is the first international legal instrument which lays

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25. Supra note 22 at p. 15.



down guarantees for the spectrum of the child's human rights (Convention on the Rights of the Child). Bangladesh ratified the Convention on the 3rd of August 1990, with certain reservations e.g., regarding inter-state adoption and religion.

The most recent international treaty i. e., the Convention on the Rights of the Child in Article 1 defines a child as a person below 18 years of age. *Article 32* of the Convention declares:

1. States Parties recognize the rights of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. State parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, State parties shall in particular:
  - a) Provide for a minimum age or minimum age for admission to employment;
  - b) Provide for appropriate regulation of hours and conditions of employment;
  - c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

The International Convention on the Rights of the Child requires that the best interests of the child should always be of primary consideration in all actions concerning children. Situations may however arise where the concrete interests of the child conferred by the convention conflicts with the 'subjective understanding of the best interests of the child in a particular context'<sup>26</sup> Although it is undeniable that the 'best interests of the child' is culturally, materially, legally and politically constructed<sup>27</sup> as mentioned before, certain behaviour irrespective of the context, is

26. Armstrong, Alice (1995). A Child Belongs to Everyone : Law, Family and the Construction Best Interests of the Child' in Zimbabwe of the; International Child Development Centre; Innocenti Occasional Papers; UNICEF Florence at p. 1.

27. Ibid at p.32.

unacceptable. The cultural diversity of individual signatory states to the Convention must be recognised but this should not impede the implementation of certain basic rights. The Bangladesh Government is often guilty of avoiding implementation of certain international norms by inserting reservations while at the same time ratifying international conventions thereby nullifying to a great extent the affect of such ratifications.

### **Domestic Legislation :**

**Age of Employment :** Domestic legislation in Bangladesh regarding age of employment is extremely confusing. Section 3 of the *Majority Act of 1875* states that 18 is the age of majority. The Act however saves any person acting in matters relating to marriage, dower etc from being affected by the provisions of the Act. Even after the age of marriage has been increased by the *Child Marriage Restraint (Amendment) Ordinance, 1984* to 18, the proviso still remains.

*The Factories Act of 1965* in Section 66 states:

No child who has not completed fourteen years of age shall be required or allowed to work in any factory.

Section 70 states:

(1) No child or adolescent shall be required or allowed to work in any factory

(a) for more than five hours in any day; and (b) between the hours of 7p. m. and 7 a. m.

The children employed in the garment factories in Bangladesh are more often than not employed for much longer periods and also in contravention of Sec. 70(1) (b). Section 3 and 5 of the *Minimum Wages Ordinance of 1961* provides for the establishment of Minimum Wages Boards which shall upon reference made to it by the Government recommend the minimum wages for 'juvenile workers employed in industrial undertakings in Bangladesh'. There is no such minimum wage fixed for underage girls working in the garments industry. One of the reasons that female child workers are so popular is the fact that have no bargaining power and are willing to work for subsistence level pay.

As far back as in 1938 the *Employment of Children Act* was enacted. According to Section 3 of this Act:



(1) No child who has not completed his fifteenth year shall be employed or permitted to work in any occupation

(a) connected with transport of passengers, goods or mails by railway;  
or

(b) involving the handling of goods within the limits of any port.

(2) No child who has completed his fifteenth year but has not completed his seventeenth year shall be employed or permitted to work in any occupation referred to in sub-section (1), unless the period of work of such child for any day are so fixed as to allow an interval of rest for at least twelve consecutive hours which shall include at least such seven consecutive hours between 10p. m and 7 a.m as may be prescribed.

Furthermore Sub-section (3) of Section 3 specifically prohibited the employment of children under the age of 12 in certain specified areas set forth in the schedule attached to the Act e.g. bidi- making, carpet weaving, cloth-printing, manufacture of matches, tanning and so forth. In the bidi factories all over Bangladesh, children much younger than 12 years are employed. As remarked before, there remains confusion as to the age under which a Bangladeshi person is to be considered a child and whose labour is prohibited.

The 1989 International Convention on the Rights of the Child imposes a duty on the State parties to 'protect children from physical and mental harm and neglect, including sexual abuse or exploitation' (Article 34) and to make 'all efforts to eliminate the abduction and trafficking in children' (Article 35) (Convention 1991).

Under the domestic law of Bangladesh there are several laws that relate to the growing crimes of rape, sale, abduction and trafficking in and of children. According to the *Penal Code of 1860* the consent of a child when she is under the age of 14 is not be construed as consent at all (Sec.375). It is immaterial therefore, that the child consented to the act. However in the case of marital intercourse, the offence of rape will not be held to have been committed if the wife is above the age of 13 years (Exception to Sec.375). Once again there is lack of conformity between laws. Marriage under the age of 18 years is punishable (though not null and void) under the *Child Marriage Restraint Act, 1929*; there is no

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conformity with the age of consent within marriage and the minimum legal age of marriage.

Section 366, 366A, 366B, 367, 372, 373 of the *Penal Code* deals with the punishment of various crimes in which women and children are kidnapped, abducted, trafficked, imported etc for the purpose of prostitution, illicit sex and other immoral purposes. *The Suppression of Immoral Traffic Act, 1933* was enacted for the suppression of traffic in women and girls. The Act was a separate act which provided punishment for various offenses relating to prostitution, procurement and trafficking. Sec. 9 deals with the punishment for 'procuration' for the purposes of prostitution; Section 10 with the punishment for importing a female for prostitution; and Section 11 for detention as prostitute or in brothels.

**The Childrens Act of 1974 (Act XXXIX of 1974)** was enacted by the Government of Bangladesh. On the 3rd of June 1974, the bill was placed in the Jatiyo Sangsad by Begum Nurjahan Murshed (State Minister for Social Welfare and Family Planning):

'to consolidate and amend the laws relating to the custody, protection and treatment of children and trial and punishment of youthful offenders'

Although a member of Parliament proposed that the bill be sent for eliciting public opinion, and another suggested that it be placed before a Select Committee, both proposals were defeated.

The above Act repealed the previously enacted *Bengal Childrens's Act of 1922*. Shri Manobendro Narayan M. P alleged that the new law was merely a rewording of the old Bengal Children's Act, passed by the British and that there was a wide gap between reality and provisions of the law. What was required, he opined, was a proper economic structure<sup>28</sup>. Part VI of the Act dealt with *Special Offenses in Respect of Children*. Section 42 deals with 'penalty for causing or encouraging seduction'. Section 42 reads: Whoever having the actual charge-of, or control over a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl or causes or encourages any person other than her husband to have sexual intercourse with her shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to Taka one thousand, or with both.

28. *Debates of the Jatiyo Sangsad*. 2nd Volume, First part; Proceedings of the 1st Jatiyo Sangsad: 5th Session, 1974; Assistant Controller-in-charge, Bangladesh Forms and Publications Office, Dhaka.



Section 43 deals with the power of the Court to direct parent or guardian to enter into a recognisance to exercise due care and supervision in respect of a girl under 16 who is exposed to the risk of seduction or prostitution. Section 44 of the Children's Act of 1974 imposes *penalty for exploitation of child employees*.

Sec. (1) states: Whoever secures a child ostensibly for the purpose of menial employment or for labour in a factory or other establishment, but in fact exploits the child for his own ends, withholds or lives on his earnings, shall be punishable with fine which may extend to Taka one thousand.

Sub. Sec (2) of the above section imposes punishment which may range from imprisonment for a term which may extend to two years, or with fine which may extend to Taka one thousand, or with both, for persons who secure a child for the purposes mentioned in Sec.44(1) but

exposes such child to the risk of seduction, sodomy, prostitution or other immoral conditions.

