The Dhaka University Studies
Part-F

JOURNAL OF THE FACULTY OF LAW

UNIVERSITY OF DHAKA
BANGLADESH

Volume 8 Number 1 June 1997

THE DHAKA UNIVERSITY STUDIES
PART-F
VOLUME 8 NO. 1
JUNE 1997

THE DHAKA UNIVERSITY STUDIES PART-F

Volume 8 Number 1 June 1997

Manuscripts and editorial correspondence should be addressed to :

The Editor
The Dhaka University Studies; Part-F
Room No. 110, Science Annexe Building
Faculty of Law
University of Dhaka
Dhaka-1000, Bangladesh.
Tel : 8613724, 9661920-59/4760
e-mail : lawfac@bangla. net

Two copies of the manuscript, typed double spaced on one side of A4 paper, must be submitted for publication in the Journal of the Faculty of Law, the Dhaka University Studies Part-F. The text must contain appropriate headings, subheadings and authoritative footnotes. The footnotes should be numbered consecutively and typed single spaced at the bottom of each relevant page. Citations conform generally to a Uniform System of citation (16th ed. 1996) and The Chicago Manual of Style (14th rev. ed 1993).

The views, interpretations and conclusions expressed in the articles published are exclusively those of the authors and, as such, the editor and the editorial board do not bear any responsibility in these regards.

Published by the Registrar, University of Dhaka and printed by Chhoyan Advertising & Printing, Office : 47, (G. Floor), Aziz Market, Shahbag, Dhaka-1000, Phone : 9662601

Sbuscription Rates

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

Journal of The Faculty of Law

Volume 8 Number 1 June 1997

Contents

CONTRIBUTORS

Dr. M. Ershadul Bari
Professor and Dean, Faculty of Law

Dr. Mizanur Rahman
Associate Professor, Department of Law

Dr. Taslima Monsoor
Assistant Professor, Department of Law

Dr. Sumaiya Khair
Assistant Professor, Department of Law

Dr. Borhan Uddin Khan
Assistant Professor, Department of Law

Dr. Nusrat Ameen
Lecturer, Department of Law

The Dhaka University Studies Part-F, Vol VIII (1) 1-27 June-1997

HUMAN RIGHTS COMMISSION : A MECHANISM FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AT NATIONAL LEVEL.

Dr. M. Ershadul Bari

I INTRODUCTION

The real history of human rights, the rights which "derive from the dignity and worth inherent in the human person" and are universally inherent, inalienable and inviolable rights of all members of the human family, began at the level of international law with the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948. Beginning with the Universal Declaration of Human Rights, the United Nations has presided over the promulgation of one hundred international human rights instruments and, as such, the last half of the twentieth century may fairly be said to mark the birth of the international as well as the universal recognition of human rights. But it should be kept in mind that the protection of human rights is much more difficult than either defining them or adopting declarations, bills and covenants concerning human rights. The major problem is that neither the United Nations nor any other organization in the world has the power to compel nations to honour all the rights of their citizens. The implementation of international human rights law depends for the most part on the voluntary consent of the nations : the mechanisms for the implementation of human rights are still in their

infancy. In June 1993, the World Conference on Human Rights in Vienna, therefore, called upon the international community to strengthen and enhance the implementation mechanisms (e.g. the Human Rights Committee, the Committee Against Torture, the Committee on the Elimination of Racial Discrimination etc.,) set up under most of the existing covenants, conventions, treaties and protocols in the field of human rights. It "recommends that the Commission on Human Rights examine the possibility for better implementation of existing human rights instruments at the international"[1] level. In addition, the international implementation must be complemented by the national application of these human rights standards which have been agreed upon by the world community. In fact, the responsibility for the implementation of international human rights norms primarily rests at the state level. The reality that the effective implementation of international human rights standards is ultimately a national issue has been indicated in human rights texts. For example, The Vienna Declaration and Programme of Action, adopted on 20 June 1993 at the World Conference on Humen Rights, "reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other

1. Para 92, The Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993.

instruments relating to human rights and international law .... Human rights and fundamental freedoms are the birthright of all human beings : their protection and promotion is the first responsibility of Governments."[2] The Declaration also provides that "it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[3] When states ratify a human rights instrument, they either incorporate its provisions directly into their domestic legislation or undertake to comply in other ways with the obligations contained therein. Therefore, universal human rights standards and norms today find their expression in the domestic laws of most countries with the provision essentially for an effective judicial remedy. It should be borne in mind that when certain human rights are written down in the constitution of a state and are protected by constitutional guarantees, they are called fundamental rights. A mere declaration and insertion of human rights in the constitution is meaningless unless an effective and easy remedy or machinery is provided in the constitution itself for enforcing these rights, or unless their enjoyment is effectively guaranteed by a provision for judicial process and judicial review. Without effective mechanism for the protection of human rights, law will amount to nothing more than grand rhetoric. It is, therefore, the primary obligation of the state to respect and ensure guaranteed human rights which was first officially enshrined in the Declaration of Independence of the USA of 4 July 1776 : "That to secure

---

2. Id., Para 1
3. Id., Para 5

these (human) rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ...."[4] However, the ability of a state to effectively discharge its responsibility to protect and promote human rights will depend predominantly on the existence of an enlightened, independent, impartial, and accessible judiciary to provide prompt, and effective remedy for the violation of fundamental rights. In view of the facts that the judiciary is not sufficient to deal with all kinds of violations of human rights properly, to provide for all the cases prompt, adequate and effective remedy for the victims, and to prevent violation of human rights, it should be supported by other useful mechanisms such as national human rights commission, for the promotion and protection of individual liberties and freedoms. A human rights commission is defined as a state sponsored and state funded institution established under the constitution or by legislation for the specific purpose of promoting and protecting human rights. It constitutes a unique and important complement to the important partners, e.g. government agencies, judiciary, parliamentary committees, non-governmental organizations, in the human rights equation. The commission is "administrative in nature"[5] in the sense it is neither judicial nor law-making. However, in this paper, an attempt will be made to trace the development of the concept of human rights commission, and consider its

---

4. The Second Preambular Paragraph, the American Declaration of Independence, 1776.

5. The U.N. National Institutions for the Promotion and Protection of Human Rights, Fact Sheet No. 19, 5 (Geneva 1993)

importance as both a preventive and a remedial instrument for the promotion and protection of human rights at domestic level. The basic issues of composition, powers, functions and independence of the commission would be examined. The relation between national human rights commission and non-governmental organizations active in the field of human rights would be discussed. The role played by the UN in the establishment of national human rights commissions in various countries and the steps taken in Bangladesh for setting up a human rights commission would be outlined.

II DEVELOPMENT OF THE CONCEPT OF THE HUMAN RIGHTS COMMISSION AT THE INTERNATIONAL LEVEL.

Although the concept of the human rights commission for the promotion and protection of human rights at the national level developed during the 1970s, 1980s and 1990s at the initiative of the United Nations, the original concern of the UN for such an institution had to be traced back to 1946 when the Economic and Social Council asked Member States to consider "the desirability of establishing information groups of local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights."[6] In 1960, the Economic and Social Council adopted a resolution in which the unique role that the national institution could play in the promotion and protection of human rights was recognized and Governments were requested to encourage the formation and continuation of

6. Quoted in id. at 3

such an institution.[7] Later in September 1978, a Seminar on National and Local Institutions for the Promotion and Protection of Human Rights was held in Geneva in pursuance of the decision of the Commission on Human Rights in which guidelines for the structure and functioning of such a body were adopted. These guidelines were subsequently endorsed by the Commission on Humen Rights and by the General Assembly. The Commission called all Member States to take appropriate steps for the establishment, where they had not already existed, of national institutions for the promotion and protection of human rights.[8]

The United Nations continued to take an active interest in national institutions throughout the 1980s and 1991. Several reports prepared in this regard by the Secretary-General were submitted to the General Assembly.[9]

In October 1991, the United Nations convened in Paris, France, the first International Workshop on National Institutions for the promotion and protection of Human Rights to explore, *inter alia*, ways of increasing the effectiveness of national institutions which was participated by national representatives of institutions, states, the United Nations, its specialized agencies, intergovernmental and non-governmental organizations. The Workshop drafted

---

7. Id.
8. Id. at 3-4.
9. A/36/440/(1981), A/38/416(1983), E/CN.4/1987/37(1987), E/CN.4/1989/47 and Add. 1(1989), E/CN,4/1991/23 and Add 1(1991).

the "Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights." The "Paris Principles", the internationally accepted benchmark concerning national institutions, were approved by the United Nations Commission on Human Rights on 3 March 1992[10] and endorsed later by the General Assembly on 20 December 1993.[11] These 'Principles' provide that a national institution must be independent, have as broad a mandate as possible, be characterized by regular and effective functioning, pluralistic and representative in composition and adequate funding, and be easily accessible to the public.

Two other international workshops concerning national institutions, one in Tunis in 1993 and the other in Manila in 1995, were sponsored by the United Nations. These workshops basically reiterated the Paris Principles."[12] The last Meeting in this regard was held in Merida, Mexico, in November 1997.

III IMPORTANCE OF THE NATIONAL HUMAN RIGHTS COMMISSION.

The necessity of a national human rights commission to ensure respect and protection of human rights is keenly felt in a state professing the rule of law for several reasons.

In the first place, the commission may provide easy access

---

10 Res. 1992/54, the Commission on Human Rights.

11, Res. 48/134, the General Assembly

12. Focus Asia-Pacific, V Newsletter of the Asia-Pacific Human Rights Information Center, 2 (September 1996)

for the most vulnerable and disadvantaged groups in society including the homeless, refugees, migrant workers, indigenous peoples, minorities, those with intellectual disabilities, and others. The reality, even in developed countries, is that the courts are inaccessible to a large proportion of the population because of the high costs involved although "Equal access to law for the rich and poor alike is essential to the maintenance of the Rule of Law."[13] The national human rights commission can, by reaching so many, transform the rhetoric of the national and international instruments into reality for millions of people for whom the term "human rights" has previously had no meaning at all.[14] It can investigate complaints without recourse to cumbersome rules of evidence and procedure and settle complaints by negotiation, conciliation or arbitration - procedure which are not only more "cost effective" than more traditional adversarial or inquisitional procedure, but also more "user- friendly" to groups which have traditionally been disempowered and frequently find the trappings of traditional courts quite intimidating.[15]

---

13. Cl. X, the Report of Committee IV on the International Congress of Jurists (New Delhi, January 1959.)

14. Burdekin, Brian and Gallagher, Anne, "The United Nations and National Human Rights Institutions" in II Human Rights, a Quarterly Review of the Office of the UN High Commissioner for Human Rights, 26 (Spring,1998)

15. Burdekin, Brian, "Recent Human Rights Developments in the Asia and Pacific Region : National Institutions and Other Factors Relevant to Regional Cooperation" in the Report of the UN Fourth Workshop on Regional Human Rights Arrangements in the Asia and Pacific Region, Kathmandhu, (26-28 February, 1996).

Secondly, the human rights commission may resolve complaints more speedily than the courts for the benefit of those whose rights have been violated.

Thirdly, the commission may provide the most effective means of preventing human rights violations through educating individuals that they have rights, balanced by responsibilities which government, private sector and other individuals must respect. It can play a valuable role in relation to research, publication and dissemination of information about human rights. Formal and informal human rights education can contribute to prevention of human rights violations by promoting a human rights culture.

Fourthly, the commission may play an important role in helping both government and non-governmental organizations to give practical effect to the international principles they are committed to observe.

Fifthly, the national commission can contribute to, and monitor, the integrity of government reports to international treaty bodies, reflecting the reality of human rights beyond the perception of bureaucrats ensconced in national capitals.

Sixthly, they can provide constructive, well-informed criticism from within, which is frequently important in corroborating or balancing criticism from 'foreigners' - often dismissed by government subject to criticism as based on ulterior or illegitimate motives.[16]

Seventh and finally, the existence of a national mechanism

---

16. Id, at 67

with the power to investigate abuses and provide relief to victims can, of itself, discourage acts or practices inimical to the enjoyment of human rights.

It should be stressed here that the role of the national human rights commission, designed to facilitate the informal, speedy, effective and cheap resolution of complaints, should be seen as complementary/ supplementary to the judiciary. It is precisely the ability of the commission to contribute substantially to the realization of the rights of minorities and other vulnerable groups which makes it so significant. An independent and autonomous commission with a mandate and appropriate powers to monitor and protect human rights can considerably attenuate the demonstrable deficiencies of democratic governments, constitutional "guarantees" and often inaccessible court system. Therefore, all the States attending the Second World Conference on Human Rights in Vienna in 1993 emphasized the importance and role of national institution in promoting and protecting of human rights thus :

> "The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information and education in human rights.
>
> The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it

is the right of each State to chose the framework which is best suited to its particular needs at the national level."[17]

IV COMPOSITION OF THE COMMISSION

The composition of the human rights commission is considered basic for its credibility and effective functioning. An effective and credible commission will be one which reflect in composition the community it is established to serve. It should compose of men and women who have a proven expertise, competence, experience and interest in the field of human rights and should be drawn from diverse backgrounds, including relevant professional groups and the non-governmental sectors. The 'Paris Principles' stress emphasis on the pluralist representation of all segments of the society thus :

"The composition of the national institution .... shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social force (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of :

Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations,

---

17. Para 36 of Part I, The Vienna Declaration and Programme of Action adopted at the World Conference of Human Rights on 25 June 1993.

for example, association of lawyers, doctors, journalists and eminent scientists ;

Trends in philosophical or religious thought ;

Universities and qualified experts ;

Parliament ;

Government departments (if they are included, these representatives should participate in the deliberation only in an advisory capacity)."[18]

V POWERS AND FUNCTIONS OF THE COMMISSION

The powers and functions of the commission should be defined in the legislative act or decree under which it is established. It should be given the mandate to deal with all human rights issues, not only with fundamental or enforceable / justiciable rights but with human rights (civil, political,economic, social and cultural rights) enunciated by international human rights standards. The powers and functions of the commission should be as follows :

Investigation into Alleged Violation of Human Rights

One of the most important functions with which a human rights commission may be entrusted is the investigation of complaints from individuals or groups alleging violation of human rights enshrined in domestic law and / or those set out in international treaties which the state concerned has ratified.[19] The commission's power to accept representative

---

18. Para 1 of Part B, the Principles Relating to the Status and Functioning of National Institution for Protection and Promotion of Human Rights, drawn up at the Paris Conference, (October 1991).

19. Burdekin, Brian and Gallagher, Anne, op. cit., 22

complaint from any person or group of persons, association or organization including trade unions and non-governmental organizations on behalf of victims especially belonging to vulnerable and disadvantaged groups is important. For such victims may be reluctant to lodge complaints or even may not be conscious about their rights or may not be in a position to engage advocates to act on their behalf. It may also be given the power to investigate on its own initiative situations and cases of published violations of human rights. The ability of a commission to initiate enquiries on its own behalf is an important measure of its overall strength and probable effectiveness especially with regard to situations involving persons or groups who do not have the financial or social resources to lodge individual complaints. Offices of national human rights commission should be established also in places other than the country's capital to decentralize its operations and increase its physical accessibility to those individuals or groups who are the most vulnerable and disadvantaged. Where decentralization of the commission is not a practical option, provision shall be made for the recruitment of field officers to serve in different regions. Flexible rules of procedure, e.g. accepting complaints through the post or over the telephone, will enhance commission's accessibility.

In order to discharge its investigative responsibility effectively, a national human rights commission may be granted a range of powers enabling it to summon and enforce the attendance of witnesses and examine them on oath, receive evidence on affidavits, issue commissions for the examination of witnesses or documents, and requisition any public record or copy thereof from any office.

Resolution of Alleged Violation of Human Rights

The human rights commission may provide an informal, inexpensive, quick and amicable resolution of complaints of human right violations through conciliation and / or arbitration. In the process of conciliation, the commission will make an attempt to bring the two parties together in order to achieve a mutually satisfactory outcome. If conciliation fails to resolve the dispute, the commission may be able to resort to arbitration in which it will, after a hearing, issue a determination.

It is not usual for a human rights commission to be granted authority to impose a legally binding decision on parties to a complaint. This does not mean that the settlement or appropriate remedial steps recommended by the commission can be ignored. The principal force behind the recommendations of the commission addressed especially to the government agency is the public opinion. The weight of its recommendation depends on the credibility of the commission in the society, on the public perception of its independence, sincerity, commitment and composition which is enhanced by the fact that failure to comply with its recommendations will be commented on the periodic reports which would imply a high political cost for the authority concerned. However, in some cases the commission may be able to transfer unresolved complaints to the courts for taking a final and binding decision. Thus the commission can potentially strengthen human rights protection without replacing the court or diminishing its authority in this regard.

Providing Assistance and Advice to Government for the Promotion and Protection of Human Rights

The human rights commission may be given the task to review systematically the government's human rights policy in order to detect shortcomings in human rights observance, to review human rights legislation in order to identify areas where legislation requires improvement because of technical defects or inadequacies and to make recommendations for the amendment of such legislation. It may submit opinions on proposed or existing legislations to ensure that their provisions conform to the basic principles of human rights. It can also have the power to make recommendation for the introduction of new legislation concerning human rights. It may be entrusted with responsibility for drawing government's attention to situations of human rights abuse and making specific proposals aimed at preventing such an abuse. Since over the years, violations of human rights in jail, prison and detention centres committed in most cases by the government agencies have become a regular phenomena, the commission may make such recommendation as may be necessary for improving the situations in those places. Human rights commission may play an important role in monitoring the implementation of international human rights instruments through advising the government concerning acceptance of international instruments and means necessary to ensure compliance with international obligations. It may further assist the government to fulfil its reporting obligations to various international treaty bodies.[20]

---

20. Id. at 22-23

Human Rights Education

In recognition of the fact that the realization of human rights cannot be achieved solely through legislation and administrative arrangements, the human rights commission may be entrusted with the important responsibility of educating individuals about their rights - which government, the private sector and other individuals must respect. Once people are educated about and aware of their human rights, they can demand for the observance and advancement of those rights, can build public opinion and generate public pressure for the compliance with those rights. There is a growing awareness that the preventive strategies must be adopted for the promotion and effective protection of human rights and among the most effective of those strategies are, appropriate education and training in human rights. Indeed, without education and training, no other preventive strategy can or will succeed. This is the basic premise underlying the United Nations Decade for Human Rights Education, launched in 1995. The human rights commission may develop practical strategies for promoting and educating about human rights which can involve collection, production and dissemination of human rights publication, human rights literacy campaign, organizing seminars, workshops and other promotional activities, holding counselling services, informing the public about the commission's own functions, and the development and implementation of training programmes for a variety of audiences. The prime targets for the human rights training are police, paramilitary, military and security personnel. The defence and security personnel cannot realistically be expected to respect human rights if they are not

appropriately trained as they are increasingly being used in what are essentially "domestic policing operations" (for example, civilian crowd control), and in disaster-relief or disaster-avoidance situations (for example, floods, earthquakes, typhoons).[21]

VI INDEPENDENCE OF THE COMMISSION

The human rights commission must be independent in performing its functions effectively. It should be legally and politically autonomous to the extent that no branch of government or any public or private entity can interfere in, or obstruct, its work. The question of independence of the commission is inextricably linked with the method of appointment, security of tenure, salaries and other terms and conditions of service of members of the commission and its finances.

Method of Appointment

The method of appointing the members of the human rights commission is of utmost importance for the independence and credibility of the commission. The members of the commission may be appointed by the head of the state on the recommendation of a selection committee consisting of the existing chief justice of the highest court of the land, former chief justices, leading members of the parliament both from the ruling and opposition parties, (prime minister and leader of the opposition), representatives of the bar council and of other relevant professional groups. Since

21. Burdekin, Brian, op.cit., 63-68

the independence of the commission greatly depends upon the personal qualities of its members, only men of independent character, keen intellect, high legal acumen, honesty, integrity, efficiency, impartiality and dignity who have proven expertise and competence in the field of human rights should be appointed as the members of the commission. Only then they could be expected to discharge their duties without submitting to any personal likeness or dislikeness, improper influences, inducements, pressures, threats or interferences from any quarter except submitting to the law and the commands of their own conscience. Clearly, the commission will only be as independent as the individuals of which it is composed. All members, acting individually and collectively, should be capable of generating and sustaining independence of action.

Security of Tenure

Security of tenure is the most fundamental of the guarantees of independence of the members of the commission. Nothing can contribute so much to their firmness and independence as security of tenure. For it enables the members to discharge their duties without fear of the consequences regardless of whether their activities do not please some other person or persons. Therefore, once appointed, a member should obviously held office for a fixed period of time. He should be removable during his tenure only for proved misconduct. Such removal must of necessity be made a difficult process, involving careful consideration by more than one person, otherwise a member of the commission cannot acquire that habit of independence requsite in his office.

Salaries and Other Terms of Conditions of Service

If the members of the commission are to be independent, they should be given adequate salaries and granted appropriate privileges so that they remain free from any outside pressure or temptation to better their pecuniary conditions by illegal means. Their remuneration, privileges and other terms and conditions of service should not be altered to their disadvantage during their terms of office.

Financial Resources

The effective functioning of the commission depends largely upon the financial and material resources made available to it. In order to maintain the independent status of the commission, it should have secured budgetary outlay sufficient to perform its task. Otherwise, the legislature and the executive, who control the purse strings, will be in a position to use the power of the purse to influence the functioning of the commission. Furthermore, the members of the commission may make endevour to please the legislature or the executive in the hope of obtaining more favourable provisions in relation to financial and material resources. The remuneration payable to the members and staff of the commission and other administrative expenses should be charged upon the consolidated fund so that they may be discussed in, but shall not be subjected to a vote of, the Parliament. The "Paris Principles" stressed on the financial independence of the commission thus :

> "The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purposes of this funding should

be to enable it to have its own staff and premises, in order to be independent of the government and not be subject to financial control which might affect this independence."[22]

VII CO-OPERATION WITH NON-GOVERNMENTAL ORGANIZATION

The national human rights commission should establish and maintain close relations with non-governmental organizations involved in the promotion and protection of human rights. This can include organizing joint projects on human rights, joint review of policies affecting human rights and joint venture in the areas of human rights education and training. It should be stressed that the non-governmental organizations have a particular focus, a freedom of movement and flexibility of action which make them a vital information source for human rights commission. The "Paris Principles" not only encouraged effective cooperation of the commission with the non-governmental community but also mandated it thus :

"In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to protecting and promoting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children,

22. Supra note 18, Para 2 of Part B.

migrant workers, refugees, physically and mentally disabled persons) or to specialized areas."[23]

VIII ROLE PLAYED BY THE UNITED NATIONS AND THE HIGH COMMISSIONER FOR HUMAN RIGHTS IN THE ESTABLISHMENT AND STRENGTHENING OF NATIONAL HUMAN RIGHTS COMMISSION.

Both the General Assembly and the Commission on Human Rights have recently requested the High Commissioner to accord priority to the establishment and strengthening of national human rights institutions. Such assistance is now a major component of the High Commissioner's Technical Cooperation Programme and is generally financed by contributions to the Voluntary Fund for Technical Cooperation. In the last few years, a large number of countries and institutions, particularly in Africa, Asia and Eastern Europe, have been the focus of technical cooperation initiatives in the form of practical advice and assistance to those involved in the establishment of new human rights commission, or the strengthening of existing ones and of facilitating international and regional meetings of national institutions. The countries, which received advice, assistance or cooperation, include, *inter alia*, Armenia, Bangladesh, Cambodia, Fiji, Georgia, India, Indonesia, Liberia, Latvia, Malawi, Madagascar, Mauritius, Mongolia, Moldova, Nepal, Papua New Guinea, the Philippines, Rwanda, South Africa, Sri Lanka, Thailand, Uganda and Zambia. The type of assistance provided varies from country to country and is tailored to specific

---

23. Id. Para 7 of Part C.

needs. In many of these countries, the High Commissioner is consulting and cooperating with the UNDP in recognition of the close relationship between human rights, good governance and sustainable development. The High Commissioner has also encouraged the formulation of projects conducted in close cooperation with bilateral donors.[24]

Establishment of a Human Rights Commission in Bangladesh.

The 1972 Constitution of Bangladesh provides that it shall be a fundamental aim of the State to realise a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens.[25] In order to promote and protect human rights in Bangladesh and in providing redress to victims of violations quickly, the Government of Bangladesh approved in April 1995 a project to assess the need for the establishment of a national human rights commission and make recommendations in this regard. The project entitled "Action Research Study on the Institutional Development of Human Rights in Bangladesh" (IDHRB) was to begin in July 1995, but it was delayed due to political crisis in the country. It was revived in March 1996 when an Agreement was signed between the Government and the United Nations Development Programme (UNDP). The IDHRB project, the budget of

---

24. Burdekin, Brian, and Gallagher, Anne, op. cit., 25.

25. Preamble to the 1972 Constitution of Bangladesh.

which was two crore, formally began in July 1996 and was scheduled to complete on 31 December 1999. The Ministry of Law, Justice, and Parliamentary Affairs was to supervise, monitor and evaluate the project under the agreement. The main object of the project, supported by the UNDP which had assisted the establishment of such national institutions in a number of countries in the region, was to prepare the grounds for setting up a viable institutional mechanism to promote and protect human rights :

> "The project will seek to find out ways and means to build a mechanism for protecting and safeguarding human rights as guaranteed under the Constitution of Bangladesh at the grassroots level and to see the effective implementation of the existing legislation and enactments mentioned (i.e. legislation and ordinances such as the Dowry Provisions Act of 1980, the Children Act of 1974, the Cruelty to Women Ordinance 1983 (Deterrent Punishment) and the Women and Children Oppression Act of 1995)[26]

A fifteen-member National Consultative Committee (NCC) of the IDHRB project, headed by the Minister for Law, Justice and Parliamentary Affairs and comprising of members from "government agencies, NGOS and eminent personalities", was established to advise on the project

---

26. Inception Report, "Action Research Study on the Institutional Development of Human Rights in Bangladesh under UNDP Project No. BGD/95/005A 01/99" (March 1996, Ministry of Law, Justice and Parliamentary Affairs, Government of Bangladesh)

which started functioning in November 1996. Later in December 1996, Brian Burdekin, special advisor to the United Nations High Commissioner for Human Rights, visited Bangladesh and met with members of IDHRB and the National Consultative Committee. The object of the visit was to provide assistance in the form of high-level consultations concerning the establishment of a National Commission, participation in workshops and facilitating contacts with representatives of National Institutions in other countries. Eventually a draft bill, for the establishment of a Human Rights Commission in Bangladesh, was prepared by the Institutional Development of Human Rights in Bangladesh Projects (IDHRB). It was revised three times over the period of more than a year"[27] after exchanging views with human rights activists, lawyers, journalists, local non-governmental organizations and foreign experts. In an interview with the Daily Star on 18 November 1998, the Law, Justice and Parliamentary Affairs Minister said, "Most of the home work has already been done, I will try to move the bill for setting up of the NHRC (National Human Rights Commission) in any of the next two sessions of Parliament."[28] Eight days later on 25 November 1998, he said at a discussion meeting organized by the 50th Universal Human Rights Declaration Day Observance Committee in Dhaka that "A bill will be placed in Parliament in its next session for establishing a Human Rights

27. The Daily Star, 19 November 1998.

28. Id.

Commission to protect people's rights . . . . The Human Rights Commission Bill will have some special provisions to prevent any government employees from curbing people's rights . . . . it will be a safeguard for the people to enjoy their rights."[29] The Bill has not yet been placed in Parliament.

IX. CONCLUSION

The foregoing discussion shows that while human rights principles are universal and standards have been negotiated and accepted at the international level, responsibility for the implementation of these norms primarily rests at the state level. The task of promoting and protecting human rights is primarily a national one as human rights involve relationships among individuals, and between individuals and the states. At the national level, rights can be protected through adequate legislation, an independent judiciary and the enactment and enforcement of individual safeguards and remedies. But the costly and complex procedures of the courts often make them inaccessible to the less advantaged persons and groups such as ethnic and linguistic minorities, indigenous populations, refugees or women. The courts may not be able to deal with certain types of violation of human rights effectively. The establishment of the national human rights commission may provide easy access for minority groups and disadvantaged people, compared with the judicial process

29. The Daily Star, 26 November 1998.

and can potentially strengthen human rights protection. The demonstrable deficiencies of governments, constitutional guarantees and often inaccessible court systems can be more effectively addressed by a national human rights commission with a mandate and appropriate powers to monitor and protect human rights. The role of the commission is clearly complementary and its strengthening can only enhance the effectiveness of both national and international systems for the promotion and protection of human rights. It is believed that a broadly based membership is the best way to obtain widespread community support for the work of the institution. So, the composition of the commission should be a pluralistic one with representation of human rights ngos, trade unions, professional organizations of lawyers, doctors, and journalists, academics, human rights experts, women, and religious and ethnic minorities for its effective functioning. In order to resolve complaints concerning violation of human rights quickly and effectively, the commission should seek amicable settlement through conciliation and arbitration without recourse to cumbersome rules of procedure and evidence. The commission should be given the power to examine the existing legislation and propose bills and make recommendations to ensure that their provisions conform to the fundamental principles of human rights. It shall, if necessary, recommend the adoption of new legislation in this regard.

The educative / promotionary role of the commission should be emphasized as it might well be the best way to effectively

protect human rights. The support and assistance of non-governmental human rights organizations with the commission is vital for its effective functioning. In order to ensure the independence, autonomy and impartiality of the members of the commission to perform their function, the method of their appointment should be fair and transparent, the members must have security of tenure and there shall be guarantee of financial resources for the commission.

A bill has recently been drafted for the establishment of a human rights commission in Bangladesh which may be placed in the Parliament sometime in 1999 or 2000. The whole nation fervently expects that the proposed bill would be, if possible, unanimously passed by the Parliament after a due process of proper examination, debate and deliberation so that an effective and meaningful commission could be set up to promote and protect human rights.

The Dhaka University Studies Part-F, Vol VIII (1) 29-47 June-1997

DEMOCRACY, LAND RIGHTS AND POVERTY ALLEVIATION

Dr. Mizanur Rahman

'The most beautiful thing to own in the world is land.'
'Why?'
'So you can walk on it, idiot.'
[Gerard Depardieu, 1991]

1. INTRODUCTION

It is difficult to find a period in the history of mankind when the question of Democracy and human rights has had a greater moral significance in study and practice than the period from 1948 to date. There have been times when the issue of democracy and human rights held capital importance in one country or another, but never has it attracted such wide attention and unfreezing interest throughout the world as at present.

Even during the period since 1948, major shifts have taken place in the attitude of nations and peoples towards the basic aspects of democracy and human rights. While some four decades ago, the prime concern of human rights law was the implementation of the rights of peoples and nations to self determination, today the essence of human rights evolve round the question of protection of rights from encroachment by ones own state and rulers belonging to the same community. Obviously then, while in post second world war scenario 'human rights' were directed against foreign colonial rule, domination and subjugation, today the thrust of human rights is directed against the 'internal foes' i.e., the tyrant and undemocratic regimes and rulers. Contemporary

political developments in many parts of the globe bear testimony to this.

Human rights were fervently pursued when people have suffered oppression. On such occasions, the cry of the oppressed has been for freedom from the sufferings inflicted on them-or, put another way, for vindication of their rights not to be oppressed (Sieghart, 1988). Resentment or struggle against foreign oppression and domination was presumed to be justified *ipso facto*, but under conditions of self-rule, the only shield that could now be used against tyranny and oppression of the state or the national government was provided by human rights. Thus human rights became the touch stone of protection of individual's freedom and liberty.

The ambit of human rights has expanded so such that it is no longer restricted within the territorial boundaries of any particular nation state, and the status of human rights in any state is today a matter of truly international concern. Thus human rights is transgressing the national frontiers by interlinking all the members of the international community.

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

Civil and political rights represent individual rights against the state and the western approach to human rights focus principally on implementation and enforcement of civil and political rights. These rights of individual, according to the western approach, are inalienable and imprescriptible rights impenetrable to state action. They are essential attributes of every human being by virtue of his being a human and they rise above the state and above all

political organizations. They are rights and freedoms assertable against the state in order to protect the individual against state action which is in violation of certain basic norms accepted by the international community as essential to civilized existence. They are, as justice Bhagwati puts it, "individualistic rights" (Bhagwati, 1995). The western concept of human rights is based on the existence of political structures organized on the traditional democratic formula. This formula accepts political and ideological pluralism and multiparty systems. It presupposes electoral confronted claims tailored by non-discrimination of any kind either personal or ideological.

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

Today, it is universally accepted that both sets of rights are vital to the existence of the democratic structure and they are interlinked with each other and one cannot exist without the other.

The emergence of Bangladesh in the political map of the world is a testament to the manifold virtues of democracy and human rights. For clarity sake, it should be iterated that democracy cannot survive if human rights are not respected and guaranteed and contrarily, human rights will remain a nights "dream" if democracy does not prevail. Hence they coexist.

2. HUMAN DIGNITY : NEW DIMENSION OF HUMAN RIGHTS

It seems then, that in modern times, democracy and human rights can not be construed as distinct concepts, rather they are correlatives and complementary to each other. However, their essence and contents may vary from one historical epoch to another. Historically, concern for the protection of human rights was articulated at the national or domestic level in accordance with the varying notions of changing times. Even in national sphere prevailing power structures in many countries resisted acceptance, beyond the purely metaphysical or philosophical, of the very notion of human rights, the dignity or the human person and the humanity of man. Violations occurred and were wide-ranging. In the result great popular upheavals took place and gave birth to various human rights documents e.g. Magna Carta, the French Declartation of Man and of the Citizen of 1789 followed by the American Bill of Rights. The Constitution of Bangladesh with elaborate list of fundamental rights and fundamental principles of state policy is but a modern addition to the long seies of human rights instruments and Charters. In the opinion of this author, the thrust of human rights generally, and specifically in Bangladesh centers round the concept of 'human dignity'- a concept which is not static but dynamic in the sense that its essential components increase in number and volume with the passage of time keeping in tune with the demands and necessities of the time in question. In this sense the interrelationship among human dignity, human rights and democracy is very delicate.