In 1983, The Cruelty to Women (Deterrent Punishment) ordinance was enacted. This Act dealt harshly with the crimes of kidnapping or abduction for immoral purposes etc. In 1995 the *Repression of Women and Children (Special Provision) Act* superceded the Act of 1983. It was enacted in recognition of the need for tougher punishment for heinous offences against women and children. The Act provides for the death penalty in several cases. Any person causing the death of any woman or child by corrosive substance will be punishable by death (section 4). Section 5 of the Act lays down that the death penalty may be imposed in cases of grave injuries (e.g. blindness of both eyes or for causing permanent injuries to head or face of the child or woman). The offence of rape is also punishable by death or life imprisonment [Section 6(1)] as is gang rape of a child or woman [Section 6(3)].

**Section 6(2) states :**

Any person who causes the death of any child or woman through rape or after committing the offence of rape will be punishable by death.

The death penalty is also imposed for causing death by gang rape or for causing death after the offence of rape (6(4)). By section 7 *attempt to cause injury or death through rape* is made punishable by death or life imprisonment. The latter punishment is also imposed for illegal trafficking of children. Any person who kidnaps a child or holds the child hostage for

the purpose of obtaining ransom may be punished with imprisonment for life (Section 13).

As with a variety of other social crimes there exists plenty of well intentioned laws for the punishment of crimes against children. However, these continue with horrific regularity. The majority of crimes remain, as mentioned before, unreported and unpunished. As with other laws in Bangladesh there must be proper implementation; it is not enough to be one of the first signatories to the Convention to the Rights of the Child, national implementation and enforcement is required. Children who are victims must be treated as such, i. e, victims (and not perpetrators) and more defenseless and vulnerable because of their age. As the Universal Declaration of Human Rights proclaims: childhood is entitled to special care and assistance.

A child is the reflection of society. The child mirrors society at large, in a magnified form. Damage to a child's growing mind and body can be permanent since the child has no second chance. Particular attention is required to meet the needs of children. If a child's survival, development and protection are at stake, then development of society are at stake, then the development of society at large is threatened.<sup>29</sup>

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29. Supra note 18.



## FUNCTIONS OF BILLS OF LADING : AN OVERVIEW

Md. Khurshid Alam

### Introduction

Bill of lading was introduced in the Sixteenth century. Since then it has become a very important part of international business transaction by sea.

Neither the Bills of Lading Act<sup>1</sup>, nor, the Carriage of Goods by Sea Act<sup>2</sup>, define bills of lading. The (English) Admiralty Court Act<sup>3</sup>, however, in Section 6 provides that a document whereby the receipt of goods is acknowledged for shipment on board a named ship, or on some other ship for carriage by sea and delivery to the shipper's order, the document being signed on behalf of the master, is a bill of lading for the purposes of the (English) Bills of Lading Act<sup>4</sup>.

The Halsbury's Laws of England<sup>5</sup> states that a bill of lading is a document of title signed by the shipowner or by the master, or other agent of the shipowner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which the goods have been delivered to and received by the ship.

According to Article 1 Rule 7 of the United Nations Convention on the Carriage of Goods by Sea<sup>6</sup> 'Bill of lading' means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which he carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.'

A bill of lading may be defined as a document in writing signed by the shipowner, or the master or any other agent on behalf of the shipowner,

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1. 1856.

2. 1925 : Act XXVI.

3. 1861.

4. 1855.

5. Para 314, Page 143, Vol. 5, 4thEdn. 1974.

6. (1978).

which states that certain number of goods have been shipped in a particular ship and which purports to set out the terms on which such goods were delivered to and received by the ship.

When a bill lading contains neither any note as to any irregularity, nor any complain, as to the goods received by the carrier, but only the statement 'shipped in apparent good order and condition', then it is said to be 'clean'. On the other hand, when it contains a note of anything appearing to be wrong with the goods received, e.g. three packages torn and dirty, the bill of lading is said to be 'qualified'.

In general, the master issues a bill of lading at the time of shipment of the goods. There is, however, a practice that when the goods are put on board, the mate<sup>7</sup> usually issues an informal receipt, called the mate's receipt, which is later on exchanged for the bill of lading. Until the issue of the latter, the carrier holds the goods on the terms of her usual bill of lading. The practice of issuing mate's receipt has almost faded out. Now-a-days, the bill of lading is issued, not by the master of the ship, but by the carrier's agent, at the time when he, i.e. carrier's agent, receives goods for shipment from the shipper or his agent.

The bill of lading performs three main functions : firstly, it acts as a receipt, secondly, it represents a document of title, and thirdly, it is evidence of the contract of carriage.

The bill of lading acts as a receipt as to quantity of the goods, apparent order and condition of the goods and leading marks of the goods.

#### **Examination of the functions of he bills of lading**

In this article an attempt will be made to examine the functions of the bill of lading. The effects of the relationship between carrier and consignee and carrier and indorsee for value will be analysed with regard to the functions of the bill of lading.

#### **Examination of the function of the bills of lading as a receipt**

##### **(a) Receipt as to quantity**

##### **(i) Carrier and consignee**

The bill of lading shows the number of packages, or pieces, or quantity or weight, as the case may be, of the goods shipped, as furnished in writing

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7. i.e. the person second in command in a merchant ship.



by the shipper. Such a bill of lading is a *prima facie* evidence as to the quantity of the goods received by the carrier. The carrier is to deliver to the consignee the very same amount or quantity of goods that have been shipped. Where there is short delivery, i.e. where there is a difference between the amount of the goods mentioned in the bill of lading and the amount of goods delivered, and the consignee brings an action for damages, the burden lies on the consignee to prove the exact amount of the goods shipped, and he can do it easily by producing the bill of lading before the court. Then the carrier to escape liability must prove that the bill of lading was not true, and that he delivered that quantity of goods which had been actually shipped. Such proof may be very difficult and expensive.

But if the bill of lading contains a 'quantity unknown' clause, meaning the carrier makes no admission as to quantity or weight of the goods shipped, but only that he has received a quantity which the shipper or his agents says so, then the bill of lading is no longer treated as a *prima facie* evidence and the consignee has to prove what exactly had been shipped.

In **New Chinese Antimony Co. v. Ocean Steamship Co. Ltd.**<sup>8</sup> the bill of lading stated that 937 tons of ore had been shipped. It also contained the clause 'weight, measurement, contents, and value... unknown'. Less than 937 tons of ore had been delivered, and the consignee claimed damages for short delivery. The Court of Appeal held that in view of the 'weight etc. unknown' clause, the bill of lading was not even *prima facie* evidence that 937 tons of ore had been shipped. The carrier was not liable for short delivery in question, since the consignee could not prove that in fact 937 tons of ore had been shipped.

#### (ii) Carrier and endorsee for value

In the case where a bill of lading is transferred, and the indorsee for value, who took the transfer of the bill of lading relying upon the information contained in it, complains short delivery, the carrier will be estopped from contending that the bill of lading was wrong.

In **Rasnoimport v. Guthrie & Co.**<sup>9</sup> the bill of lading stated that 225 bales of rubber had been shipped. In fact, only 90 bales were shipped, and this

8. (1917) 2KB 664.

9. (1966) 1 Lloyd's Rep. 1.

was delivered to the indorsee for value of the bill of lading, who claimed damages for short delivery, i.e. for the value of 135 bales which had not been delivered. It was held that the carrier was liable. Since the indorsee for value accepted the bill of lading upon the faith of the information contained therein, the carrier was estopped from contending that the bill of lading was incorrect. It was also immaterial that when signing the bill of lading the defendants had been neither negligent, nor fraudulent, and had acted according to the practice of the port of loading.

In the hands of an indorsee for value, where the bill of lading contains a statement that the quantity or weight of the goods are unknown, it is submitted that in such a case there is no estoppel.