The very core of the idea of human rights is the conviction that human dignity is inviolable and attributed to every man and

woman equally. Human dignity is best expressed in the struggle for justice, freedom and equality. Freedom of the individual self-determination, self-actualization and the equal protection of every person are the elements of the concept of justice. Indeed, justice as freedom and equality is an ideal rather than reality. But it is the ideal, which we strive for. It is the ideal of justice, which to strive for is the prime mission of the rule of law state. Freedom and equality are the main idea of human rights : freedom of the individual against state and government, freedom as protection of the individual by constitution and law, equality of the individual as equal treatment of the law and equal action of state authorities under the law.

Prof. Sieghart very correctly observes that "human rights law does not treat individuals as equal, on the contrary, it treats them as so different from one another as to make each of them unique and for that very reason entitled to the equal respect that is due to every unique human being (Sieghart, 1988, P. 10). Consequently, in the changed world scenario, principle of non-discrimination fails to grasp the entire essence of human rights. Today, it is submitted that, the single principle that is able to reflect the philosophy and reality of human rights is the concept of preservation of "human dignity". Human rights today may precisely be construed as preservation of human dignity.

3. HUMAN DIGNITY - THE ESSENCE OF HUMAN RIGHTS AND DEMOCRACY

It is suggested that for a better comprehension of human rights a clear understanding of the concept of human dignity is indispensable. The importance of the concept of human dignity is well exemplified by its inclusion, in the national and international basic legal texts. The Universal Declaration of Human Rights

(UDHR) mentions 'dignity' twice in its preamble and thrice in the articles[1] Similarly, the International Covenant on Economic-Social and Cultural Rights (ICESCR) has also mentioned it twice in its preamble and in the article[2] and the Covenant on Civil and Political Rights (ICCPR) mentions it twice in its preamble[3].

Despite its heightened importance a study of the literature in the field reveal an alarming lack of agreement concerning the meaning of the term 'human dignity'. The term appears to be not yet comprehensively understood by the interested quarters. The dictionary meaning of the term 'dignity' denotes a quality, an honour, a title, station or distinction, of honour [4]. But this meaning is not applicable for the great masses of mankind or when we talk of the average persons dignity. Hence, we need to look elsewhere for a purposeful meaning of human dignity.

Emphasizing the inviolability of human dignity in *Keshavananda vs. State of Kerala*[5] Sikri C.J. observed that the basic structure of the Indian Constitution "is built on the basic foundation, i.e., the dignity and freedom of the individual", which cannot be destroyed by any form of amendment[6]

In Minerva Mills Ltd. Vs. Union of India[7] Chandrachud C.J. said that the dignity of the individual could be preserved only through the rights to liberty and equality.

---

1. Articles 1, 22 and 23, Universal Declaration of Human Rights.
2. Articles 10, International Covenant on Economic, Social and Cultural Rights.
3. Preamble, International Covenant on Civil and Political Rights.
4. Blacks Law Dictionary, 5th ed. 1989.
5. (1973) 4 SCC 225; AIR 1973 SC 1461.
6. Id, at 366
7. (1980) 3 SCC 625, 660 : AIR 1098 SC 1789

In *Francis Coralie Mullion Vs. Administrator, Union Territory of Delhi*[8] the court observed :

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

In his dissent in *Bachan Singh Vs. State of Punjab*, Bhagwati, J. turning to the Indian Constitution found that "it is a human document which respects the dignity of the individual and the worth of the human person and directs every organ of the state to strive for the fullest development of the personality of every individual. Undoubtedly... the entire thrust of the Constitution is in the direction of the development of the full potential of every citizen and the right to life along with basic human dignity is highly prized and cherished"[9]

In *Neeraja Choudhury Vs. State of M.P*[10] Bhagwati, J again reiterated :

> It is obvious that poverty is a curse inflicted on large masses of people by our malfunctioning socio-economic structure and it has the disastrous effect of corroding the social and sapping the moral fibre of human being by robbing him of all basic human dignity and destroying in him the higher values and the finer

---

8. (1981) 1 SCC 608-19 : AIR 1981 SC 746
9. (1982) 3 SCC 24, 77 : AIR 1982 SC 1325
10. (1984) 3 SCC 243, 245, 255 : AIR 1984 SC 1099 Supra note 1 at 14.

> susceptibilities which go to make up this wonderful creation of God upon earth, namely man. . .

A close scrutiny of the above excerpts leads us to believe that, so as to be part of the world civilization, which we claim to be, human dignity should be understood, at least in the following three senses :

ii) The dignity of the individual can only be preserved if his rights to liberty and equality are not infringed, this is the negative aspect of dignity.

iii) The word 'dignity' should be identified with the bare necessities of life such as adequate nutrition, clothing, shelter and facilities for education.

iiii) In a more positive sense, the world 'dignity' includes freedom and equality of all citizens, which are the very essence of democracy.

It then appears to be highly logical that comprehension of the concept of 'human dignity' in the above mentioned connotations guarantees 'the right to live with human dignity', and enables to 'express oneself in diverse forms'.

Dignity of a person cannot be guaranteed, for what is guaranteed may be withheld. Dignity, being inherent in a person, is either assured or recognized or respected. Thus human dignity, being an inherent quality of every human person, is common to all civilisations, and human rights interpreted in terms of respect for human dignity can bring together all nations and peoples transgressing all borders.

4. HUMAN DIGNITY AND THE CONSTITUTION OF BANGLADESH

Human dignity appears to be the cardinal stone in the Constitution of Bangladesh as well. The preamble to the Constitution declares

it to be "a fundamental aim of the state to realise through the democratic process a socialist society, free from exploitation— a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be assured for all citizens." It is equally noteworthy that "democracy and socialism meaning economic and social justice" (Art. 8) have been proclaimed as fundamental principles of state policy, and for this to be attainable the state is obliged to guarantee 'fundamental human rights and freedoms and respect for the dignity and worth of the human person." (Art.11). The spirit of our constitution is very clear in that the emancipation of peasants and workers i.e. the toiling masses and backward sections of the people from all forms of exploitation (Art. 14) should form the essence of our economic and development policy. Likewise, the state bears the primary responsibility to secure to its citizens "The provisions of the basic necessities of life, including food, clothing, shelter, education and medical care" (Art. 15). In its pursuit of securing for its citizens a life with dignity the state is under obligation to "regard the raising of the level of nutrition and the improvement of public health as among its primary duties..." (Art 18.1) Probably a more fundamental duty of the state is "to ensure equality of opportunity to all citizens" (Art. 18.1). The economic bias of this obligation becomes explicit if we read the following provision from the same art. 19 of the constitution :

> The state shall adopt effective measure to remove social and economic inequality before man and man and to **ensure** the **equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.** "(emphasis mine- M.R)

It is in the context of this interpreation of the concept of human

dignity, that we need to approach the question of land rights as a human right in Bangladesh.

5. LAND AND LAND RIGHTS

Total land area of Bangladesh is approximately 35 million acres. Of this, two-third is under cultivation. Total availability of land has largely been unchanged over the last twenty five years. Per capita land availability today is under 20 decimals. At the beginning of this century, there was one person to each acre of land. Today there are five persons to each acre of land and on present population growth trends, this could rise to as much as eight persons by the end of the century, (Rahman, 1995, P. 15).

Land scarcity and landlessness are integrally linked. The 1983-84 Agricultural census reveals that 9% of households own no land whatsoever whether homestead or arable. If we add those who own homesteads but no arable land then the proportion of landless rises to 28% However, the common definition of landlessness also includes those who are considered functionally landless i.e. those owning up to 50 decimals only. On this latter definition total landlessness stands at 56% (Rahman, 1995, P.16)

These statistics do not appear to be appealing unless they are interpreted in the context of deprivation of a huge percentage of the total population from access to land, as a means of feeding themselves. Neglect of this important economic right i.e. the right to feed oneself, frustrates the realization of the high ideal of the constitution mentioned in the preceding section of this article.

In economic theory, land is a symbol for natural resources. "Land to feed oneself' indicates the use that has to be made of natural resources- and of other resources as well : They are there for people to feed themselves. For deprived persons access to

resources is a matter of life and death. Hence it is here where oppression finds a perfect breeding ground. Monopolizing resources is a stronghold of oppression (Kuunnemann, 1997, P. 16).

The slogan 'land to feed oneself' could also be juxtaposed to the slogan 'land to gain from'. This is a question posed very concretely in most agrarian reforms. Will the existing resources be used as the basic livelihood for landless peasants, jobless workers and future generations— or will a different logic dictate its use for a maximum short run return on capital invested? The increasing marginalisation of communities, the destruction of the social fabric etc. under the current economic paradigm in the agricultural sector points to the fundamental importance of the land question in the human rights perspctive.

6. RELEVANT LAWS & ENACTMENTS

The first major attempt in the direction of land reforms was the enactment of the East Bengal State Acquisition and Tenancy Act, 1951. The main provisions of the 1951 Act were three fold: (i) abolition of all rent-receiving interests, (ii) prohibition of future subletting of land and (iii) putting a ceiling on land holding per family of upto 100 standard bighas (33.33 acres). However, the Land Reforms Ordinance, 1984 provides for a second ceiling on acquisition of agricultural land. It says that families owning land upto 60 bighas (20 acres) are barred from acquiring further land by purchase, inheritance or otherwise. Another feature of this Ordinance is a bar on eviction from rural homestead, even in the process of law, for non-payment of rent or tax.

The 1951 legislation did not touch the problem of borgadars (share croppers), nor did it regulate the land owner-borgadar relationship. The absentee landowners left the cultivation of their land to the borgadars, who, because of uncertainty of continuance

of their tenure, lacked the necessary incentive to improve the bargadar-operated forms. (Hussain, 1995, P. 69).

The State Acquisition and Tenancy Act did not thus solve the cardinal problems of the agrarian structure. The rural population is still faced with "ubiquitous share-cropping, widespread sub marginal holdings, acute sub-division and fragmentation, dubious land records and peculiar problems associated with the management of khas or char lands" (Hossain, 1995, P. 69). Any land reform therefore, must cover the regulation of tenancy rights, including those of borgadar share-croppers, measures to tackle sub-division and fragementation of holdings, proper land management including improvement of crop-yeild. The objective should be to achieve higher living standars, improvement of social status and better opportunities for those engaged in cultivation so that their human dignity is not compromised.

The above mentioned 1984 Land Reforms Ordinance attempts to provide some protection to borgadars. It stipulates a 'borga-contract' for 5 years and ensures two-third share for a borgadar in the crop produced by his own labour, plough, seed, water and fertilizer. If, however, seeds and fertilizers are supplied by the landowner, he will share the crop to the extent of two-third. Full implementation of this law, however, remains a far cry.

An analysis of the relevant laws and enactments shows that they have not been successful in uprooting the traditional land system of Bangladesh in which a dominant minority of land holders have secure rights to land whereas the majority in rural areas have either tenuous rights to land or no land at all. Those having secure rights to land seldom perform labour on it or make investments in its improvement. Instead, they have assigned labour and investment functions to actual tillers, who can be evicted by the superior landholder at will. Within the framework of this system,

with ownership and control of land traditionally separated from labour and investment, neither the owner nor the tiller of the soil has a strong incentive to increase productivity. On this basis, some authors quite rightly conclude that "the primary impediment to economic progress in Bangladesh in the traditional system of relationship of people to the land" (Jannuzi & Peach, 1994, P. 26). It is, however, very emphatically submitted that change in the traditional agragian structure of Bangladesh is the *sine qua non* for sustained increases in the agricultural production within a social and economic framework that encourages broad participation in economic progress, ensures equality of all citizens in all spheres of life and guarantees a status with dignity. Is this attainable within the framework of even the most successful agrarian reforms without considering the question of land ownership?

7. WEST BENGAL EXPERIENCE

West Bengal Land Reforms Act, 1955 as modified upto 1975 and the Rules framed thereafter, has fixed the land-holding ceiling at from 2.50 hectares (6.25 acres) to seven hectares (17.50 acres) per adult raiyat, depending on the size of the family. The produce of land cultivated by a bargadar is to be divided (i) in the proportion of 50 : 50 if plough, cattle, manure and seeds are supplied by the landowner, and (ii) in the proportion of 75 : 25 in all other cases. The legislation also provides that no person would be entitled to terminate cultivation of his land by a bargadar except on very stringent grounds. The barga right is now treated as heritable, but not transferable.

In case of more successful stories like in China, North Vietnam, Cuba, Japan, Taiwan, North Korea, South Korea, Ethipia etc. radical land reform was interwoven with the question of land ownership either in a socialist collective model or pro-peasant

pro-rural area bourgousise model (Akas, 1995, P. 69). Whereas in the socialist collective model land was taken away from the orbit of private ownership and therefore accelerated the pace of establishing an egalitarian rural society, the path/model in the capitalist countries though was able in curbing the existing power and societal hierarchy in the rural areas, but could hardly be defined to have established totally egalitarian society. Therefore, hardly can this model be suited to establish a society, guaranteeing the high ideals of our constitution. It is submitted that mere reforms in the agrarian sector without restructuring land ownership will not yield desired results. In the opinion of an author on the subject :

"By far the most important outcome of a redistributive land reform of the variety frequently advocated in Bangladesh would be the destruction (or at least severe limitation) of the rural elite and the establishment of a small peasant proprietorship dependent on the state, that is on the political and administrative bureaucracy that is ultimately controlled by the urban elite of the country .... the real gainers, whether by design or by default, would be the urban elite who control the political parties and the bureaucracy, they would secure a firm control over the rural population" (Taslim, 1993, P. 369).

8. LAND RIGHTS & ETHNIC MINORITIES

The CHT Manual recognizes, expressly or impliedly, a variety of rights over land. For purposes of convenience, they may be divided into two main categories : private rights and common rights. By private rights are meant the rights of individuals over a clearly demarcated piece of land, whether freehold (with rights in perpetuity) or leasehold (with rights for a specified period).

The common rights are more difficult to define. These common

rights of the ethnic minorities in the CHT are based upon customs and usages that date back to many centuries. Such common rights include inter alia, the rights to jum (Roy, 1995, P. 63).

At the international level, multilateral instruments have been adopted aimed at recongizing traditional rights of indigenous peoples. The most prominent among those is the Universal Declaration on the Rights of Indigenous People drafted by the Economic and Social Council of the United Nations in 1989[11] Another landmark instrument is Convention 107 of the International Labour Organization (ILO), 1957, concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries. The Convention 107 has been revised and replaced by Convention 169 of 1989[12] which marks significant development in international law pertaining to indigenous peoples, their land rights, including : (a) recognition of collective land rights, (b) rights of ownership and possession etc. The ethnic minorities of the CHT though may not qualify as 'indigenous' under the law, but easily qualify as tribal people under convention 169 (Farooque, 1995, P. 110).

Though the traditional land right of the ethnic minorities has been recognized as a 'crucial issue from human rights as well as environmental perspectives' (Farooque, 1995, P. 118), flagrant violations of this right has been very widely reported[13]. One source close to the ethnic minorities has put it like this :

---

11. See. UN DOC. E/cn. 4/Sub.4.1988/25 and E/CN.4/Sub.2 /1988/24.
12. Bangladesh is a signatory to the Convention 107 but not the Convention 169.
13. Life is not ours. Land and Human Rights in the Chittagong Hill Tracts, Bangladesh. The Report of the Chittagong Hill Tracts Commission, May 1991.

> "In the plains the ethnic minorities belonging to at least 14 groupings experience, in addition to the common and routine abuses, systematic robbing of their land and landed property. Communal ownership of land in the plains has ceased to exist. The efforts to save the Adivasi/land from being grabbed or illegally transferred have been suppressed and limited by government machineries and fraudulent practices. Growth of cultural majority in areas where the ethnic minorities live, has continued to give impetus to physical force and violence for grabbing adivasi/land" (Gain, Moral, 1995, P. 46).

It is believed that the traditional right of common ownership of land forms the basis of the 'right to life' guaranteed by the Constitution. Moreover, it is a fundamental principle of state policy to "adopt measures to conserve the cultural traditions and heritage of the people" (Art. 23). These principles of state policy explicitly enshrine the protection of traditional rights from all forms of exploitation and interference. The principles are fundamental to the governance of Bangladesh and to be taken as a guide to the interpretation of the constitution and all other laws of Bangladesh (Art. 8.2).

9. IN LIUE OF CONCLUSION : LAND RIGHTS & POVERTY ALLEVIATION

In the present day world, democracy and human rights have become complimentary to each other. A society can not claim to be democratic if it does not respect human rights and freedoms. However, human rights can not be said to be existing if human beings are devoid of the 'status of dignity'. Poverty itself is a negation of the status of dignity, as is hunger. It has been shown elsewhere (Baechler, 1992) that hunger is a manifestation of the violation of the right to land since right to land in essence signifies

'right to land to feed oneself'. Hunger and famine, the antithesis of human dignity and human rights, cannot be eradicated without revolutionary change in the system of entitlement to land. One great economist remarks : "Famines, are in fact, best explained in terms of failures of entitlement systems' (Sen, 1988, P. 61).