In **Canadian and Dominions Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd.**<sup>10</sup> a bill of lading contained the qualifying clause 'signed under guarantee to produce ship's clean receipt.' The ship's receipt was not clean as it contained the phrase 'many bags stained, torn and re-sewn'. It was held that the bill of lading was a qualified bill, and the carrier was not estopped.

#### **(b) Receipt as to condition**

##### **(i) Carrier and consignee**

The bill of lading shows the apparent order and condition of the goods shipped. Apparent order and condition means apparently, and so far as meet the eye, and externally, the goods are placed in good order on board the ship.<sup>11</sup> Such an admission applies only to the outward appearance of the goods since the carrier has no means of judging their internal condition and quality. Goods not properly packed are not in good order and condition. The bill of lading is *prima facie* evidence as to apparent order and condition of the goods received by the carrier. This proposition indicates that the carrier is under an obligation to deliver goods to the consignee in the very same condition, which is stated in the bill of lading. Where goods are received in good condition but delivered in bad condition and the consignee brings an action for damages, the burden lies on the consignee to prove the condition in which the goods have been shipped, and he can do so, simply by referring to the bill of lading. Then in order to escape liability, the carrier must prove affirmatively that the bill of lading was wrong, i.e. the goods were torn or

10. (1947)AC 46, PC.

11. Per Sir R. Phillimore in *The Peter der Grosse* (1875)1-PD 414.



dirty and damaged when received on board the ship. The carrier will find it very difficult to prove error in the bill of lading.

In **The Peter der Grosse**<sup>12</sup> the bill of lading contained the clause 'shipped in good order and condition ...weight, contents, and value unknown'. The carrier delivered goods dirty externally, and damaged. The consignee claimed damages therefor. It was held that the bill of lading was evidence that the goods had been shipped in good condition externally. Since the carrier could not prove that the goods were in fact shipped in bad condition externally, the inference of the bill of lading is that the goods were damaged while in the carrier's possession. The carrier was, therefore, liable.

But if the bill of lading contains a 'condition unknown' clause, meaning that the carrier do not acknowledge such matters in relation to the goods shipped, the bill of lading is not considered as a *prima facie* evidence and the consignee is to prove exact condition in which the goods had been shipped.

In regard to 'quality and condition unknown' clause, the tendency in recent cases has been to confine this to the internal condition of the goods and not to treat it as cutting down the admission contained in the early words. In some cases, however, the word 'quality' has been taken to refer to the inherent character of the cargo and the word 'condition' to the outward appearance, and this seems the more reasonable view.<sup>13</sup>

#### (ii) Carrier and Indorsee for value

Where a bill of lading is transferred, and the indorsee for value, who accepted the transfer of the bill relying upon the accuracy of the statements contained therein, complains damage to goods, the carrier will be estopped from showing that there was a mistake in the bill of lading.

In **Compania Vascongada v. Churchill**<sup>14</sup> the bill of lading contained the clause 'shipped in good order and condition; quality unknown'. The timber shipped was in fact badly stained and saturated with petroleum

12. (1875) 1PD 414.

13. See Chorley & Giles' Shipping Law, 7th Edn. p. 181.

14. (1906) 1 K.B. 237.

when brought alongside for shipment. This condition was apparent, and the master had notice thereof, but even then he signed a clean bill of lading. Stained timber was delivered to the indorsee for value, who claimed damages. It was held that the words 'good order and condition' amounted to a representation as to the actual appearance of the goods when shipped. Since the indorsee for value accepted the bill of lading upon the faith of the representation therein, the carrier was estopped from denying that the damage was caused on board the vessel. The carrier could not also rely on the words 'quality unknown'. 'Quality' referred to something that was usually not apparent to an unskilled person, while, 'condition' was something apparent. The master of the ship is expected to notice the condition of the goods, but not the quality. The carrier was, therefore, liable.

In the hands of an indorsee for value, where in a bill of lading the words 'shipped in apparent good order and condition' are qualified by other words, it is submitted that in such a case estoppel will not arise.

### **(c) Receipt as to leading marks**

#### **(i) Carrier and consignee**

The bill of lading shows the leading marks as furnished in writing by the shipper. Shipping marks or leading marks describes the goods shipped in such a way, so that they can easily be identified at the time of discharge. Identification being the main purpose of leading marks, they may be composed of letters, as well as, figures or marks, e.g. '\$'. Such a bill of lading is a *prima facie* evidence as to the leading marks of the goods received by the carrier. The carrier is to deliver to the consignee goods with the very same marks with which they have been shipped. Where there is a discrepancy between the marks mentioned in the bill of lading and the marks on the goods delivered, and the consignee brings an action for damages, the burden lies on the consignee to prove the marks on the goods shipped, and he can do it easily by showing the bill of lading. Then the carrier to escape liability must prove that the bill of lading was wrong.

#### **(ii) Carrier and indorses for value**

Where the marks inserted in the bill of lading are material to the description of the goods, i.e. they convey a meaning as to the character



of the goods and are, therefore, essential to the identity of the goods, and on the faith of those marks an indorsee for value receives the bill of lading, the carrier will be estopped from proving that there was a mistake in the bill of lading.

But Section 3 of the **Bills of Lading Act**<sup>15</sup> does not preclude the person who has signed the bill of lading from showing that the goods were marked otherwise than as stated, unless the marks are material to the description of the goods.

In **Parsons v. New Zealand Shipping Co**<sup>16</sup> . frozen carcasses of lamb were marked as 622X and 488X. On arrival some carcasses were found to be marked 522X and some other 388X. The indorsee of the bill of lading contended that the defendants by section 3 of the Bills of Lading Act were estopped from denying the statement in the bill of lading, i.e. the lambs marked 522X and 388X were part of the shipment, and were liable for failing to deliver the carcasses shipped. It was held by the majority of the Court of Appeal that the carrier was not liable. The marginal description of the goods in the bill of lading and the number of packages stated therein did not affect or denote the nature, quality or commercial value of the goods. Here the marks are quite immaterial, as far as the purchaser was concerned, because the carcasses delivered were of the same character and value as those shipped. Where the marks are immaterial to the description of the goods, there is no estoppel. 'Suppose, by way of example, a bill of lading was dealing with five parcels of goods of the same size, quality, and value, and, after describing these goods accurately, it proceeded to state that the parcels were numbered consecutively, one to five. Could a purchaser refuse to accept delivery of one or two of the parcels, and hold the signer of the bill of lading estopped under the section, because it turned out that two out of five which should have been respectively marked figure 3 and figure 4 were both marked figure 4? It appears to me that he could not . . .' 'For the purposes of the Act, a description in a bill of lading of marks on the goods is not of necessity part of the description of the goods themselves..... Marks on the goods which, so far as the purchaser is concerned, have no meaning, and could only be referred to in the bill of lading in order to assist the more sure or speedy identification or delivery of the goods, do not, in my opinion, form part of the description of the

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15. (1856).

16. (1901) 1 KB 548.

goods, within the meaning of section 3, so as to bind the signer of the bill of lading by way of estoppel.<sup>17</sup>

### **Relevant enactments**

#### **The Schedule to the Carriage of Goods by Sea Act<sup>18</sup>**

##### **Article III Rule 3**

'After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper....

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking'.

##### **Article III Rule 4**

'Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b) and (c)'.

##### **Article III Rule 5**

'The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper'.

17. Per Romer L.J.

18. 1925: Act XXVI.