Prof. Amartya Sen prophesies : "If the goals of relief of hunger and poverty are sufficiently powerful, then in would be just right to violate whatever property rights come in the way" (Sen, 1988 P. 62).

125 years ago Karl Marx wrote :

> "However, leaving aside the so-called "rights" of property, I assert that the economical development of society, the increase of concentration of people, the very circumstances that compel the capitalist farmer to apply to agriculture collective and organized labour, and to have recourse to machinery and similar contrivances, will more and more render the nationalization of land a 'social necessity', against which no amount of talk about the rights of property can be of any avail". (Marx, 1977, P. 288).

At the International Congress of Brussels in 1868, Caesar De Paepe said :

> "Small private property in land is doomed by the verdict of science, large land property by that of justice. There remains then but one alternative. The soil must become the property of rural associations or the property of the whole nation. The future will decide that question." (Marx, 1977, P. 290).

To this, Marx added that the social movement will lead to this decision that the land can but be owned by the nation itself.

Unless the land question is treated in this perspective, there is every reason to be pessimistic about poverty alleviation as much as it is dependant on the land rights. Even Prof. Rehman Sobhan seems to be no exception. He writes :

> "Thus rural poverty, underemloyment and land lessness are likely to remain with us and be subject to erosion only in some of the fastest-growing of the newly industrializing countries. For the rest, we will have to address our attention to the dynamics of peasant mobilization and social transformation if we are to seek answers to the hopes of eradicating rural poverty." (Sobhan, 1993, P. 138).

Prof. Sobhan's reference to peasant mobilization and social transformation is the disguised expression of what Marx had mentioned as social movement some 125 years ago. If the disease has properly been diagnosised, will we not go for its cure?

REFERENCES :

M.M. Akas. Agrarian Reform And Social Transformation : Preconditions for Development - An analysis. — In : Necessity for Agrarian Reform in Bangladesh : Reconsideration (in Bangla) Bangladesh Economic Association & ALRD. Dhaka, 1995.

Justice P.N. Bhagwati. Asia and Human Rights In: NLSIU. Human Rights Law and Practice, 17-22, October 1991, Course Compendium.

Jean Baechler. Liberty, Property and Equality. In : Elizabeth Mensch & Alan Freemon (ed). Property Law. Vol. 1-215-234, London, 1992.

Mohiuddin Farooque. Traditional Land Rights : Conflict of Traditions. In : Bangladesh, Land, Forest and Forest People, SEHD, 1995.

Philip Gain, Sishir Moral. Land Rights, Land Use and Ethnic Minorities of Bangladesh. Land, Vol. 2 No.2, December, 1995.

T. Hussain. Land Rights in Bangladesh, Problems of Management UPL, 1995.

F. Tomasson Jannuzi, James T. Peach. Bangladesh : A Strategy for Agrarian Reform. Land, Vol. 1, No. 1, February, 1994.

Rolf Kunnemann, Land to feed onself - Fulfillment bound obligations under Human Right to Feed Oneself-Hungry For What is Right, FIAN Magazine, No. 9, Februray, 1997.

Hilary Lim & Kate Green, Land Law, London, 1992.

Karl Marx The Nationalization of the Land. In : K. Marx and F. Engels. Selected Works. Progress Publishes, Moscow, 1977.

Hossain Zillur Rahman, Land Reform Agenda in the 1990s. Land, Vol. 2 No. 2, 1995.

Raja Davasish Roy, Land Rights, Land use and Indigenous Peoples of the Chittagong Hill Tracts. In : Bangladesh. Land, Forest and Forest People, SEHD, 1995.

Sieghart Paul : An introduction to the international covenants on Human Rights, Human Rights Unit, Occasional paper, Commonwealth Secretariat, March, 1988.

M.A. Taslim, Redistributive Land and Tenancy Reform in Bangladesh Agriculture-The Journal of Developing Areas, April, 1993.

West Bengal Land Reforms Act, 1955 (as modified upto 31st August 1974) and Rules framed thereunder.

Amartya Sen, Property and Hunger, In- Economics and Philosophy, No. 4, 1988.

The Dhaka University Studies Part-F, Vol VIII (1) 49-65 June-1997

WOMEN'S RIGHTS UNDER MUSLIM FAMILY LAW WITH PARTICULAR REFERENCE TO CUSTODY AND GUARDIANSHIP

Dr. Taslima Monsoor

The Muslim law recognises that a mother is of all persons most desirable to have the custody of a small child, so that proper care and attention can be given to him.[2] There is no Quranic verse fixing the age limit of custody of children and no evidence from the practice of the prophet is recorded. But in the moral sphere it is specified in the Quran that the mother should breast-feed her offspring for two whole years. [3] This moral injunction implies in the ethical sense that the custody in the first instance belongs to the mother.[4] The Hanafi school entrusts the mother to have custody of her daughter until she attains puberty and of her son till he is 7 years of age, while the shafi and Maliki school entitle

---

1. This article is a part of the research on Islamic Law for PhD from University of London in 1994. For this article women's rights is considered as rights of women under Muslim Law; for general view see Monsoor, Taslima : *Rights of Bangladeshi Women in International And Municipal Law.* In VI Dhaka University Studies, Part-F, (June 1995).
2. Rahman, A. F. M. Abdur : *Institutes of Mussalman law : A treatise on personal law according to the Hanafite school.* 210 (Calcutta, 1907).
3. *The Quran.* Sura 11:223.
4. Rahman A.F.M. Abdur op. Cit., 719 (1907).

the mother to have custody of a female child until her marriage.[5]

The right of the mother to the custody of her children continues even when she is divorced by the father of her children, but she forfeits the right in certain circumstances : if she marries a person not related to the minor within the prohibited degrees[6] ; if she resides, during the subsistence of the marriage at a distance from the father's place of residence, if she neglects her children or fails to take care ; if she leads an immoral life e.g. if she is a prostitute[7] or by change of religion.[8] There is another rule of Islamic law that the basis of custodianship is the welfare of the minor, hence if the Court thinks that in the fact and circumstances of the case shows that it will be for the welfare of the minor to be placed under the custody of the mother even if she marries a person not related to the minor within the prohibited degrees it will be in accord with the Islamic principles.[9] If the mother forfeits her right it devolves upon

---

5. For details see Tyabji, Faiz Badruddin : *Muslim law.* 216 (4th ed. 1968); Rahman 718(1907); Fyzee, Asaf A. A. : *outlines of Muhammadan law* 33 (4th ed. New Delhi 1974).

6. The Court's of Pakistan have held that this is not an invariable rule as it does not have Quranic basis, *Mohd. Bashir v Ghulam Fatima* PLD Lah. 73 (1953); *Amar Ilahi v Rashida Akhtar* PLD Lah.412 (1955). For details see Hodkinson, Keith) : *Muslim Family Law*; 313 (London, 1984).

7. For more details see Fyzee op. Cit., 199 (1974).

8. Rahman A. F. M. Abdur Op. Cit., 211 (1907).

9. See for details Rahman, Tanzil-ur : *A code of Muslim Personal Law.* 744-745 (Karachi,1978).

her nearest female relation until the father is legally entitled.[10]

In case the mother is not alive or not capable or is absent the custody of a boy below 7 and a girl below puberty goes to the other female relations of the child. They are in order of priority : mothers mother, how high soever ; father's mother, how high soever ; full sister ; uterine sister ; consanguine sister ; full sister's daughter ; uterine sister's daughter, consanguine sister's daughter ; maternal aunt in like order as sister ; paternal aunt in like order as sister. Failing the above female relatives the custody of the child then passes to the males. The father is among them first in order of priority and failing him the paternal relations in order of priority are the nearest paternal grandfather ; full brother ; consanguine brother ; full brother's son; consanguine brother's son ; full brother of the father; consanguine brother of the father; son of father's full brother; son of father's consanguine brother. In case of a son above the age of seven and a girl who has reached the age of puberty the custody belongs to the father and the paternal relations in order of priority. In classical Islamic law father is recognized as the legal as well as natural guardian of the person and property of the minor.[11]

Custody and guardianship of person also includes the right and duty to act as the guardian of the marriage of the minor. However, under the *Child Marriage Restraint Act* of

---

10 Rahman, A.F.M. Abdur, op. Cit., 212 (1907); Tyabji, Faiz Badruddin, 217 (1968).

11 Hodkinson Keith, op. Cit., 313 (1984).

1929 the guardians will be given punishment and penalty for marrying someone under the marriageable age. The title of the Act itself indicates its lacunae, as it suggests restraint of child marriage and not its prevention or abolition. Penalties and punishments were provided for the male who is over 21[12] years and marries a girl under 14 years (which has been later on extended upto 18 years), but they were lenient and discretionary.

The parents or guardians who promote, permit or fail to prevent such a marriage are also punished. But where the guardian or parent is a woman, she shall be exempted from punishment of imprisonment, but only a fine shall be imposed [section 6(1) and section 12]. This milder penalty is a concession to women by the legislature indicating paternalistic attitudes in a society which does not recognise equality of the sexes. As a tool in the hands of some male relations, women are not the principal offenders and so are not punished.[13] This is a form of positive discrimination which shows that the law also recognises women as the weaker sex.

More important is the issue of validity of a child marriage. Although the parents or guardians or the bridegroom may be punished, there is nothing in the Act to invalidate a child marriage.[14] The significance of the Act, however, was that

---

12. The *Muslim Family Laws Ordinance* 1961 (under section 12 and 13) later reduced the age limit of males to be penalised for contracting a child marriage from 21 years to 18 years.

13. Sastri, L.S. : *The Child Marriage Restraint Act, 1929*. 28, (4th ed. Allahabad, 1988).

14. Mahmood, Tahir : *The Muslim law of India*. 52 (3rd ed. Allahabad 1987).

it raised the minimum ages for marriage for girls to 18 years and for boys to 21 years and criminalised violations.

The *Sharia* permits the marriage contracted by the guardians of the minor with the option that the minor can repudiate it when they have puberty which is regarded as the option of puberty or *Khiyar-ul-bulugh*. Preference for marriage guardianship is given to the father, then to paternal grand father then other agnatic relations and then finally to mother and other maternal relations.[15] There is a consensus of opinion that a guardian must be prudent, major and a Muslim. In no way according to *sharia* can an insane or minor be the guardian of any minor.[16]

EVOLUTION OF THE LAW :

The Muslim law and statutory evolution regarding custody and guardianship is being discussed here to comprehend the present position of the law.

In the Indian subcontinent, after the minor attains the specified age, the custody of the mother immediately becomes illegal. The refusal of the mother to hand over the children to the father would amount to removal of the ward from the custody of their rightful guardian under section 25 of the *Guardians and Wards Act* of 1890.[17]

There are three types of Guardians of the property of the minor. First is the legal guardian and the father in default his executor in whose default the father's father and in

---

15. Hodkinson Keith op. Cit. 314 (1984).
16. See for details Rahman Tanzil-ur, 188 (1978).
17. *Mst. Zebu v Miraj Gul* PLD Pesh 77 (1952).

it raised the minimum ages for marriage for girls to 18 years and for boys to 21 years and criminalised violations.

The *Sharia* permits the marriage contracted by the guardians of the minor with the option that the minor can repudiate it when they have puberty which is regarded as the option of puberty or *Khiyar-ul-bulugh*. Preference for marriage guardianship is given to the father, then to paternal grand father then other agnatic relations and then finally to mother and other maternal relations.[15] There is a consensus of opinion that a guardian must be prudent, major and a Muslim. In no way according to *sharia* can an insane or minor be the guardian of any minor.[16]

EVOLUTION OF THE LAW :

The Muslim law and statutory evolution regarding custody and guardianship is being discussed here to comprehend the present position of the law.

In the Indian subcontinent, after the minor attains the specified age, the custody of the mother immediately becomes illegal. The refusal of the mother to hand over the children to the father would amount to removal of the ward from the custody of their rightful guardian under section 25 of the *Guardians and Wards Act* of 1890.[17]

There are three types of Guardians of the property of the minor. First is the legal guardian and the father in default his executor in whose default the father's father and in

---

15. Hodkinson Keith op. Cit. 314 (1984).
16. See for details Rahman Tanzil-ur, 188 (1978).
17. *Mst. Zebu v Miraj Gul* PLD Pesh 77 (1952).

whose default the father's father's executor are the legal guardian. It was held in a leading case[18] that the mother has no power to alienate the property of the minor as she is not the legal guardian of the Minor. Failing the above the second category of guardians are those appointed by the Court. The Court may appoint a guardian of a minor under section 17 of the *Guardians and Wards Act* of 1890. Under section 17(1) in appointing or declaring the guardian of a minor the court shall be guided by the law to which the minor is subjected and this appears in the circumstances to be for the welfare of the minor. Welfare of the minor is the dominant consideration and the rules only try to give effect to what is minor's welfare under Muslim law. Moreover, in considering what will be the welfare of the minor, the court shall have regard under section 17(2) the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. Section 17(3) states that if the minor is old enough to form an intelligent preference, the court may consider that preference. It was held in the case of *Mst. Johara Khatun v Amina Bibi* [19] that the judge may appoint the mother or some other person as such guardian. Finally the last category are the De-facto guardians who have voluntarily placed himself in charge of the person and property of the minor. The De-facto guardians are only custodian of the property and does not

---

18. *Imam Bandi* v *Mutsaddi* 48 IA 73 (1918).

19. 62 CWN 357 (1957).

have any right to alienate or transfer the property of the minor.

In the Pakistani period a Commission on Marriage and Family Laws was established on 4th August 1955 to find solutions of different family law issues.[20] The Commission on Marriage and Family Laws argued that it is admissible to propose changes and modifications in the matter of custody of minor children, as the divine origin or the practice of the Prophet did not fix any age limit and some of the Muslim jurists have expressed the view that the matter of age limit in this respect is an open question.[21]

The critic of the Commission cited a *hadith* on which the Hanafi law of custody is based. [22] It orders children to observe prayers at the age of seven, making it obligatory for the father to start religious education of his children when they attain the age of seven. Hence, he can take over custody of the children at that age.[23] However, the mother is entitled to the custody of a female child, according to the dessenting note, not only up to the age of puberty but up to the time of her marriage.[24] Other traditional writers did not take recourse to the modification of the legal age but were in favour of the theory of the welfare of the child and cited

---

20. The Marriage and Family Laws Commission Report, *The Gazette of Pakistan.* 1197 (20 June, 1956).

21. Id. at 1219.

22. On 30 July 1956, a dissenting note by Maulana Ehteshamul Huq was published in the Gazette of Pakistan.

23. Id. at 1601.

24. *Id.*

illustrations where the mother was given custody when it was in the best interests of the child.[25]

Under Hanafi law a mother can only be the legal guardian of a minor's property at the death of the father, the paternal grandfather or their executors, provided she is appointed by the court or the father or the paternal grandfather. By strictly following the principle of legal guardianship after the death of the father, the property is often not properly protected. [26]

The Commission suggested that in the absence of the father the Family Court should be able to appoint the mother for the protection and management of the minor's property.[27] The critic was emphasising that only if there is no trustworthy male guardian should the property of the minor be given to the mother.[28] After considerable delay, the martial law government under Ayub Khan was bold enough to adopt many recommendations of the Commission. In March 1961 it promulgated the *Muslim Family Laws Ordinance*, against strong opposition by the *ulema*, who regarded it as totally un-Islamic.[29] However,

---

25. Islahi, Amin Ahsan : 'Marriage Commission Report X'rayed' in Ahmad, Khurshid (ed.) : *Marriage Commission report X'rayed.* 220 (Karachi, 1959).

26. Supra note 20, 1221.

27. *Id.*

28. Supra Note 22, 1602.

29. See for details Islahi Amin Ahsan 33-34 (1959); Mahmood, Tahir : *Muslim personal law : Role of the state in the Indian subcontinent.* 165-166 (1st ed. New Delhi, 1977).

the *Muslim Family Laws Ordinance* of 1961 fell short of the needs and expectations of women's organizations and other social reformers who aspired for the better legal protection of women. The Ordinance did ignore some of the important issues crucial to women, such as custody of children, *khul* divorce and past maintenance for women, as had been recommended by the all Pakistan Women's Association.[30]

JUDICIARY AND THE LAW :

Traditionally, the right of guardianship of children is always vested in the father.[31] The judiciary in Bangladesh is not giving enlightened judgements in cases of guardianship. They are mainly following the conservative line of interpretation of not recognising a woman as a natural guardian of her children. But the cases on custody in Bangladesh protect women more, as they exhibit mothers' rights of custody of young children as almost an absolute right. Enlightened pronouncements in the cases of custody of young children have encouraged mothers to claim custody beyond the conventional limitations relying on arguments about the welfare of the child. The modern trend of judgements started, in fact, from the Pakistani period.