**Article IV Rule 2**

'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from --

- (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship:
- (b) fire, unless caused by the actual fault or privity of the carrier:
- (c) perils, dangers and accidents of the sea or other navigable waters:
- (d) act of God:
- (e) act of war:
- (f) act of public enemies:
- (g) arrest or restraint of princes, rulers or people, or seizure under legal process:
- (h) quarantine restriction
- (i) act or omission of the shipper or owner of the goods, his agent, or representative:
- (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general:
- (k) riots and civil commotions:
- (l) saving or attempting to save life or property at sea:
- (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, quantity, or vice of the goods:
- (n) insufficiency of packing:
- (o) insufficiency or inadequacy of marks:
- (p) latent defects not discoverable by due diligence:
- (q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person

claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.'

### **Article IV Rule 3**

'The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants'.

### **The Bills of Lading Act<sup>19</sup>**

#### **Section 1**

'Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.'

#### **Note :**

Contracts are not assignable. Hence a transfer of a bill of lading with the intention of passing the property in the goods, merely passed the property in the goods, but did not transfer the rights and liabilities under the contract of carriage. A great change was introduced by Section 1 of the Act of 1856. Since the passing of the Act, with the passing of property, the rights and liabilities under the original contract pass to the consignee or indorsee for value, as if he was a party to it. Under Section 1, the transfer of bill of lading assigns the contract of carriage, simultaneously with the passing of property. Section 1 will not apply where just the possession of the goods, rather than the ownership, has passed.

Where Section 1 applies, the right to suit is vested exclusively in the consignee or the indorsee for value. This means that in such a case the shipper, who has concluded the contract of carriage with the carrier, cannot claim damages for the loss sustained by the consignee or indorsee for value.

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19. 1856 : Act.



In **The Albazero Case**<sup>20</sup> crude oil was shipped from Venezuela to Antwerp under a bill of lading naming the charterers as consignees. The bill of lading was subsequently transferred to an indorsee. Later, the vessel and her cargo were lost. The charterers, as consignees, claimed damages from the carrier contending that the carriers were in breach of the terms of the charterparty and that the loss had been caused thereby. It was held that the action failed, since the charterers had no locus standi. By virtue of Section 1 the right of action was vested solely in the indorsee.

### Section 2

'Nothing hereing contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.'

### Note :

#### Shipper's right of stoppage in transit

Section 2 preserves the right of the shipper to stop the goods in transit. By exercising this right, the unpaid seller can resume possession of the goods as long as they are in the course of transit, and may retain them until the payment of price.

In connection with this right, four points are to be noted, namely.

- (a) the buyer must be insolvent;
- (b) the goods must be in transit, Generally, transit begins when the goods leave the seller's possession, and ends when they enter the buyer's possession;
- (c) it's exercise does not rescind the contract of sale, but merely restores possession of the goods to the seller;
- (d) it is defeated by a bona fide transfer of the bill of lading for value.

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20. (1977)A.C. 774.

In **Lickbarrow v. Mason**<sup>21</sup>, the buyer indorsed the bill of lading to Lickbarrow, a bona fide purchaser for value. Later, the buyer became insolvent. The seller tried to stop the goods in transit, and sent one bill of lading to Mason, who obtained possession of the goods. Lickbarrow sued Mason for recovery of the goods. It was held that Lickbarrow was entitled to recover the goods, since the right of stoppage in transit was defeated by the bona fide transfer of the bill of lading for value to Lickbarrow.

### **Carrier's right to freight**

Section 2 preserves the right of the carrier to claim freight from the shipper, even though the bill of lading may have been assigned to the consignee. So, the carrier can sue either the shipper or the indorsee of the bill of lading for the freight. By shipping the goods, the shipper impliedly undertakes to pay for the freight. However, he is relieved of this obligation,

(a) where the master for his own convenience accepts a bill of exchange from a consignee, who was willing to pay cash;<sup>22</sup> or,

(b) where the bill of lading is indorsed with a clause freeing the shipper from the liability, and the carrier has knowledge of such clause.<sup>23</sup>

### **Section 3**

'Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.'

21. (1794) 1 Sm LC (13th edn.), p. 703.

22. *Strong v. Hart* (1827) 6 B & C 160.

23. *Watkins v. Rymill* (1883) 10 QBD 178.



**Note :**

Section 3 does not make the master liable for non delivery of any goods represented as having been shipped. It only gives the consignee or indorsee for value a statutory estoppel. But the master is liable to an indorsee, who has relied on that statement, for damages for breach of warranty of authority.<sup>24</sup> This is a personal liability which does not extend to the ship owner on the ground that a master has no authority to issue a bill of lading when he has not at all received goods on board the ship. 'This remedy against the master, however, may be of little practical value since most masters of ships are comparatively poor people.'<sup>25</sup>

**Examination of the function of the bill of lading as a document of title**

The bill of lading is a document, not of proprietary title, but of possessory title, i.e. it has both negative and positive components.<sup>26</sup>

**(a) Negative Components**

Only the holder of the bill of lading is entitled to claim delivery of the goods from the carrier. So, where there is no bill of lading, there is no delivery of goods.

In **Trucks & spares v. Maritime Agencies Ltd.**<sup>27</sup> the consignee went to claim delivery of the goods without a bill of lading. Due to debts owed to the carrier, the shipper did not receive one, and as such could not deliver it to the consignee, i.e. the carrier had the bill of lading. It was held by Lord Denning that the consignee is not entitled to claim delivery of the goods, since the bill of lading must be produced to make a good title to the goods (i.e. to collect the goods).

**(b) Positive Components**

In some cases, e.g. in a Cost Insurance Freight Contract, possession of a bill of lading amounts to constructive possession of the goods. So, by transferring the bill of lading the consignee can effectively transfer the possession of the goods to an indorsee for value. In effect, the tendering of the bill of lading is the same as delivery of the goods.

24. *Rasnoimport V/O v. Guthrie & Co. Ltd.* (1966) 1 Lloyd's Rep 1.

25. *Chorley and Giles' Shipping Law*, 7th Edn., P. 185.

26. *Janette Charley, International Trade Law*, Edition.

27. (1951).

In **Horst Co. V. Biddell Bros.**<sup>28</sup> a cargo of hops was shipped from San Francisco to London. While the goods were abroad the ship, the shipper tendered the bill of lading to the consignee demanding payment. The latter refused to pay for the goods until they were actually delivered. It was held by the Court of Appeal that the shipper was entitled to payment, since the handing over of the bill of lading to the consignee was equivalent to the handing over of the possession of the goods.

In **Sanders v. Maclean**<sup>29</sup> the consignee refused to make payment simply because two out of three bills of lading were tendered to him. It was held that the tender of one bill of lading was sufficient, unless there was a stipulation to the contrary.

### **Transfer of bill of lading**

When the word "negotiable" is used in relation to a bill of lading, it merely means transferable.<sup>30</sup> Whether a bill is negotiable or not is determined by the form in which it is written. For instance a bill of lading made out to the order of a named consignee, or to order, or to bearer is negotiable. On the other hand, a bill of lading made out to a certain consignee is not negotiable, e. g. consignee Nova means the bill of lading is not transferable, and can only be given to Nova. It has never been settled, however, whether transfer of a bil of lading marked "non-negotiable" transfers title at all.<sup>31</sup>

A bill of lading is not a negotiable instrument within the meaning of the Negotiable Instrument Act.<sup>32</sup> There are, however, some similarities and dissimilarities between them.

The **Similarities** are,

- (a) both of them are transferable by indorsement and delivery;
- (b) the transferees in both the cases can sue in their own names;<sup>33</sup>
- (c) the transferees in both the cases can give a valid discharge to the person liable.

28. (1912) AC 18.

29. (1883) 11 QB 327.

30. Kum v. Wah Tat Bank Ltd. (1971)Lloyd's Rep 439 at 44C, PC.

31. Ibid.

32. 1881 : Act.

33. The transferee of a bill of lading can sue under S. 1 of the Bills of Lading Act (1856).



On the other hand, the **Dissimilarities** are,

(a) a bill of lading relates to goods. While, a negotiable instrument relates to money;

(b) the bona fide transferee for value of a bill of lading acquires no better title than what the transferor had; thus if the transferor had no title, he cannot pass one. While, a bona fide transferee of a negotiable instrument, on becoming a holder in due course, gets a good title even though the title of the transferor was defective.

### **Examination of the function of the bill of lading as evidence of the contract of carriage**

#### **(a) Carrier and shipper**

Between the carrier and the shipper, the bill of lading is not necessarily the contract. This is logical because the contract of carriage is concluded before the bill of lading is issued, i.e. when goods are accepted by the carrier for shipment. Bill of lading though not forming the contract of carriage of goods by sea themselves are first class evidence of the contract between the parties.<sup>34</sup> In effect, it is a very good evidence of the contract of carriage, and other evidence may be adduced to show that the actual contract contained different terms, i.e. different from those contained in the bill of lading, and hence, it is not conclusive, but only prima facie evidence.

In **The Ardennes (Owner of Cargo) v. The Ardennes (Owners)**<sup>35</sup> there was a verbal contract between the shipper and the carrier that the ship was to proceed directly from Cartagena to London in a bid to evade additional import duty that was due to be increased on 1 December. However, the bill of lading also contained a liberty clause allowing the carrier to stop on the way. The carrier did stop at Antwerp, and thus did not get to London until 4 December. By that time the import duty was increased and other cargoes had arrived, causing a fall in the price. The shipper sued the carrier for deviating from the route, and the carrier relied on the liberty clause.

34. *M/s Abdul Rahman Abdul Gani v. M/s United Oriental Steamship Co. Karachi and others* (1958) 11 DLR SC 133.

35. (1951) 1KB 55.

The issue of the case was what were the actual terms of the contract - - were they those in the bill of lading or the verbal contract that was made.

It was held by the Court of Appeal that the bill of lading only constituted evidence of the contract of carriage, and so other evidence could be admissible in rebuttal. The carrier was in breach of the contract of carriage, and liable, since he was bound by what was actually agreed verbally.

**(b) Carrier and consignee or indorsee for value**

Between the carrier and the consignee or indorsee for value, the bill of lading is considered to contain the full terms of the contract of carriage. The consignee or indorsee will be bound only by the terms set out in the bill of lading as it is presumed that he accepted it subject to those terms, and he knew nothing about other terms agreed upon by the carrier and the shipper.

In **Leduc v. Ward**<sup>36</sup> there was a verbal contract that the carrier could deviate. The bill of lading for goods shipped from Fiume to Dunkirk gave 'liberty to call at any ports in any order...' On shipowners private business the ship deviated from her course some 1200 miles and went towards Glasgow. She was lost in a storm in Clyde. The consignee sued for damages. It was held that the verbal contract was inadmissible, and the liberty clause contained the terms of the contract, which merely gave a right to call at any port in any order substantially in the course of the voyage. Glasgow was not in the course of the voyage. Proceeding towards Glasgow was an unjustifiable deviation, and the carrier was, therefore, liable.

**(c) Carrier and holder of bill of lading**

The court may imply that a contract of carriage (on the same terms as in the bill of lading) exists between the carrier and the holder of the bill of lading, meaning a person, who is neither a consignee, nor an indorsee for value.

In **Brandt v. Liverpool Steam Navigation Co.**<sup>37</sup> a commercial bank held a bill of lading as security for a loan it had made, i.e. the bank was a

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36. (1888) 20 QBD 475.

37. (1924) 1KB 575.



## PROTECTION OF CHILDREN RIGHTS : NATIONAL AND GLOBAL APPROACH

M. Shawkat Alam

The children of the world are innocent, vulnerable, curious, full of hope and vigour. Their future should be shared in harmony and cooperation. But each day countless children around the world are exposed to danger. The situation of many children, both in this country and abroad, remains critical, and in some countries is likely to worsen in the coming decade. The reality is that no country protects the rights of all of its children or provides them with an adequate standard of health care, education, day care, housing and nutrition, or properly protects them from abuse, neglect and exploitation.<sup>1</sup> As children are vulnerable, they need rights to protect their integrity and dignity. The protection of children from exploitation and abuse is regarded as a fundamental human right. But the relationship between national and international approach, in respect of children's rights is different because international law has moved significantly ahead of domestic law in their domain. This article will consider the protection of the rights of children focusing on international legal regime on children's rights and their limitations. It will also discuss the impacts of international instruments upon national legislation having compared between the two situations. For the purposes of this article, attention will primarily be focused upon the provisions of International Convention on the rights of the child and their impact on Bangladesh.

### Needs for Special Rights to Children

Children having rights is a relatively new and emerging concept. The recent interest in children's rights is due to the recognition of a societal obligation to protect the weaker section of the community from inconsiderate or inadequate governmental actions. Children are human beings and understandably should possess certain fundamental and inalienable rights just as any human being does simply by virtue of birth. Rights accorded to children may reflect rights granted to human beings

1. Castelle, Kay "In the Child's Best Interest" A Primer on the UN Convention on the Rights of the Child, Rhode Island: Foster Parents Plan of Australia, 1989 at 1.

and the standards applicable to them. Moreover, they require special safeguards because of their physical and mental immaturity and consequent dependence and vulnerability.

### **The Origins, Development and Significance of the Convention on the Rights of the Child**

At the international level, attempts to develop general principles which guide states in their treatment of children started in 1920s. In 1924, the Assembly of the League of Nations adopted the Declaration of Geneva. This Declaration 'contained five principles which were general but to the point. One was that children should be the first to receive relief in emergencies'<sup>2</sup>.

A more profound development occurred in 1959 when the United Nations General Assembly adopted the Declaration on the rights of the child. The declaration recognized that children, by reason of their physical and mental immaturity, need special safeguards and care, including appropriate legal protection, before as well as after birth. The Declaration then goes on to enunciate ten principles to guide parents, governments and voluntary organisations in their treatment of children. These principles include : non discrimination on grounds of race, colour, sex, language, religion and political opinion; enjoyment of special treatment under the law; entitlement to a name and nationality at birth; enjoyment of social security benefits; provision of education and protection against neglect, cruelty and exploitation. The fundamental problem with the Declaration on the Rights of the Child was that it did not create any legally binding obligations.

The birth of the convention on the rights of the child commenced in the 1970s. The need for a convention was dictated by a number of factors. The inadequacies in the existing UN Human Rights Conventions and instruments in addressing the needs of children was a relevant factor. For example, the Universal Declaration of Human Rights, the International Convention on Economic, Social and Cultural Rights failed to recognize the special status and needs of children. There were other important considerations. Hammarberg appropriately summarises these :

2. Hammarberg T, "The UN Convention on the Rights of the Child- and how to make it work" 12 *Human Rights Quarterly* (1990) at 98.



One argument for moving from the Declaration to a Convention was the desire to lay down precise obligations for states. Another was that the existing international standards for the protection of children were scattered among eighty different legal instruments. It was proposed that those ought to be brought together in one comprehensive law. If work started on such a convention there would also be an opportunity to iron out inconsistencies between the standards already agreed upon. Also the thinking about children had advanced. Among the rights of children should not only be those related to protection and material welfare but also the right to influence one's own situation and to take part in decision making.

In some quarters there was also realisation that the rights of children did not always coincide with those of the parents, a fact which was not recognized in the two earlier declarations. The main argument for a separate international human rights law for children was the reality of reports from all over the world indicating that children indeed needed special rights because of their vulnerability. Children suffered so badly that their protection required special attention.<sup>3</sup> Following proposals by the Polish Government during the International Year of the Child in 1979 for the negotiation of a convention dealing with children's rights, the United Nations Commission on Human Rights appointed a working group of experts to draft the convention. On 20 November, 1989, after ten years of negotiation, United Nations General Assembly approved the text of the convention on the rights of the child.