---

30. *Recommendation of Family Laws Ordinance 1961.* All Pakistan Women's Association (APWA), (Lahore, 1961).

31. Anderson, J.N.D. : 'The Eclipse of the Patriarchal Family in Contemporary Islamic law', in Family Law in Asia and Africa. 222 (London 1968).

In the case of *Mst. Fahmida Begum v Habib Ahmed*,[32] it had been held that the courts in Pakistan can ignore the rules in textbooks on Muslim law, since there was no Quranic or traditional text on the point. Further on, the court concluded that it would be permissible to depart from the rules stated in those textbooks if on the facts of a given case its application was against the welfare of the minor.[33] There are many judgements supporting this claim of departing from traditional Muslim law as stated in the textbooks, as the rules propounded in different textbooks on the issue are not uniform.[34]

The cases of custody shows that the judiciary in Bangladesh is deciding the issue on the paramount consideration of the welfare of the minor. In *Md. Abu Baker Siddique v S.M.A. Baker and others*,[35] on the strength of precedents in the Pakistani period, the Appellate Division ruled,

> It is true that, according to Hanafi school, father is entitled to the *hizanat* or custody of the son over 7 years of age. Indisputably, this rule is the recognition of the prima facie claim of the father to the custody of the son who has reached 7 years of age, but this rule which is found neither in the Quran nor Sunnah would not seem to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure. [36]

---

32. 20 DLR WP 254 (1968).
33. Id. at 257.
34. See for example *Zohra Begum v Latif Ahmed Mohawar* 17 DLR WP 134 (1965).
35 38 DLR AD 106 (1986).
36. Id. at 114.

It was further held in the above case that the welfare of the minor was assumed to be the determining factor which the court regards as 'paramount consideration', even though the opinion of well-known jurists may not be followed. Thus, the rules of custody propounded in Hanafi law may be departed from in permissible circumstances, in consideration of the minor's welfare. In the above case, the mother was preferred to be the guardian of the minor. The facts of the case were that the mother, being a doctor, was considered better suited to look after the minor than the father, especially in view of the illness of the minor. The Appellate Division conclusively determined that,

> Facts as mentioned above clearly point out that the welfare of the boy requires that his custody should be given to the mother or that she should be appointed as his guardian. [37]

But this is only a rare case where a woman as a specific individual was recognised as having the right to custody when her own ability and interest to help the child was greater than that of her husband. This was probably, not a plan of the father to get rid of a handicapped child, using the convenient fact that the mother was a doctor ; actually, the mother wanted to have custody of the child. Recently Appellate Division in the case of *Abdur Razzaq Vs. Mst. Jahanara Begum*[38] held that divorced mother is entitled to custody of her minor daughter aged about 16 years in preference to the father considering the welfare of the girl

---

37. Id. at 115.

38. BLD (AD) 163 (1996)

and her willingness to live with the mother. In the case of *Romana Afrin Vs. Fakir Ashrafuddin Ahmed*[39] it has also been held that Muslim mother has absolute right against the father over the minor children's guardianship till she remarries.

Generally, the socio-economic conditions of women have the effect of not favouring their cases and the preconceived idea remains that women are unable to maintain their children. It is a fact that the primary legal responsibility to maintain the child remains with the father and the issue is only the care and control of the person and property of the child. The image that a mother is unable to maintain the child is sustained perhaps to protect men's own patriarchal interest.

Sometimes the traditional rule has been restated and given a patriarchal interpretation to deprive women of their rights. In the custody case of *Gulfam v Gazala Parvin and others*,[40] the Family Court decided that although the minor son had not arrived at the predetermined age of 7 years, the custody of the boy should go to the father because the mother had remarried. The court, on the other hand, emphasised that the father's remarriage did not affect the issue of appointing him as the custodian of the minor boy even at this tender age. The court relied on the book of Muslim law by Gazi Shamsur Rahman,[41] which reflects orthodox concepts.

---

39. BLD 487 (1996)

40. Family Suit No. 45, 1992 (unreported).

41. Rahman, Gazi Shamsur : *Paribarik Adalot Adhadesh.* 62 (Dhaka 1978).

This judgement seems to reflect an inclination towards orthodox Muslim law. But, in fact the judgement does not follow Muslim law, as otherwise it would have given custody of the small child to the nearest female relation of the mother. Thus, the classical orthodoxy is being reinterpreted sometimes to take away the already granted rights of women.

It is an established fact that a mother is normally seen as better qualified to care for the child in his or her tender years and that committing the custody to her is of advantage to the child.[42] But, in *Dr. Rashiduddin Ahmed v Dr. Quamarunnahar Ahmed*,[43] the High Court considered it to be in the best interests of the children to place them in the interim custody of their father while the issue was finally settled in the lower court. The High Court decided on the ground that the father had been taking care of the children for nearly a year while their mother was in England. To put the children in the custody of the mother now would upset their settled lives.[44] But the question remains whether it is for the paramount consideration of the welfare of the children to deprive them of the care of their mother or whether the courts are actually taking advantage of the modern doctrine of the child's welfare to deprive women of the already very limited rights granted to them. Thus, it is

---

42. *Rahimullah Choudhury v Mrs. Sayeda Helali Begum* 20 DLR 1 (1968). See Ali, Syed Ameer : II *Mahommedan law.* 293 (Calcutta, 1917).

43. 30 DLR 208-211 (1978).

44. Id. at 210.

very easy for the judiciary to deprive women of their rights by the doctrine of 'best interests of the child' where there are no firm criteria to evaluate what are those interests.

The situation seems, however, favourable in the lower courts as reflected in the four unreported custody cases collected from the Family Courts of Dhaka city. A mother is usually given custody of the child during his or her infancy or tender age in accordance with Muslim law.[45] Moreover, in the lower court, i.e. Family Court, there is a case where a mother is also given custody of minors even above their tender years. [46] This seems to reflect sensitisation of the judiciary to give more rights to women. There is also an unreported case in which the mere application of the traditional law is described as a breakthrough. In *Abul Bashar v Md. Ufazuddin*, [47] the facts and circumstances of the case were that the father of the minor boy was staying abroad and the minor had been born and brought up in his maternal grandfather's house in the care of the maternal grandmother, even while his mother was alive. Considering these facts and circumstances, the court granted the maternal grandmother custody of the boy up to the predetermined age of 7 years. The court reasoned that the welfare of the boy was of paramount importance. But the court did not indicate that they were in fact only following

45. *Mst. Noorjahan Khanam v A.T.M. Mamoonur Rashid*, Family Suit No. 96, 1992 (unreported).

46. *Syed Nurul Haq v Anjuman Ara Begum*, Family Suit No. 106, 1989 (unreported).

47. Family Suit No. 15, 1991 (unreported).

Muslim law, where the maternal grandmother substitutes the position of the mother in the tender years of the child.

In other cases of guardianship, the courts are deciding the issue on the predetermined norms of Islamic law, i.e. giving paramount importance to the right of the father. In the case of *Akhtar Jahan Taniya v The State*,[48] the Court decided that the mother's guardianship was lost by operation of law as soon as she remarried another person who was not related to the minor girl within the prohibited degree or who was a stranger. [49] In the absence of the father, the guardianship of the child devolves to the grandfather and the mother is not entitled to be the guardian.[50] Thus, even when there are some cases of custody where mothers are given custody of the children above the pre-determined age, the guardianship of the property of the minor is retained according to the traditional conception of Muslim law.[51]

In *Rehanuddin v Azizun Nahar*,[52] the High Court Division of the Supreme Court agreed with the decision of the District Judge in this case :

48. BLD 281(1986).
49. Id. at 283.
50. *Syed Nurul Haq v Anjuman Ara Begum*, Family Suit No. 106, 1989 (unreported).
51. Id.
52. 33 DLR 139 (1981).

> The learned District Judge has found that although the appellant was the natural guardian under the Muslim law, the mother in facts and circumstances of the case was entitled to be appointed as the guardian.[53]

The District Judge had ascertained at the first instance that the facts and circumstances of the case reveal that the mother was not treated well by her in-laws and apprehended that the minor boy would also be treated in the same manner. On appeal the High Court agreed that the mother should be entitled to be appointed guardian but did not allow her to be guardian on the ground that she, being young (26 years), might remarry and sent the case back to decide the issue afresh.

The cases, except a few unusual ones, suggest that the father's guardianship of the property of the minor is dominant. Patriarchal attitudes toward women are clearly evident here, in particular the belief that the interests of the minor will suffer at the hands of the mother, or the common notion that mothers cannot maintain the property of the minor prevails. This is another way to subjugate women by undermining their credibility. However, as we saw, in some rare cases mothers were appointed guardian of their children with reference to their best interests. These mothers, as specific individuals, were given recognised rights in guardianship cases when their own ability to help

---

53. Id. at 140.

the child was greater than that of the father.[54] The financial position of the mother is considered by the court, whereas the primary responsibility of maintenance under the Islamic law lies with the father. Thus, the patriarchal ideal generally survives in cases of guardianship and males are, in particular, regarded as the natural guardian of the property of the minor.

The welfare doctrine should be given paramount consideration in all cases of custody and guardianship of the minors. The judges while taking into account the well-being of the minor must use their insights as it might be different in unlike circumstances but the welfare of the child must outweigh all other considerations. Sometimes mother's custodianship with a stranger husband is for the welfare of the child than others or mothers guardianship of the minor is better than others who want to live on child's property or to draw benefits out of him.[55]

---

54. A reported example is *Md. Abu Baker Siddique v S.M.A. Bakar and others*, 38 DLR Ad 106 (1986).

55. See for details Rahman Tanzil-ur, 745 (1978).

The Dhaka University Studies Part-F, Vol VIII (1) 67 -93 June-1997

REVISITING INTERNATIONAL HUMAN RIGHTS LAW

Dr. Sumaiya Khair

1.0 INTRODUCTION

The term 'human rights' refers to a wide range of inherent and inalienable rights, which all individuals have, irrespective of their race, colour, sex, language, political or other opinion, birth or other status. Human rights are distinct from other rights in two aspects : firstly, human rights cannot be acquired, transferred or disposed of by any act or incident and as such, they inhere universally in all human beings by virtue of their humanity alone and secondly, their primary correlative duties rest on public authorities of states and not on individuals.[1]

Human rights, at the initial stage, comprised mainly of the struggle for people's right to life and liberty. Subsequently concepts and horizons of human rights have undergone a vast transformation and acquired altogether different and new dimensions. Concern of the contemporary world over various aspects of human life has expanded the scope of human rights. Human rights have now achieved greater plurality and have become more comprehensive and refined in their application. These rights, which are sanctioned by international legal standards and recognised as such by the global community, now include all such rights that are

---

1. Sieghart, Paul, *The International Law on Human Rights*, 17 (Oxford, 1984).

essential for securing human survival, security and dignity.

2.0 AN OVERVIEW OF THE DEVELOPMENT OF HUMAN RIGHTS LAW

The concept of human rights can be traced from the archaic Greek theory on natural law, i.e. a law higher than state laws, which declared that individuals were entitled to certain inviolable and immutable rights by virtue of their humanity.[2] From the classical period through the Middle ages and the late Renaissance this concept found expression in the scholarly exercises of Bodin and Jean Jacques Rousseau of France, Grotius of Italy, Vattel, John Locke and Blackstone of England and Karl Marx of Germany who maintained that all persons were entitled to certain natural rights by reason of their humanity.

The idea of human rights developed, to a large extent, as a consequence of the struggles of man against injustices committed by tyrannical governments. Revolutionary leaders, in an attempt to restrict the arbitrary application of government power, set forth certain basic rights for citizens in charters, bills or declarations. For example, the Magna Carta (1215), a treaty of peace between King John of England and wealthy landowners was designed to protect barons from unfair taxation by the king. The Magna Carta,

---

2. Cicero, a Roman jurist speaks about the development of certain inalienable rights of individuals around 200-300 BC by the Greek Stoics in an attempt to thwart the disorder and tyranny of the Hellenistic world. For more see Szabo, Imre, 'Historical Foundation of Human Rights and Subsequent Development' in Karel Vasak (ed.), I *The International Dimensions of Human Rights*, 11-12 (Paris, 1982)

many of the provisions of which were later extended to the common man, was followed by two more human rights documents : the petition of Rights 1628 and the Bill of Rights 1689, both of which gave more power to the Parliament and the Courts by limiting the king's power.

The English Bill of Rights had a tremendous impact on American revolutionary movements and was instrumental in evolving the Virginia Declaration 1776 and the Declaration of Independence 1776. The French, likewise, adopted the Declaration of the Rights of Man and of the Citizen in 1789 which pronounced the cessation of feudal rule in the cause of universal human rights and thereby marked the beginning of a new era. Both the Americans and the French included the human rights catalogues in their written constitutions which took the place of divine or natural law and were, therefore supreme over everything else.[3]

While the English, American and French treaties primarily concentrated on people's civil and political rights, it was the socialist and Marxist revolutions in the early 20th century which advocated for economic, social and cultural rights. The first Soviet Constitution of 1918 embodied economic, social and cultural rights in an effort to ensure that civil and political rights are fully realised. This, in essence, was indicative of the fact that civil and political freedoms cannot be isolated from economic, social and cultural rights.

Traditionally international law purported to exclude the

---

3. Sieghart, Paul, *The Lawful Rights of Mankind. An Introduction to the International Legal Code of Human Rights*, 29 (Oxford , 1985)

application of international human rights law in domestic jurisdiction of states. This, in essence, denied other states within the international community the right to intervene on behalf of individuals. By the nineteenth century the doctrine of' humanitarian interventions' by other states in cases where a state committed atrocities against its own subjects was invoked.[4] This provided exceptions to the rule that human rights were matters entirely within the domestic jurisdiction of states with no scope of outside interference. These included the anti-slavery movements of the nineteenth and early twentieth centuries which resulted in the adoption of the Slavery Convention of 1926 ; early international concern over the treatment of Jews in Russia and Armenians in Turkey ; the inclusion in certain post World War I treaties establishing new states in Eastern Europe of provisions protecting minority rights within these newly created states ; the protection of industrial worker's rights by the ILO and so on.[5] Human rights therefore, were no longer independent from international scrutiny and sanction, the international community having both a right and responsibility to protest and seek redress for violations of human rights.[6] In other words, the post World War II development in human rights law was premised on the

---

4. Sieghart, op. cit., 13 (1984).

5. Hannum, Hurst, *Guide to International Human Rights Practice*, 5 (London, 1984).

6. Cotler, Irwin, 'Human Rights as a Modern Tool of Revolution', in Mahoneys, Kathleen E. and Paul , *Human Rights in the Twenty-First Century* : A Global Challenge, 12 (Dordrecht et al., 1993).

internationalization of human rights and the humanization of international law'.[7]

3.0 POST WORLD WAR II INITIATIVE : THE UN CHARTER

In general the principles of customary international law of the time addressed only the situation of 'some' people inside a state and that too, where such concern was considered proper in a system of autonomous States.[8] Therefore, while initiatives were being undertaken to protect rights of specific categories of people, e.g. religious minorities, concern for 'man' as a human being began to crystallise during and after World War II. The atrocities committed against mankind during the World War II by fascist states (Italy, Germany) convinced the nations of the world that the protection of individual freedoms could not be left to the singular discretion of states. The end of World War II marked the beginning of a campaign for the protection of human rights and dignity as a means of ensuring enduring peace within the international community. This, in fact, became the principal purpose of the new United Nations Organisation. Delegates met in San Francisco in 1945 and drew up the first international Charter promoting the universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.[9]

---

7. Id. at 11.

8. Henkin, Louis 'International Law : Politics, Values and Functions', in Steiner, Henry v and Alston, Philiped *International Human Rights in Context. Law, Politics and Morals*, 114 (Oxford, 1996).

9. Art. 55 (c), United Nations Charter.

It was the UN Charter that first gave a formal and decisive meaning to the human rights movement that began after World War II. Its references to 'human rights' though oblique, are nevertheless significant. However, while the Charter encourages the promotion of human rights and stresses on states pledging themselves to achieve to purposes, its provisions are not clear about obligations.[10] Devoid of a definition or a catalogue of what constitutes human rights, the UN Charter lacks an adequate legal machinery to assure the effective implementation of its provisions'.[11]

3.1 UN Organs on Human Rights

Although many organs or bodies within the UN deal with human rights issues, the activities of some of these bodies concentrate mainly on the promotion and protection of human rights. These include :

i. The General Assembly :

Resolutions declaring human rights standards (as in a human rights document) or condemning violations of human rights are adopted at the General Assembly. Peace-keeping efforts are also undertaken by the General Assembly in respect of actual breach or threat to breach of peace within nations.

ii. The Economic and Social Council (ECOSOC) :

Having a general jurisdiction over matters of human rights

---

10. Steiner and Alston, op. cit., 119.

11. Said, Abdul Aziz, 'Pursuing Human Dignity', in Said, Abdul Aziz (ed.), *Human Rights and World Order*, 3 (New York et al., 1978)

this organ is responsible for monitoring the overall human rights scenario in states and has the power to take initiatives in adopting resolutions on economic, social and cultural rights.

iii. The UN Commission on Human Rights :

Comprising 54 member states the Human Rights Commission of the UN, an intergovernmental body, has three distinct functions :

a. **Standard Setting** : The commission is responsible for drafting human rights conventions, treaties and declarations before they are placed before the General Assembly for adoption.

b. **Promotional Activities** : The Commission, undertakes specialised training programmes and conferences on human rights issues in an attempt to promote awareness and knowledge on human rights.

c. **Enforcement** : The Commission follows set procedures for considering and condemning, where necessary, breaches of human rights by states. The procedures include Resolutions 1235 and 1503.

Resolution 1235 enables the Commission to appoint special rapporteurs, envoys, representatives or working groups to explore areas of human rights violations within states and examine, in detail, whether there is any consistent pattern of such violation. South Africa and Cuba, for example, have, for many years been studied by a working group. Reports of these groups often result in a resolution condemning atrocities by states.

Resolution 1503 Authorises confidential examination of

communications from individuals[12] and NGOs on' situations which appear to reveal a consistent pattern of gross violations of human rights'. This procedure involves the entire hierarchy of the UN's human rights organs, i.e. the General Assembly, ECOSOC, the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[13]

Apart from the above procedures the Commission also undertakes the identification and review, through working groups or rapporteurs, of specific human rights problems (for example, cases of arbitrary executions, disappearances) throughout the world and receives periodic reports in that regard.

iv. The Sub-Commission on Prevention of Discrimination and Protection of Minorities :

Established by the Human Rights Commission, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities is composed of experts in their individual capacity and functions under Resolution 1503. Although it is subordinate to the Human Rights Commission 'its independent character permits it to follow an approach different from that of the parent Commission. It conducts studies on problems and issues of human rights and assists

---

12. Individual complaints are also possible under the Optional Protocol to the International Covenant on Civil and Political Rights.

13. For more on Resolution 1503 see Shelton, Dinah L., 'Individual Complaint Machinery under the United Nations 1503 Procedure and the Optional Protocol to the International Covenant on Civil and Political Rights', in Hannum, Hurst (ed.), op.cit., 59-73.

the Commission in the drafting of standard setting instruments on human rights.

3.2 Standard Setting Instruments on Human Rights

The modern international law making process is premised on the adoption of a declaration or resolution by an inter-governmental forum, as in the General Assembly of the UN, which is followed by attempts to convert its principles into binding treaties thereby creating obligations in international law for states which become parties to them. This is negotiated in the same inter-governmental forum. These treaties specify particular obligations of State Parties in respect of human rights and fundamental freedoms of persons within their jurisdiction and set up procedures for monitoring, supervision and application of the provisions.

Although the UN Charter imposes general obligations on member states to respect and promote human rights, more specific international human rights obligations have been established through a series of UN sponsored human rights treaties. These standard setting instruments of the UN consist of key human rights conventions, resolutions and declarations of the General Assembly. These instruments include ILO conventions that protect economic and social rights. The human rights conventions and declarations are largely aspirational which are not in themselves binding in law.

3.2.1 The Universal Declaration of Human Rights 1948

The adoption of the Declaration of Human Rights in 1948 was one of the major achievements of the UN in respect of

international human rights. The Declaration of Human Rights, which is neither a treaty nor a convention but merely a proclamation, is the first international instrument which set a common standard of achievement for people's and all nations' and gave a concrete definition and shape to the concept of human rights. It is founded on the philosophy that all human beings are born free and equal in dignity and rights based on principles of equality and non-discrimination in the enjoyment of human rights and fundamental freedoms (Articles 1 and 2). Articles 3-21 broadly contain civil and political rights—rights to life, liberty, property, fair trial, freedom of expression, association and freedom from torture and so on. While articles 22-27 incorporate economic, social and cultural rights, articles 28-30 recognise that everyone is entitled to social and international order within which human rights can be fully realised.

Although the Declaration lacks binding force, its influence is apparent in a great number of national constitutions, municipal legislation and decisions of national and international courts ; in fact, the Declaration has become a permanent and universal point of reference for all peoples for the cause of human rights.[14]

3.2.2 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights 1966

14. Bari, Ershadul, M., 'International Concern for the Promotion and Protection of Human Rights, II *The Dhaka University Studies, Part F*, 35 (June 1991).

The principles of the Declaration of Human Rights which lacked binding force were transformed into legally binding norms through the Convenants on Civil and Political Rights and on Economic, Social and Cultural Rights. These Covenants provide protection for specific rights and freedoms without discrimination and proclaim the rights of people to self determination.

The Covenant on Civil and Political Rights recognises the right of every person to life, liberty, security; to privacy; to freedom from torture and cruel, inhuman and degrading treatment; to freedom from slavery; freedom of thought, expression and religion; to peaceful assembly and association; to immunity from arbitrary arrest and detention and to a fair trial and so forth.

The Optional Protocol to the Covenant on Civil and Political Rights empowers individuals, who feel that their rights have been violated, to appeal directly to the United Nations for redress. In 1989 the General Assembly adopted and opened for signature the second Optional Protocol to the International Covenant on civil and Political Rights aimed at abolishing the practice of death penalties. The Protocol binds States Parties not to carry out executions within their jurisdiction. This is intended to enhance the right to life and human dignity.

The Covenant on Economic, Social and Cultural Rights recognises the right to work and employment; to fair wages; to unionise; to adequate standards of living and social security; to food, shelter, health, education and participation in cultural life.

Despite having a common goal to give binding form to

rights proclaimed by the Universal Declaration of Human Rights, the Covenants have different obligations. The Covenant on Civil and Political Rights imposes an absolute obligation on state parties to respect and ensure the rights of individuals within their jurisdiction and take legislative and other measures for implementation. The Covenant on Economic, Social and Cultural Rights is essentially promotional by nature and is more concerned with stipulating objectives rather than measures for implementation.

The two Covenants also differ in respect of implementation mechanisms. While the Covenant on Economic, Social and Cultural Rights offers no provisions for interpretation and application the Covenant on Civil and Political Rights has competence to consider communications by one state party regarding the violation of human rights by another state party.

3.2.3 Other Human Rights Instruments

The process of standard setting by the UN has been carried further by drafting and adopting Conventions and Declarations in specialised areas. Some of the other prominent UN standard setting instruments on human rights include :

i. The Genocide Convention 1948

ii. The Convention for the Suppression of Traffic in Persons and for the Exploitation of the Prostitution of Others 1949

iii. The ILO Convention on the Right to Organise and

Collective Bargaining (no.98) 1949

iv. The Refugee Convention 1951

v. The 1926 Slavery Convention as Amended and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutional Practices Similar to Slavery 1956

vi. Convention Against Racial Discrimination 1966

vii. Convention on the Elimination of All Forms of Discrimination Against Women 1979

viii. Declaration on the Elimination of Religious Discrimination 1981

ix. Torture Convention 1984

x. Declaration on the Right to Development 1986

xi. Convention on the Rights of the Child 1989

xii. Convention on the Rights of Migrant Workers 1990

xiii. Declaration on the Rights of Minorities 1992

The enforcement of the obligations arising from the above mentioned human rights documents depends on a committee set up to receive individual communications citing breach of human rights and investigate and examine periodic state reports on the overall human rights situation of a state. In no case, however, can a state which is in breach of its treaty obligations be legally bound by any ruling of the concerned committee.

3.3 Ratification, Accession, Reservations

When an international treaty is adopted it is formally opened

for signature by the permanent representatives on behalf of their respective governments. Signing a document however does not imply that governments are bound by it. Ratification of a treaty consists of a formal ceremony whereby solemn confirmations to be bound by its texts are exchanged by the parties. Since ratification of a document may involve changes in the States' domestic laws, it is common for negotiating governments to consult with parliamentary representatives to gauge the opinion of their people.

Where new states are created which have had no part in negotiating with the texts of treaties already in force, the process of ratification is a little different. Since ratification involves the confirming of something that has already taken place through someone else, new states, in order to avoid technicalities, must accede to such a treaty instead of ratifying it. The procedure for both ratification and accession is the same—an instrument of ratification/ accession must be deposited with the appropriate depository (usually the Secretary General of the concerned inter-governmental organisation). Once the document is deposited the negotiating governments become bound by its texts.

Although many nations, under the pressures of the international community, have modified their domestic laws to conform to international obligations, others have not yet fully accepted these obligations under international human rights law. Governments of developing states demonstrate a degree of reluctance to engage actively in dialogues on human rights, especially at the international level. Although

the record of ratification may not be the best indicator of a country's status regarding human rights, it is nevertheless significant in providing some guidelines. The chief rationale behind non-ratification of many international instruments is the existence within domestic law of machinery upholding the fundamental rights of citizens.[15] For example, although Bangladesh have not ratified many international conventions, the Constitutional obligation to enforce fundamental rights reinforces the state's responsibility to protect people from breach of human rights. As such it is common for the government to argue that since the fundamental rights enshrined in the Bangladesh Constitution are in themselves reflective of international human rights standards, it is illogical to ratify additional international human rights treaties. However, despite having constitutions replete with references to human rights, wide gaps between legal declarations and ideology often succeed

---

15. Since the adoption of the Universal Declaration of Human Rights in 1948, national constitutions that have been enacted and promulgated have incorporated a separate chapter on citizen's fundamental rights. See the Constitutions of India 1949, of Pakistan 1956 and then in 1962, of Malaya 1949, of Nigeria 1959, of Bangladesh, 1972 in Choudhury, Z.I., 'Introducing Human Rights : Concept and Practice' in Patwari, M.I. (ed.), *International Review of Humanism and Human Rights*, 50 (1992).

    Also see references to the more modern Constitutions of the Republic of Cuba, Czechoslovakia in Espiell, Gros H. 'The Evolving Concept of Human Rights : Western, Socialist and Third World Approaches' in Ramcharan, B.G. (ed.), Human Rights : *Thirty Years After the Universal Declaration*, 58 (The Hague et al., 1979).

in superseding human rights.

Where a ratifying state has difficulties in accepting a human rights treaty in its entirety, it has the option of making a formal reservation to the treaty, specifying the particular provision, which is unacceptable, and giving reasons why. Unless the reservation affects the core of the treaty, the other states usually have no difficulty in acceptingt.

3.3.1. Enforcement of Human Rights

Composed mainly of widely accepted substantive norms and internationalised standard setting procedures, the international human rights instruments are primarily promotional in their nature and hence lack any real enforceability. The scope for international implementation of human rights norms is limited as human rights are often deemed to be a national and not an international issue. In the name of maintaining national sovereignty states often refuse to be subjected to international scrutiny with regard to human rights practices, particularly because it would entail exposing violators who would then be removed from power.

The concept of state sovereignty, however, has undergone a change in recent times. While according to earlier notions, state sovereignty was violated when outside forces occupied and imposed their will on people, the more modern approach accepts that national sovereignty is violated when internal usurpers of power wield authority against the wishes of the people. While protection of sovereignty is still of paramount concern, the object of such protection lies,

not in the power base of a tyrant ruler but, in the continuing capacity of a population to freely express their choices.[16]

The non-enforcement of international human rights is often the result of calculated political decisions. As Donnelly points out :

> In the absence of a power capable of compelling compliance, states participate in or increase their commitment to international regimes more or less voluntarily. Barring extraordinary circumstances, states participate in an international regime only to achieve national objectives in an environment of perceived international interdependence . . . states will relinquish authority only to obtain a significant benefit beyond the reach of separate national action or to avoid bearing a major burden.[17]

In other words, procedures of international human rights regime rest primarily on underlying political perceptions of interest and interdependence among states.

It is often argued that UN resolutions, which are merely recommendations to member states, do not have any law making effect and as such, are not ipso facto binding on states. While this is true in particular circumstances, it is necessary to regard such resolutions as vehicles for the

---

16. Reisman, Michael, 'Sovereignty and Human Rights in Contemporary International Law' in Steiner and Alston (eds.), op. cit., 159 (1996).

17. Donnelly, Jack, 'International Human Rights : A Regime Analysis' in Steiner, Henry J. And Alston, Philip (eds.), id at 451.

expression of state practice which provide evidence relevant to the formation of rules of customary of general international law.[18]

4.0 Cultural Relativity and Human Rights

One of the intense debates in the human rights movement involves the 'universal' or 'relative' character, related to the absolute or 'contingent' character, of the rights declared.[19]

Universalists claim that international human rights must be the same everywhere. It has been observed that lawyers are inclined to speak of the 'international human rights systems' as though they were a single system 'based upon sound and essentially unchallenged foundations, applying a reasonably clear, coherent and internally consistent set of norms'.[20] This lacks reason as many basic rights are often implemented through culturally influenced forms as each culture is a part of the personality of the people that it represents which leads to the understanding that no two cultures are the same.

---

18. Brownlie, Ian, 'The Human Right to Development', *Human Rights Unit Occasional Paper*, Human Rights in Development Series, 14 (London, 1989).

19. 'Comment on the Universalist-Relativist Debate' in Steiner Henry J. and Alston, Philip (eds.), op. cit., 192 (1996).

20. See Alston, Philip. 'The Nature of International Human Rights Discourse : The Case of the "New" Human Rights', paper presented at the Conference at Oxford University: *An Interdisciplinary Inquiry Into the Content and Value of the So-Called New Human Rights*, 7 (1987).

It is often questioned whether the imposition of 'human rights' as envisaged in the West essentially constitutes a 'form of intellectual, political, or legal neo-colonialism or neo-imperialism'[21] According to relativists the universalisation of human rights succeeds in destroying the diversity of cultures thereby creating a homogenised world. The relativist approach sees each state as espousing its own conception of what human rights entail as a social institution based upon its cultural preferences and political ideology.[22] While societies in the West regard human rights as being essentially individualistic, adversarial, justiciable, and inalienable, other traditions, where moral values, including human rights, are relative to the cultural contest in which they arise, may not necessarily encompass any of these characteristics. A great majority of developing nations, for example, maintain that solutions to basic problems of food, shelter, health and education and the lack political and administrative stability, have priority over the question of formal human rights which are an unknown quantity for many of the ignorant and impoverished masses living therein.

However while there may be difficulties in the universal application of human rights norms, the exercise of discretion by states in interpreting the meaning of 'rights' may have adverse consequences on the people. Where governments are known to be primary violators of human rights, it would

---

21. Sieghart, op. cit., 15 (1984).

22. Donoho, Douglas Lee, 'Relativism Versus Universalism in Human Rights : The Search for Meaningful *Standards', XXVII Stanford Journal of International Law*, 354 (1989).

be irrational to empower them to determine and interpret rights of the people. This would also obligate the international community to maintain a degree of indifference towards human rights violations by states, which, in essence, would destroy the collective effort of the international community to promote and protect human rights. Moreover,

> Restricting international human rights to those accepted by prevailing perceptions of the values and norms of the major cultural traditions of the world would not only limit these rights and reduce their scope, but also exclude extremely vital rights. Therefore the expanding the area and quality of agreement among the cultural traditions of the world may be necessary to provide the foundation for the widest possible range and scope of human rights.[23]

Despite prevalent cultural diversities, people of all societies share a common culture of fundamental values, interests and concerns which can be utilised to broaden the universal consensus on the promotion and protection of human rights.

5.0 Third Generation Solidarity Rights

The concept of human rights have undergone tranformations not only in respect of its application but also

---

23. An-Na 'im, Abdullahi Ahmed, 'Towards a Cross-Cultural Approach to Defining International Standards of Human Rights' in An-Na'im, Abdullahi Ahmed (ed.), *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus*, 21 (Philadelphia, 1992)

its content. In recent years there has been a strong support within the international community for the development of 'third generation' human rights, a concept popularalised by Karel Vasak, formerly UNESCO's Legal Adviser. It is contended that the first and second generation rights, i.e. civil and political rights and economic, social and cultural rights respectively lack sufficient flexibility and dynamism to be able to respond to present day situations. In the circumstances there is need to identify and acknowledge new and more or less homogenous demands, the realisation of which depends largely on solidarity.[24] These rights include the right to development, the right to peach, the right to a healthy environment, the right to benefit from the common heritage of mankind and the right to humanitarian assistance and so on. These are people's collective rights.

Among the various third generation rights the Right of Development and the Right to Self-Determination of Peoples are of particular significance. These are explored briefly in order to gain an understanding of the third generation rights in their proper perspectives :

i. The Right to Development

The right to development is premised on the basic idea that individual states should be able to control and develop their own economies in their own ways. The concept of the right to development has gained considerable prominence since the first UN World Conference on Human Rights was

---

24. Alston, Philip, 'A Third Generation of Solidarity Rights : Progressive Development or Obfuscation of International Human Rights Law?', *XXXII Northern Ireland Reports*, 307 (1982).

held in Tehran in 1968. It was first recognised by the UN Commission on Human Rights which was later affirmed by General Assembly in the 1986 Declaration on the Right to Development.

The Declaration recognises that the right to development is an inalienable human right inhering in both individuals and peoples. This right which is a corollary of people's right to self-determination, reinforces the exercise by peoples the right to sovereignty over their natural wealth and resources. Article 2(3) of the Declaration provides that.