### **Overview of the convention**

The convention on the rights of the child consists of a comprehensive preamble and 54 articles. The preamble outlines the general underlying objectives of the convention. It links the promotion and protection of the rights of children to the general human rights principles under the United Nations Charter; the Universal Declaration of Human Rights and the human rights conventions negotiated under the auspices of the United Nations, particularly the International Covenant on Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political

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3. Hammarberg, 2 above at 98-9.

Rights 1966. The rights guaranteed by the convention are covered by articles 1-41. Articles 42-45 discuss the monitoring of the convention and 46-54 discuss how the convention will enter into force. However, its not possible to consider each article individually within the scope of this paper. It is better to broadly mention different rights recognized by the convention.

The rights of child, recognized by the convention, can be subdivided in five headings in line with the traditional classification of human rights :<sup>4</sup>

### **1. Civil rights**

In general, these correspond to the rights recognized by the first 18 articles of the Universal Declaration of Human Rights (1948). Examples are the right to a name to acquire a nationality (article 7) and the right to an identity (art 8); the right to life (art 6) and the principle of non-discrimination (art 2). But there are also the so called "integrity rights", such as the ban on torture (art 37), the right to protection from physical violence (arts 19 & 34), from arbitrary arrest (arts 37 & 40), the right to privacy (art 16).

### **2. Political rights**

These cover freedom of opinion (art 12), freedom of expression (art 13), freedom of association (art 15), freedom of opinion, religion and conscience (art 14), freedom of access to information (art 17).

### **3. Economic rights**

Article 4 states in general terms that state parties shall take all appropriate legislative, administrative and other measures regarding economic, social and cultural rights. More specifically this involves, among other things, the right to be protected from exploitation (arts 32 & 36).

### **4. Social rights**

The heading of article 4 covers the right to education (art 28 & 29), health care (art 24) and social security (art 26).

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4. Eugene Verhellen, *Convention on the Rights of the Child* (1994) Belgium, Garant publishers at 72.



## 5. Cultural rights

In addition to article 4 once again, in this context we need to mention article 31, recognizing the right to rest and leisure, to engage in play and to participate fully in cultural and artistic life.

### **Convention : prospects and problems**

By recognizing various rights of the child and their implementation procedure the convention is now extraordinarily comprehensive in scope. By granting children civil, political, economic, social and cultural rights, the convention at the same time places children issues on the political agenda and also puts them in an international context. In addition, the convention has served as a facilitator for further developments in the international law on the rights of the child, which in turn helps to improve acceptability of specific rights of children.<sup>5</sup> An analysis of the convention on the rights of the child reveals that it accomplishes five goals.<sup>6</sup>

It creates new rights under international law for children where no such rights existed, including the child's right to preserve his or her identity and the right of indigenous children to practice their own culture (articles 8 & 30).

Secondly, the convention of the rights of the child enshrines rights in a global treaty which had until the conventions adoption only been acknowledged or refined in case law under regional human rights treaties, for example, a child's right to be heard either directly or indirectly in any judicial or administrative proceedings affecting that child, and to have those views taken into account (art 12).

Thirdly, the convention also creates binding standards in areas which, until the conventions entry into force, were only non binding recommendations. These include safeguards in adoption procedures and the rights of mentally and physically disabled children (arts 21 & 23).

The convention also imposes new obligations in relation to the provision and protection of children. These include the obligation on a state to take

5. See, for example, United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985, adopted GA Res 40/33, discussed in chapter 7, and United Nations Guidelines on Refugee Children 1988, in chapter 13.

6. Van Bueren, Geraldine *The International Law on the Rights of the Child*, (1995) London: Martinus Nijhoff, at 16.

effective measures to abolish traditional practices prejudicial to the health of children and to provide for rehabilitation measures for child victims of neglect, abuse and exploitation (arts 28 & 39).

Finally, the convention adds an additional express ground by which states parties are under a duty not to discriminate against children in their enjoyment of the convention rights [art 2 (1)].

Though the convention constitutes notable improvements in standard setting on children's issues but some of its provisions are very crucial to some extent.

The convention is based on the philosophy that children are *equals* and that they have the same value as adults. But they are also at the same time vulnerable because of their age and because of the ways in which their lives are subject to the decision and behaviour of adults. Herein lies a tension for adults either as parents or as members of agencies responsible for children, how best to treat children as *equals* but at the same time recognize their vulnerability.

Article 3.1 states 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities and legislative bodies, the best interest of the child shall be a primary consideration.'

Thus, the interest of others including parents and social work groups, education or health agencies are less important than those of the child. Moreover, the child should also have a say in decisions about his or her future. Article 12.1 states that : State parties shall assure to the child who is capable of forming his or her own views the right to express these views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. These articles reflect the view that the *protections of children* has to be balanced with a concern for their growth to independence and respect for their rights as individuals. One of the main implication of the conventions is that development in childcare and child law will increasingly give children the right to be involved in decisions in all situations in which they find themselves whether these involve their parents or other adults in key agencies such as health, social work or education. Though the convention is childcentred but it also states the rights, responsibilities and duties of parents and legal guardians (art 5). Here the scope of



rights, responsibilities and duties of parents and legal guardians to provide appropriate direction is very ambiguous within the ambit of the convention. It is, in fact, a difficult and controversial area where many developing states' social and legal policy may not cope with the requirements of the convention.

The definition of 'child' (art 1) in the convention also creates controversy. For the purposes of the convention, a 'child' is defined as a 'human being below the age of 18 years, unless, under the law applicable to the child, majority is attained earlier. The practical effect of this provision is to allow any state to evade the requirements of the convention simply by lowering the age of majority.

The convention also imposes duties on states (art 27) to provide the necessary resources with which children can grow to realise their potential and can themselves contribute to social and political change throughout the world. But the allocation of resources mostly depend on the social, political and economic climate of a country. For third world countries where basic survival is an issue, it is very difficult to allocate necessary resources to develop the children potential.

Moreover, the concentration on children rights in western industrialized communities is in sharp contrast to a conception of the rights of the children in third world countries. Because of this difference and the universality of the rights granted through the convention, the convention is often criticised as only reflecting 'western' case law and cultural value.<sup>7</sup>

#### **Bangladesh and the convention**

Bangladesh is one of the early signatories of the convention to make it an enforceable international law by ratifying it on 3 August, 1990. Bangladesh is now under an obligation to take the necessary measures to bring the convention into force. Besides the convention, Bangladesh is very rich of tremendous laws to protect and ensure the rights of children. Most of the convention provisions' relation to children rights are

7. See Wai, "Human Rights in Sub-Saharan African"; Said 'Human Rights in Islamic Perspective'; 'Human Rights : A Western Construct With Limited Applicability'; all in Pollis and Schwab(eds) *Human Rights: Cultural and Ideological Perspectives* (1979) See also Donnelly, Human Rights and Human Dignity: An analytical critique of non western conceptions of human rights, 76 *American Political Science Review* (1982) at 303.

consistent with the rights and protection relating by the national laws. Following are some areas where the great majority of provisions of Bangladesh law conform fully with the convention provisions relating to the basic needs.

The basic needs of children and the duties of the state towards them are enshrined in articles 14, 15, 17 and 18 of the Bangladesh constitution. Article 14 of the constitution prohibits all sorts of exploitation and article 15 ensures the right to social security. Article 17 obliges the state for adopting effective measures for free and compulsory education. Article 18 of the constitution provides that the state shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties. Article 28(4) empowers the state to make special provisions for children. These provisions in respect of basic needs correspond to convention articles 24, 28(1), 28(1)(a), 28(1)(b), 26(1) and 27(1).