> States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the wellbeing of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 8 further adds :

> States should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be made with a view to eradicating all social injustices.

Therefore participation of the people in deciding their own lifestyles and in defining the goals of development is central to the understanding and realisation of the right to development.

The chief motivation behind the right to development was the need to enhance the implementation of existing human rights standards and to stress the interdependence of civil and political rights on the one hand, and economic and social rights on the other; the ethical quantities behind the thinking included the international duty of solidarity for development, economic interdependence and the maintenance of peace.[25]

ii. The Right to Self Determination

In the past the international community has been reluctant to acknowledge and accept the concept of self-determination. The emergence of modern international human rights law has altered the somewhat sacrosanct image of states. Under the new regime of human rights states are no longer exempt from challenge if they fundamentally fail to live up to their commitments. Since a state is under a basic obligation to protect the life and the physical integrity of its citizens, the persecution of specific groups of the population by oppressive state machinery destroys the basis of loyalty of those groups to remain under the jurisdiction of that state. Self determination refers to the right of the people to govern themselves and to control their own destiny; the relationship between self determination and human rights humanises the former and

---

25. Brownlie, Ian, QC, op. cit., 22 (1989).

lends to the latter a powerful metalangauge to harness the totality of popular aspirations.[26]

Since claims by groups seeking self-determination are deemed as undermining the stability and integrity of a state, the concept has been greatly disputed from jurisprudential and practical perspectives. Nevertheless, such rights have been recognised in resolutions of the United Nations General Assembly. Following the World War II, the United Nations developed the concept of self-determination. This appears in Articles 1 and 55 of the UN charter. The purpose of the UN, as laid out in Article 1, includes the development of friendly relations among nations based on respect for the principle of equal rights and self determination of peoples'. Article 55 of the UN Charter speaks about conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples'. The right of self determination was strengthened by the 1960 Declaration of the General Assembly on the Granting of Independence to Colonial Countries and Peoples. Resolution 1514 states that 'all peoples have the right to self determination; by virtue of that right they may freely determine their political status and freely pursue their economic; social and cultural development'. Resolution 1541 (XV) stresses independence as the principal means through which self-determination is

---

26. Thornberry, Patrick, 'The Principle of Self-Determination', Lowe, Vaughan and Warbrick, Colin (eds.), *The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst*, Routledge, 193 (London et al., 1994).

implemented and demands in paragraph 5 that

> Immediate steps shall be taken, in Trust and Self Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations.

Apart from the UN Charter and the General Assembly Resolutions, reference to the right of self-determination also appears in both the 1966 Covenants on Human Rights. The parameters of the concept of self-determination were extended with the Declaration on Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations as adopted by the General Assembly in 1970. The Declaration required the universal application of the principle of self-determination and acknowledged that 'emergence into any political status, freely determined by a people, constituted a mode of implementing the right of self determination'.[27] The perceived right to self-determination therefore encompasses principles of human rights, territorial sovereignty, recognition and statehood. The extent to which these principles are applied sets the parameters of the right to self-determination.[28]

While supporters of third generation rights find it necessary to incorporate such rights in order to respond to growing global interdependence, the concept of third generation human rights has not escaped critique. Alston, for example, points out that

27. Batistich, Marija, 'The Rights to Self-Determination and International Law', VII *Auckland University Law Review*, 1020-21 (1995).

28. Id., at 1023.

> in a field where understanding of existing international norms is poor, the further "sophistication" introduced by the concept of third generation solidarity rights seems more likely to confuse and complicate than to enlighten and clarify.[29]

He adds :

> The resort to generational terminology in order to develop new rights implies that the best human rights response to new needs and changing circumstances is the formulation of additional rights as part of a new generation, rather than the progressive development of existing rights. As a result, a Pandora's Box of 'new' rights is opened up, many of which might otherwise have been accommodated within the existing range of human rights . . . If a degree of precision as to their content and meaning is to be retained, discussions of such rights should be rooted firmly in these provisions rather than being placed in the vague context of new rights. The latter approach . . . encouraged by the concept on generations, serves only to diminish the standing of existing rights and to sow seeds of doubt as to exactly which rights are recognised by the international community and which are not.[30]

6.0 Conclusion

Despite the rapid development of human rights law over the years, gross violations of human rights continue to

---

29. Alston, Philip, op.cit., 319 (1982).

30. Id., at 317-318.

occur in nations across the world where there has been little progress in achieving universal respect for human dignity. The protection and promotion of human rights in a world rife with human rights violations are a difficult task, particularly since the implementation of international human rights law depends largely on the will of the nations. In the face of relentless pressure of poverty, increasing population, resource depletion, economic instability and environmental degradation, it is only organised resistance to oppression that can constitute absolute guarantee of human rights. Setting standards alone is hardly sufficient — there is a greater need to ensure that the commitments entered into are fulfilled. It is unrealistic to pretend that international human rights law can produce immediate and magical changes in human conditions without increasing the willingness of state parties to address human rights issues fairly and on their own merits. It is actual implementation that needs to be addressed in order to reduce the scale of human rights violations all over the world. Although the respect, promotion and protection of human rights presuppose an idea, which is deemed unalterable on account of inherent human dignity, the concept of human rights, of their relationship with political and socio-economic factors, their limitations and forms of enforcement will surely evolve and change with time.[31] As such, increased efforts to strengthen advocacy, monitoring, supervision, dissemination and enforcement of human rights at the institutional, national, regional and international levels are essential if human freedom and dignity are to be ensured.

---

31. Espiell, op.cit., 64 (1979).

The Dhaka University Studies Part-F, Vol VIII (1) 95-123 June-1997

THE EFFECTIVENESS OF ILO SUPERVISION RELATING TO INTERNATIONAL LABOUR STANDARDS ON FREEDOM OF ASSOCIATION IN BANGLADESH

Dr. Borhan Uddin Khan

Human rights are not separate part of the activities of the International Labour Organisation (hereinafter referred to as ILO), but lie at the very heart of its objectives. Most ILO Conventions and Recommendations concern the promotion and protection of human rights in a broader perspective. Having been in the vanguard of efforts to ensure the international protection of human rights, the ILO's system of supervision is concerned not only with the implementation of standards, but also has more general significance for the protection of human rights as a whole.

The ILO system for the supervision of Conventions and consideration of complaints is often cited as a model for other systems for ensuring protection of human rights. But it is not easy to assess the effectiveness of such a system. The relationship of cause and effect in this area is difficult to measure and not always apparent. However, the ILO itself has undertaken studies of the impact of ILO supervision in global perspective[1] and others have carried

---

1. See, ILO, *The Impact of International Labour Conventions and Recommendations* (Geneva, 1976).

out similar examinations.[2] While these studies may be lacking in precise conclusions, they have nevertheless led to the general view that ILO supervision of implementation of the Conventions in general has been relatively successful. We will however, in this paper, assess how this supervision has been effective in the context of Bangladesh in relation to the Conventions on freedom of association.

In the present paper, the expression freedom of association' refers to the rights of workers and employers to organise for the defence of their occupational interests as are understood by the various Conventions on freedom of association adopted by the ILO.[3] In particular, it will be used to refer to the rights and freedoms that are guaranteed by the Freedom of Association and Protection of the Right to Organise Convention, 1948 (NO. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Thus, the expression will be taken in its broad sense, which means it will not only include the right to set up associations but also a number of other rights without which the right to organise would lose much of its meaning e.g. the right of associations to organise their administration and activities freely. It is not suggested that Conventions Nos. 87 and 98 are exhaustive of the concept of freedom

---

2. See, Haas, E. B., *Human Rights and International Action : The Case of Freedom of Association* (Stanford, 1970); Landy, *E.A., The Effectiveness of International Supervision : Thirty Years of ILO Experience* (London, 1966).

3. For a conceptual analysis of freedom of association, see, Von Prondzynski, F., *Freedom of Association and Industrial Relations : A Comparative Study*, 10-16, 225-26 (London, 1987).

of association. Quite clearly they are not.[4] The fact remains, however, that Conventions Nos. 87 and 98 have acquired a degree of acceptance amongst the international community,[5] rendering them uniquely authoritative in relation to freedom of association.

1. AN OVERVIEW OF THE ILO SUPERVISORY MACHINERY

From the outset, the Constitution of the ILO contained a series of requirements to ensure that international labour standards are given due consideration by the member countries. This explains why, of the forty Articles contained in the Constitution of the Organisation, more than a quarter of them concern the establishment of the machinery for the enforcement of these standards.[6] The supervisory system of the ILO is based primarily on provisions of the ILO Constitution, but these have served as the starting point for progressive development. The initial aim of supervision was to ensure the discharge by states of obligations arising out of the ratification of Conventions, but this was subsequently extended to promoting the implementation

---

4. They do not, for example, make any express reference to the right to strike. They are entirely silent on issues such as right not to associate, protection of trade union funds, inviolability of trade union premises.

5. As at December 1994 Conventions Nos. 87 and 98 have been ratified by 112 and 124 states respectively. For the lists of states that have ratified the Conventions, see, ILO, *Lists of Ratification's by Convention and By Country*, Report III (Part 5), 110-11,127-28 (Geneva, 1995).

6. See, Arts. 19 to 35 of the ILO Constitution.

of the ILO standards even where no formal obligations existed. The search for effectiveness led to the introduction of a variety of procedures beyond the constitutional provisions of supervision.[7]

The methods and procedures that exist in the ILO for supervising its standards may be grouped under two headings.[8] The first, that of permanent supervision, acts as a catalyst to obtain the widest possible application of the instruments concerned, and seeks to detect or prevent any derogation from Conventions that have been ratified. Under this heading falls the submission by Governments of reports on the implementation of Conventions and Recommendations,[9] the examination of these reports by a Committee of Independent Experts ; and the discussion of problems of application and compliance with the constitutional provisions relating to Conventions and Recommendations by a tripartite Committee of the International Labour Conference. In addition to the reporting procedures, there exists another form of supervision based on contentious proceedings i.e., the presentation of representations[10] and complaints[11] under the ILO

---

7. Valticos, N., International Labour Law 258 (Deventer, 1979).
8. For a detailed account of the supervisory machinery of the ILO, see, Tikriti, A., *Tripartism and the International Labour Organisation* 274-333 (Stockholm, 1982); Valticos, N., supra note 7,225-61; Samson, K. T., "The Changing Pattern of ILO Supervision", *International Labour Review*, Vol. 118, 569-87 (1979).
9. See, Arts. 19 and 22 of the ILO Constitution.
10. See, id., Art. 24.
11. See, id., Arts. 26-34.

Constitution.[12] The general procedures stated as above apply to the Conventions on freedom of association as they do to others, but in view of importance of the freedom of association, the ILO has established additional machinery for its protection. This involves the examination of complaints by the Governing Body's Committee on Freedom of Association and by the Fact-Finding and Conciliation Commission on Freedom of Association.

2. State of Compliance with Reporting Obligations by the Government

However important may be the adoption of international standards and ratification of Conventions, these are only the first steps in an international standard-setting activity. The rights proclaimed, and in many eases legally accepted, might remain without effect if there were no machinery to follow up their application. The basis of the system of examination and follow-up is Article 22 of the ILO Constitution which requires a ratifying state to report regularly to the International Labour Office 'on the Measures which it has taken to give effect to the provisions of Conventions to which it is a party'. The working and success of the whole procedure depends on satisfactory compliance with this basic requirement. Supervision is impossible unless reports are in fact received and it is necessary therefore to consider whether the Governments comply in fact with its reporting obligation. This is of significance to

12. It may be pointed out that no complaint or representation has yet been filed against the Government of Bangladesh.

the present study because the receipt of reports is the essential precondition of and starting point for any attempt at supervision.[13]

Following the independence of Bangladesh in 1971 and its membership in the ILO on 22 June 1972 and the Conventions Nos. 87 and 98 having been ratified,[14] the Government sent its first reports for the Conventions in 1974.[15] Since then the Government has always duly sent its reports due under the Conventions.[16] So far as the unratified Conventions on freedom of association are concerned, under Article 19 of the Constitution, the ILO in 1980 requested the Government of Bangladesh to send report on the position of national law and practice in regard to the Rural Workers' Organisations Convention, 1975 (No. 141). The Government duly sent its report which was

---

13. See, Landy, E. A., supra note 2, 27.
14. Bangladesh has ratified Conventions Nos. 87 and 98 on 22.6. 1972 when it became a member of the ILO, but these have been in force in its territory since 14.2. 1951 and 26.5. 1952 respectively, as being ratified by Pakistan.
15. See, ILO, Official Records, File No. ACD 8-2-309-11 ; File No. ACD 8-2-309-87; File No. ACD 8-2-309-98.
16. In order to comply with the constitutional requirements that states report annually on the measures taken to give effect to the ratified Conventions, Governments are required to supply a general report each year on those Conventions for which detailed reports are not required that year. When a detailed report is not sent in the year for which it is due or when the report does not reply to the comments made by the supervisory bodies, a detailed report would be due the following year.

received by the ILO office on 26 August 1982.[17]

We may thus conclude that the Government of Bangladesh has abided by its constitutional obligation of Submission of reports under Articles 19 and 22 of the ILO Constitution.

The Mere fact of compliance by the Government of regular submission of reports does not provide any guarantee by itself that the supervisory machinery has been effective and the purpose and objective has been achieved, but it does provide a basis for achieving it. However, on the basis of reports, the Committee of Experts is the body to evaluate the degree of legislative conformity and also to be able to ascertain whether the law and regulations have been enacted or modified as a result of ratification and its observations. Thus, our next step will be to scrutinise the reports with a view to analysing them and to explore how this body of information have been subject to comments by the ILO supervisory body and how far the purpose of supervision has been achieved.

3. COMMITTEE OF EXPERTS ROLE IN THE ASSESSMENT OF REPORTS AND GOVERNMENT'S RESPONSE

Having outlined Government's degree of compliance with the reporting obligation which sets the supervisory machinery in motion, we will now highlight and examine the contents of the reports and the observations of the Committee of Experts. This will on the one hand show the

---

17. See, ILO Official Records, File No. ACD 7-309-141; ILO, Freedom of Association and Collective Bargaining, 1, 131(Geneva, 1983).

nature of governmental reporting practice and on the other hand provide how this supervisory organ of the ILO has dealt with these reports in an effort to secure compliance with the provisions of the Conventions.

As indicated earlier, the Government in 1974 submitted its first report on the application of Conventions Nos. 87 and 98. As far as Convention No. 87 was concerned, the Government's report,[18] without taking consideration of the various provisions of the Industrial Relations Ordinance, 1969, (hereinafter referred to as IRO) merely highlighted Section 3 of the Ordinance,[19] as giving effect to the

---

18. See. ILO, Official Records, File No. ACD 8-2-309-87.

19. Sec. 3 of the Ordinance reads as follows :

"Subject to the Provisions contained in this Ordinance—

a. Workers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join associations of their own choosing without previous authorisation ;

b. Employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join associations of their own choosing without previous authorisation :

c. Trade Unions and employers' associations shall have the right to draw up their Constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes ;

d. Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation or confederation shall have the right to affiliate with international organisations and confederations of workers' and employers' organisations."

Thus, it appears that in framing workers' right of association, the framers of the Ordinance theoretically heavily relied on the ILO Convention No. 87, as almost all the provisions of the Convention were incorporated in the Ordinance.

provisions of the Convention. Similarly, for Convention No. 98 the Government's report[20] indicated Sections 3 and 15 of the Ordinance to be the Corresponding provisions. [21]

Since independence in 1971, the IRO, 1969 has undergone several amendments restricting the exercise of right of association.[22] The discussion below will highlight the various aspects of incompatibility of the legislation vis-a-vis Conventions Nos. 87 and 98 which the Committee has been indicating over the years but has failed to evoke any positive action on the part of the Government to fulfill its international obligations by bringing the legislation into conformity with the Conventions which it has ratified.

Restrictions upon the right to join or to hold office in Trade Unions

Soon after the promulgation of the Industrial Relations (Regulation) Ordinance, 1975, which in Section 6 provided that only persons working in the undertaking concerned

---

20. See ILO, Official Records, File No. ACD 8-2-309-98.

21 Sec. 15 of the IRO, 1969, deals with unfair labour practice on the part of employers. The provision of this Section has its source in Art. 1 of Convention No. 98.