#### **Provisions relating to the protection**

Article 27 of the constitution of Bangladesh states that all citizens are equal before law. Article 28(1) forbids the state to discriminate against any citizen on grounds of religion, race, caste, sex or place of birth etc. These provisions are consistent with anti-discrimination provision of the Convention contained in article 2. Article 32 of the constitution of Bangladesh states that no person shall be deprived of life or personal liberty save is accordance with the law. This article is identical to convention articles 6 and 37. Again, article 33 of Bangladesh constitution which provides safeguards against arrest and detention is similar to the convention articles 37 & 40(2)(b).

The right to nationality is granted to every citizen in article 6 of the Bangladesh constitution and to every child in article 7 of the Convention. From a Bangladesh viewpoint most of these Convention provisions relating to protection seem uncontroversial as they are listed as fundamental rights in part III of the constitution.

The right to protection from physical violence (arts 19 & 34 of the convention) correlates to part V of the Children Act 1974 which deals with care and protection of the destitutes and neglected children. The right to protection from economic exploitations (con. art 32) is similar to art 15(b) of the constitution. Besides this, section 3(1) of the Employment of Children Act 1938 has provided provisions for the same purpose.



### **Provisions concerning the participation of children in decision making**

Freedom of movement (con. art 10), Freedom of assembly and of association (con. art 15), Freedom of speech and expression (con. art 13) are covered by the fundamental freedoms guaranteed by articles 36, 37, 38 and 39(2) of the Bangladesh constitution.

Besides the laws mentioned above Bangladesh also has a number of laws which either have direct or indirect relevance upon the convention provisions. However, its not possible to discuss all of them here. Though many of the convention provisions are consistent with the existing legal structures of Bangladesh, at the same time, there are some areas where the social policy and legal frameworks confront controversy with the convention.

### **Definition of the child in the convention**

For the purposes of the convention a child is defined as a 'human being below the age of 18 years, unless, under the law applicable to the child, majority is attained earlier'. There is no uniform definition of child in the law of Bangladesh. Majority of a child varies from 12 to 21 years of age.<sup>8</sup> Again the ages at which persons may marry vary with male and female. For a marriage to be valid a male has to be 21 years & female 18 years.

### **Best interests of the child (Art 3)**

Art 3(1) of the convention provides that 'In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

This provision has already created controversy questioning the traditional concept that family life is always in the best interests of the children and that parents are always capable of deciding what is in the best interests of children. In Bangladesh, the best interest principle is absent in most of the legal policies although it is sometimes found in the court decisions. Here family is the determinant of the childrens well-being. Father is

8. For example, see *The Majority Act, 1875, Guardian and Wards Act, 1890, The Children Act, 1974, Muslim Law.*

responsible for maintenance, education, health and directing the course of career for the children. In such a social and legal context Bangladesh confronts the child's best interest principle.

#### **The child's right to express opinion**

Art 12(1) of the convention provides the right of a child to express his or her views. This article explicitly states that children have the right to have a say in the processes affecting their lives. In Bangladesh, family of any child plays the most significant part in the protection of his or her interest. Traditionally, it is believed that family is the natural environment for the growth and wellbeing of children. As the family system is patriarchal, father is the most important person in the family and he is generally responsible for making any decision affecting the children's lives. Children's views about their health, education and employment are not taken into consideration. There is no legal requirement that the children's views be taken into account in adoption, custody, maintenance and divorce. So, regardless of maturity, the children in Bangladesh have had to look to others to have a say regarding their matters. This situation will also come into conflict with art 13 (1) of the convention where children are stated to have a more general right to 'freedom of expression' and to 'impart and receive information' and children's right is not conditioned by parents' right to filter expression or information.

#### **Freedom of thought, conscience and religion (Art 14)**

This article seems to run counter to the religious ethos of Bangladesh. In Bangladesh, children follow their parents' religion as a matter of divine law and do not therefore make a choice of their own. It is regarded to be in the best interest of the children that he or she follows the religion of the father. According to Islam, a child does not have a right to choose another religion. With regard to art 14, Bangladesh made its observation that 'a child being immature by definition is not in a position to consider such complex issues clearly and is consequently unable to make a free and voluntary choice of its own and is likely to act in such cases under the influence or even pressure of others, neither of which is conducive to its normal natural healthy growth.'

#### **Children's rights to privacy (Art 16)**

It is also difficult for Bangladesh to apply this provision in reality. Privacy of children is mostly controlled by parents and in most cases it is related to parents' income and resources. When the parents are striving for their



existence, they have very little to spend for the privacy of their children. As we know the poor have never had much privacy; their lives have always been more public than that of more affluent people. For a country like Bangladesh, the privacy concept is a luxury. Given the governments limited resources it is also not clear how the state can intervene in families where the right to privacy is not adequately respected.

### **Adoption and intercountry adoption**

Convention in its article 21 provides for the provision for adoption where the best interests of the child should be 'the paramount consideration'. It also contains the principle of intercountry adoption. Bangladesh law falls short of its convention obligation in relation to article 21. Muslim law does not recognize the right to adoption. In part, this position is based on a concept of consanguinity and inheritance within the interrelated extended family, which can not and should not be altered by or affected by the act of bringing an outsider into the family structure. Instead the Islamic law substitutes the concept of *kafala* as a method of caring for abandoned or orphaned children. Under *kafala* a family may take a child to live with them on a permanent legal basis, but that child is not entitled to use the family's name or to inherit from the family. The adoption of children in Bangladesh was made temporarily legal in 1972 by The Bangladesh Abandoned Children Order, 1972. It provided provisions for both intercountry and intracountry adoption to meet the needs of children who were abandoned or made orphans after the liberation war of 1971. However, after having many allegations of malpractice, this law was subsequently repealed and intercountry adoption was prohibited. In 1982 by an ordinance (Ordinance no. 50) provision was made to exclude non-Bangladeshi citizens from being declared as guardians of Bangladeshi minors.

According to a recent estimate 15 to 20 thousand children from developing states are annually placed with families in Europe, the United States, Canada and Australia<sup>9</sup>. Inter-country adoption on such a scale is a relatively new phenomenon and shows the very existence of demand from western Countries. This demand stimulates the creation of child

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9. Hoksbergen, *Adopted Children at Home and at School*, 1987 at 3

'markets' in third world countries. In response to this demand traffic in children for adoption occurs.

During the first reading of the convention Bangladesh drew attention to the fact that intercountry adoption has created abuses in Bangladesh and other developing countries as children are sometimes adopted for the purpose of 'proselytisation'. Bangladesh wanted to see the convention amended specifically to safeguard against such abuse.<sup>10</sup> Such a proposal was not incorporated. Eventually in *retifying* the convention, Bangladesh placed an expressed reservation with regard to the art 21 on the ground that adoption as such is not possible under Islam and because of the widespread abuse of the law, Bangladesh does not allow intercountry adoption.

### **Protection against economic exploitation**

Art 32 of the convention recognizes the right of the child to be protected from economic exploitation. It imposes duties upon state to take 'legislative, administrative and educational measures to ensure the implementation of this article'. It further directs the state parties to provide for (a) a minimum age for admission to employment, (b) appropriate regulations of the hours and conditions of employment, (c) appropriate sanctions to ensure the effective enforcement of this article. In Bangladesh there is no single law prescribing a minimum age for admission to any kind of employment. Rather various minimum ages have been fixed by different laws on the related sectors depending on the nature of the work.<sup>11</sup> Minimum age limit varies from 12-18 according to the various categories of employment. Again there is no law in certain sectors regulating the conditions of the employment of children. These areas are agriculture, forestry, fishery, domestic service and household works. Due to the absence of law a significant number of children working in those areas are exposed to abuse and exploitation.

### **Some measures to implement the convention**

Before analysing the implementation of the convention in Bangladesh we should not lose sight of the socio-economic condition of the country.

10. UN Doc E/CN. 4/1986/39 Annex iv page 2.

11. Zinat Ara, "The national legal situation concerning minimum age for admission to work and the work of children"-Paper presented in the seminar on the ILO Minimum Age Convention, Dhaka-29-31, March 1994.



Within its limited resources Bangladesh has directed actions and programmes for the realization of the convention obligation. As examples we may cite the following.

a. Government has already set 7 targets up in cooperation with the UNICEF. These include protection of the live of mothers and children; nutrition for mother and child; basic education; supply of pure drinking water; removal of sanitary problems; better environment; poverty alleviation and economic base of a family.

b. To fulfil the convention obligation Bangladesh has already formulated national policy on children and the national plan of action for children.

c. The government of Bangladesh has undertaken a Universal Primary Education Programme under which all children would be given primary education in phase by the year 2000. Government has enacted Compulsory Primary Education Act 1990 (amended up to January 1992) for making universal primary education compulsory and free. Provision has also been made for free education for girls up to class eight in rural areas.

d. In recognition of the discrimination against and for the welfare of the girls, Bangladesh, along with the members of the SAARC (South Asian Association for Regional Cooperation) has declared '1991-2000' as 'The Decade of the Girl child' and has formulated an Action plan for the decade of the girl child, 1991-2000 (shomota). By taking this action plan Bangladesh has committed itself to changing the condition of girls by progressively eliminating all forms of social prejudice and economic or other exploitation against them and by creating opportunities for their full development.

e. Bangladesh, with its limited budgetary allocation, is trying to provide essential minimum health care to all. The government as its national health goal, has accepted the global goal of health for all by 2000 A. D. To improve the health status of the population government has set objectives giving priority to women and children. In many health programmes BRAC and other NGO's and UNICEF are supplementing governmental efforts.

#### **Realization of the convention : rhetoric and reality**

Although considerable steps have already been taken to enforce the provisions of the convention, in practice, Bangladesh is still facing

challenges over a number of issues for the implementation of the convention.

Bangladesh, as an underdeveloped country, is striving for economic growth and sustainable development. Because of its poor economic condition and extreme poverty children of Bangladesh are in a very difficult situation although the convention requires states to promote the highest standard of health for all children equally and without discrimination. Infant mortality rate in Bangladesh is the third highest in the world. The child (up to 18 years) population in Bangladesh is now 50 million of whom 18 million belong to below 5 years age group.<sup>12</sup> Nearly 83% of children live below the poverty level in Bangladesh where 4 million children are born annually. 10% of pre school age children suffer from third degree malnutrition. Hundreds of children remain hungry and they also die in hundreds everyday of preventable diseases. Children are also suffering from scarcity of pure drinking water and sanitation problems.

The convention again obliges the states to make primary education compulsory and free to all. Although Bangladesh has undertaken a primary education programme but the drop-out rates and illiteracy rates in Bangladesh suggest that this right is not being universally satisfied. For example in 1991 the enrolment of children between 6-10 years into primary school stood at 75.6 per cent out of 17.020 million children. Out of 17.020 million children the enrolment rate for boys and girls in the same year was 55.0 per cent and 47.8 per cent respectively.<sup>13</sup> Moreover physical infrastructure and facilities available for this purpose are also considered inadequate. In many cases the school authorities sell the text books to the students for a price rather than free distribution among students.

From the moment of birth, a child has a right to identity and to know and be cared for by his parents (art 7 of the convention). Many of the convention's provisions (arts 8,9,10 and 11) affirm this essential right of the child to live in a family and thereby not to be separated from parents. Despite this, in Bangladesh many children have no family life; these are the abandoned street children, commonly known as 'tokais', abused,

12. Baby Moudud, "Protecting Rights of Under-privileged Children" (13/11/92) *The Bangladesh Observer*.

13. Primary and Mass Education Division, Government of the Peoples Republic of Bangladesh, In *Education for All*, National Plan of Action, 1995 at 15-18.



neglected and violated by their parents, or sold and thus deprived of all family support. They are a fact of life in Bangladesh and enjoy none of the constitutional rights, contrary to the principle of article 2 of the convention.

The growth of the number of street children continued to increase although the government has set up 5 rehabilitation centres to provide shelter to destitute children.

Article 32 of the convention recognizes the right of children to be protected from 'economic exploitation'. In Bangladesh socio economic norms of the society confront this provision. Available information suggest that child labour constitutes about 15 per cent of total labour force of Bangladesh. In 1990, it amounted to approx. 33 million.<sup>14</sup> Because of extreme poverty children are forced to earn their livelihood by selling their labour. This child labour in most of the cases is exploitative and therefore has serious consequences upon children's educational and intellectual development.

A study (1990) on child labour in Dhaka city indicated that 70% of the working children came to Dhaka with their families as refugees. Of these child labourers, about 85% are boys. Their average age is 12 and they work for 10 hours everyday earning 572 taka (US \$ 16) per month. Of these child labourers 50% have never gone to school.<sup>15</sup>

Article 34 of the convention requires states to protect the child from sexual exploitation and abuse including prostitution and involvement in pornography. Section 42 of the Children Act 1974 prohibits prostitution of children below 16 years of age. The Cruelty to Women (Deterrent Punishment) Ordinance 1983 provides life sentence for exploiting, forcing or encouraging any women into prostitution. These laws however, have not been able to restrict child prostitution as it is a social menace in Bangladesh. Poverty, illiteracy and unemployment force the children to become prostitutes. Sometimes, sexual abuse and exploitation at workplace, household, parks and pavements send them in a point of no return. Majority of the children come to the profession of prostitution through pimps. Article 35 of the convention obliges the states to prevent the sale, trafficking and abduction of children. In practice, Bangladesh

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14. Coordinating Council for Human Rights in Bangladesh (CCHRB), *State of Human Rights, (1991)* Dhaka, 1992 at 85.

15. 14 Above at 86

has a widespread problem of purchase and trade in children. Usually they are kidnapped by human traffickers while some are sold by their parents due to poverty. The traffickers sell Bangladesh girls in countries such as India, Pakistan and in the Middle East at a price of \$1000-1500 each young girl. Male children are also being smuggled out to some Middle Eastern countries to be used in camel race.<sup>16</sup>

However, this is far from a complete survey of the childrens situation in Bangladesh. Those above are a few problems which, I believe, show how laws and practices are different from each other and crucial they are to the child's life.

### Conclusion

As it is evident from our findings that the vast majority of regulations in Bangladesh law comply with the convention. Unfortunately, their objectives are often unclear or weakened by partial and inexpedient implementation. For the proper implementation we need to systematically examine our legislation concerning children and the methods of their implementation. However, legislation is not the only solution although they have direct impact on the status and general welfare of children. We need to have a changed outlook to the upbringing of children in the family, to create a healthier social environment for their development. The convention requires that states 'maximize their efforts' in the provision of social services to children. In order to act in any serious way upon this commitment it is necessary to assess the contemporary socio-economic situation of children in Bangladesh. Government ought to make children a priority in its resource allocation and appropriate programmes have to be taken to promote the particular socio-economic context the children are in at present. Since children's welfare is inseparable from the general societal context, government needs to incorporate structural changes in the political economy.

The convention is an important milestone in history providing notable improvements in children's status internationally. To bring this status of children into line with the norms of the convention, Bangladesh has a long way to go.

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16. Baby Moudud, '12 Above