22. *The Industrial Relations (Regulation) Ordinances of 1975 and 1982* and the *State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Act, 1974*, were passed to override the provisions of the IRO, 1969. *The Industrial Relations (Amendment) Ordinance, 1977; The Industrial Relations (Amendment) Act, 1980; The Industrial Relations (Amendment) Ordinance, 1985 and the Industrial Relations (Amendment) Act, 1990* provid provisions restricting the exercise of the freedom of association.

may be members of a Trade Union, the Committee of Experts in 1977 by a direct request[23] notified the Government that the enactment of the said provision restricted trade union rights guaranteed by Articles 2 and 3 Convention No. 87. The Committee also requested the Government to re-examine the legislation with a view to giving effect to the guarantees contained in the Convention.[24] But the Government, instead of re-examining the provisions in the light of the suggestions made, re-enacted the provisions by the Industrial Relations (Amendment) Act, 1980, which repealed the Industrial Relations (Regulation) Ordinance, 1975. Section 7A1(a)(ii) of the IRO, 1969, as amended by the Act of 1980 contained in identical terms the provisions of the repealed Regulation of 1975. This prompted the Committee to point out that Section 7A1(a)(ii) of the IRO, 1969 limited the right to be a member or officer of a Trade Union to persons actually engaged in an establishment or group of establishments concerned. Thus, the Committee considered the provisions to be violative of Articles 2 and 3 of Convention No. 87.[25] The observation of the Committee was followed by asking the Government to re-examine and re-consider the provision in question.[26] Although the Committee noted incompatibility of the legislation in 1977 and requested the Government to

---

23. See, ILO Official Records, File No. ACD 8-2-309-87.
24. Id.
25. See, ILO *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 69th Session, 115-116 (Geneva, 1983).
26. Id.

take necessary measures, the Government did not take any positive action nor pass any comment on the issue until 1984 when it reported :

> The Government has since re-considered the provisions under Section 7A(1)(a)(ii) and (b) of Act No. XXIX of 1980 and measures of relaxation is under consideration.[27]

The Committee's response on the above communication was as follows :

> It notes with interest the Government's statement that it is prepared to examine these provisions and that measures to ease them are under study. [28]

The Government's indication of 'under consideration' was followed by the promulgation of Industrial Relations (Amendment) Ordinance, 1985, which brought some amendments to the provisions in question.[29] The Committee noted the abolition of the requirement contained in clause (b) of the Section in question that an officer or member of a Trade Union must cease to be an officer or member of the said Trade Union on the coming into force of the 1980 amendment if he was not employed in the establishment in which the union had been formed and observed that the clause has been abolished because it has ceased to be

---

27 ILO, Official Records, File No. ACD 8-2-309-87.

28. See, supra note 25, 121.

29. Under Sec. 2 of the Ordinance and ex-worker of the establishment became entitled to be a member or officer of a union in that establishment.

necessary by reason of the effluxion of time.[30] It further observed. "the basic requirement contained in Section 7A1(a)(ii) remains in force".[31] The Committee's above observation evoked Government's response as it was considered by the Government that the new amendment brought the provisions in question in conformity with the Convention. Thus, in its report for the period ending 30 June 1988 the Government communicated :

> The provisions of Section 7A1(a)(ii) and (b) have already been amended in 1985 into Section 7A(1)(a)(b). The Government therefore does not agree to the interpretation of the ILO [32] in this regard.[33]

Actually, the stipulation formerly embodied in Section 7A(a)(ii) is to be found in the new Section 7(1)(b), but with an important qualification that former employees at an establishment or group of establishments could be members or officers of Trade Unions formed at that establishment. The omission by the Committee in its observation of this 'qualification' may have led the Government to hold the contrary view. Nevertheless, the Committee subsequently pointed out the fact.[34]

Despite Government's disagreement with the 'interpretation of the ILO' as the Government put it, the Committee has

---

30. See, supra note 25, 73rd Session, 142 (Geneva, 1987).
31. Id. and also see, 74th Session, 142 (Geneva, 1988).
32. Italics for emphasis.
33. See, ILO, Official Records, File No. ACD 8-2-309-87.
34. See, supra note 25, 76th Session, 128 (Geneva, 1989).

consistently taken the view that provisions of this kind do restrict the right of workers to establish and join organisation of their own choosing (Article 2 of Convention No. 87), to elect their representatives in full freedom and to organise their administration and activities (Article 3). The Committee therefore has been requesting the Government to adopt measures with a view to making the present provisions more flexible by exempting from the occupational requirement a reasonable proportion of the officers of an organisation so as to allow the candidature of persons who are outside the profession.[35]

The "30 percent" requirement for initial or continued registration as a Trade Union

On the issue of 30 per cent requirement for initial or continued registration as a trade union as provided in Sections 7(2) and 10(1)(f) of the IRO, 1969, the Committee of Experts in its various observations[36] has requested the Government to review them in order to bring the provisions into conformity with Article 2 of Convention No. 87. The first of these provisions is to the effect that no Trade Union may be registered unless it has a minimum membership of 30 per cent of the total number of workers employed in the

---

35. See, supra note 25, 78th Session, 148 (Geneva, 1991); 81st Session, 197-198 (Geneva, 1994); 82nd Session, 152 (Geneva, 1995).

36. See, supra note 25, 71st Session, 123 (Geneva, 1985); 73rd Session, 150 (Geneva, 1987); 75th Session, 144 (Geneva, 1988); 76th Session, 130 (Geneva, 1989); 78th Session, 149 (Geneva, 1991); 81st Session, 198 (Geneva, 1994); 82nd Session, 153 (Geneva, 1995).

establishments in which it is formed. The second gives the Registrar of Trade Unions the power to cancel the registration of a union where its membership has fallen below the 30 per cent threshold. In reply, the Government in one of its reports indicated:

> The provisions of Section 10(f) of the IRO, 1969, as amended by Section 5 of Act No. xxix of 1980, were incorporated to create a strong and healthy trade union movement in the country. Multiplicity of Trade Unions with nominal membership weakens the cause of workers and leads to unhealthy conflict and hampers industrial peace. The principle of 30% was adopted after due consideration of the national conditions.[37]

The Government by another report[38] expressed its inability to review the provisions of law in the following terms :

> The said requirement has attained its objectives of reducing mushroom growth of Trade Unions and it is not considered by the workers as an obstacle to establishment of organisations.[39]

On the other hand, in the opinion of the Committee of Experts the figure of 30 per cent, applied generally both to small and to large establishments, is excessive and may be an obstacle to the establishment of organisations and thus violative of Article 2 of Convention No. 98.

---

37. See, supra note 18, Report of the Government for the Year Ending 30 June, 1986.
38. See, supra note 18, Report of the Government for the Year Ending 30 June, 1988.
39. See, supra note 18, Report for the Year Ending 30 June, 1989.

The extent of external supervision of the internal affairs of Trade Unions

Rule 10 of Industrial Relations Rules, 1977, introduced the provisions of supervision by the Registrar or any other person authorised by him of the internal affairs of Trade Unions. The power of supervision as per the rule which allows the Registrar to enter the premises of a Trade Union or federation of Trade Unions and inspect and seize any record, register or other documents attracted Committee's attention. The Committee has repeatedly considered that the procedure under which an administrative authority has wide power of supervision over the internal affairs of a Trade Union, is incompatible with Article 3 of the Convention No. 87[40] which provides that workers' and employers' organisation have the right to organise their administration and activities and to formulate their programmes and that public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof. The Committee therefore asked the Government to reconsider the provisions in question. But the Government instead of reconsidering the provisions in the light of the suggestions, adopted a defensive stand as it communicated to the ILO :

> As regard empowering the Registrar of Trade Unions to inspect and seize any record of Trade Unions and federations, it may be stated that this has been done

---

40. See, supra note 25, 69th Session, 116 (Geneva, 1983); 71st Session, 123 (Geneva, 1985); 73rd Session, 150 (Geneva, 1987); 75th Session, 141 (Geneva, 1988); 76th Session, 129 (Geneva, 1989); 78th Session, 148 (Geneva, 1991).

> to ensure proper maintenance of accounts and safeguarding against tampering of documents, misappropriation and misuse of union funds, raised mainly through subscriptions and donations from its members. Hence, it would be evident that the existing provision of law is not to interfere or restrict the right to freedom of association of workers or of employers.[41]

It appears from the above statement that Government considers the issue in question as a facilitating provision whereby the Registrar of Trade Unions would help the unions and federations to meet the expectations of their members. At this juncture it may be recalled that in its General Survey in 1983, the Committee of Experts has emphasised that in order to avoid interference by the authorities in Trade Union matters, "supervision of union funds should not normally go beyond a requirement for the organisation to submit periodic financial returns" and that "investigatory measures should be restricted to exceptional cases, when they are justified by special circumstances, such as presumed irregularities that are apparent from annual financial statements or complaints reported by members of the Trade Unions" and "furthermore, . . . these controls should be conducted subject to review by the competent judicial authority".[42]

In the absence of any express indication in the provisions of the Rule, Government's explanation that "as per provision

---

41. See, supra note 18, Report of the Government for the Year Ending 30 June 1986.

42. ILO, *Freedom of Association and Collective Bargaining : General Survey*, 59-60 (Geneva, 1983).

of the law the supervision exercised is limited to inspection of account books and calling for clarification relating to maintenance of accounts"[43] cannot be considered to provide sufficient guarantee of the provisions of the Convention. Thus, the Committee has been rightly observing for some years that investing an administrative authority such as the Registrar of Trade Unions, with broad discretionary powers to examine the papers of an organisation would create gave danger of interference with the guarantees provided by the Convention.[44]

The right of association of public servants

During pre-independence period, the right of association of public servants as governed by the Secretariat's Notification No. 6/1/48 Ests. (S.E.) of 1948 provided for establishing 'class wise' associations contrary to the principle of Article 2 of Convention No. 87. After independence in 1971, the situation did not change as rule 29 of the Government Servant's (Conduct) Rules, 1979, following the said Notification, *inter alia* provided for 'class wise' organisations. On this issue the Government in one of its reports to the ILO asserted :

> The Government considers the present position regarding the association of public servants as in conformity with the principles set fort by the Convention.[45]

---

43. See, supra note 18, Report for the Year Ending 30 June 1988.
44. See, supra note 25, 76th Session, 129 (Geneva, 1989); 78th Session, 148-149 (Geneva, 1991); 81st Session, 56 (Geneva, 1995).
45. See, supra note 18. Report for the Year Ending 30 June 1988)

It needs to be emphasised that Rule 29(a) provides membership of the associations to be confined class wise and under rule 29(b) they must not be affiliated to another association.[46] The Committee accordingly observed :

> ... these aspects of legislation are not in accordance with the right of workers to establish and join organisation of their own choosing laid down by Article 2 of the Convention ... and to the right that every Trade Union should have to exercise its activities, to formulate its programmes and to organise its administration without interference from the public authorities, in accordance with Article 3.[47]

The Committee's above observation was not confined to mere pointing out the incompatibility but followed by requests to reconsider the situation in the light of the above comments with a view to giving full effect to Articles 2 and 3 of the Convention in respect of public servants.[48] In its various reports the Government merely indicated that it has noted the observation of the Committee on this point,[49] but provided no indication that it proposes to introduce the changes as requested by the Committee. This led the Committee to note with 'regret' about the continued failure

---

46. See, Government Servants (Conduct) Rules, 1979.
47. See, supra note 18, 71st Session, 122 (Geneva, 1985); 73rd Session, 149 (Geneva, 1987); 75th Session, 143 (Geneva, 1988).
48. Id.
49. See, supra note 18. Reports of the Government for the Years 1989 and 1990.

of the Government to give effect to the requirements of the Convention.[50]

Voluntary bargaining in public sectors

Under the State-Owned Manufacturing Industries Workers (Terms and Conditions Service) Act, 1974, the Government may determine wages and other fringe benefits for any worker employed in a state-owned manufacturing industry and that no condition more favourable than those fixed could be granted to the workers concerned. The Committee as early as in 1977 and 1979 reviewed the provisions of the Act and indicated them to be not in conformity with Article 4 of Convention No. 98.[51]

In its reply for the period ending 30 June 1980, the Government explained that the legislation was designed to achieve uniform wage structure for the public sector and to safeguard the interest of workers in less viable industries and therefore did not counteract Article 4 of Convention No. 98.[52] So far as the safeguarding of workers' interest in less viable industries was concerned, the Committee indicated that though it might be normal for a Government to issue direction and guidelines as to wages, the final decision on the matter should rest with the parties to the agreement. [53] Accordingly, the Committee has expressed

---

50. See, supra note 25, 78th Session, 148 (Geneva, 1991); 81st Session, 198 (Geneva, 1994); 82nd Session,152 (Geneva, 1995).
51. See, ILO Official Records, File No. ACD 2-8-309-98.
52. Id.
53. See, supra note 51. Direct request addressed to the Government in 1981 by the Committee of Experts.

its concern for a number of years, in relation to the development of collective bargaining in the public sector and has drawn Government's attention to Article 4 of the Convention requesting to take steps to encourage and promote the development and utilisation of machinery for the voluntary negotiation of collective agreements. [54]

Protection against the acts of interference in establishing, functioning and administering unions

Following Government's first report after independence in 1974, the Committee on several occasions requested the Government to indicate in what manner the protection of workers' organisations against acts of interference was being assured under Article 2 of Convention No. 98.[55] In response, the Government in its report for the year ending 30 June 1978 admitted :

> There is no protection in our law against any acts which are designed to promote the establishment of workers organisations under the domination of an employer or employers' organisation as to support workers' organisations by financial or other means, with the object of placing such organisations under the control of an employer or an employers'

---

54. See, supra note 25, 71st Session, 214-15 (Geneva, 1985); 73rd Session, 263 (Geneva, 1987); 76th Session, 262 (Geneva, 1989); 78th Session, 250-51 (Geneva, 1991); 81st Session, 251 (Geneva, 1994).

55. See, supra note 51. Direct request addressed to the Government by the Committee of Experts.

> organisation. Generally, such efforts are not made by the employers in this country. [56]

The Government further assured :

> If the circumstances demand the Government will not hesitate to protect workers' organisation against acts of interference whatsoever.[57]

The Committee of Experts noted Government's statement and relying on preventive rather than curative approach requested the Government to consider the possibility of adopting specific provisions guaranteeing legal protection against the acts of interference covered by Article 2 of the Convention.[58] Further, the Committee took the view that by virtue of Article 2 special measures must be taken, in particular through legislation, accompanied by appropriate civil and penal sanctions.[59]

However, the Government instead of adopting any legislative measure subsequently changed its stand and pointed out that Sections 15 and 16 of the IRO, 1969, provide legislative protection with respect to interference in trade union activities.[60] This attracted Committee's attention which observed :

---

56. See supra note 51.
57. Id.
58. See supra note 51. Direct request addressed to the Government by the Committee of Experts.
59. See supra note 28, 73rd Session, 263 (Geneva, 1987).
60. See supra note 51. Report of the Government for the Year Ending (30 June 1989).

> The Committee noted that Sections 15 and 16 of the Ordinance, taken together with Section 53 do appear to provide an appropriate form of legislative protection against anti-union discrimination as envisaged by Article 1 of the Convention. However, the Committee is not satisfied that these provisions constitute an adequate response to the requirements of Article 2.[61]

The Committee therefore has been requesting the Government to review the legislation with a view to adopting an appropriate measure of protection against any interference for the purposes of Article 2 of Convention No. 98.[62]

Our investigation into the Committee of Experts role in the supervisory process has revealed that in the most recent period of the Committee's history, its reports have been ever more detailed, its observations ever more pointed, and its suggestions for remedial actions more specific. This has resulted due to Government's introduction of various restrictive provisions on trade union rights in the post independence period. It must be pointed out that the Committee's persistence in demanding full implementation of ratified Conventions has been commendable. In the case of certain recurring non-compliance, the Committee has continued to exert pressure with a view to bringing the legislation in conformity with the provisions of the Conventions at some point.

---

61. See supra note 51. 76th Session, 236 (Geneva, 1989).
62. See supra note 28, 78th Session, 251 (Geneva, 1991); 81st Session, 251 (Geneva, 1994).

4. CASES BEFORE THE COMMITTEE ON FREEDOM OF ASSOCIATION AND THE OUTCOME

Complaints to the Committee on Freedom of Association (hereinafter referred to as CFA) may be submitted by Governments or by organisations of workers or employers. There are three categories of workers' and employers' organisations which may file complaints : (a) national organisations directly interested in the matter ; (b) international organisations of workers, employers or employers having consultative status with the ILO[63] and (c) other international organisations of workers and employers where the allegations relate to matters directly affecting their affiliated organisations. So far Bangladesh is concerned, all the above three categories of workers' organisations have lodged complaints before the CFA. Since independence in 1971, the CFA has considered 8 cases from Bangladesh. These cases are : (i) Case No. 729 : Complaint presented by Bangladesh workers federation,[64] (ii) Case No. 816 : Complaint presented by the National Workers Federation (Jatiya Sramik Federation) ;[65] (iii) Case No. 861 : Complaint presented by the World

63. The international organisations of workers and employers which presently have consultative status with the ILO are the following : International Confederation of Free Trade Unions, World Confederation of Labour, World Federation of Trade Unions, International Organisation of Employers.

64. For details of the case, see, ILO, *Official Bulletin*, Vol. LVII, Series B, No. 1, (Supplement) 288-90 (1974).

65. For details of the case see, ILO, *Official Bulletin*, Series B, Vol. LIX, No. I, 2 (1976) Vol. No. LXI, No. 1, 2 (1972) Vol. No. LXI, No. 2, 6-8 (1978).

Federation of Trade Unions (WFTU);[66] (iv) Case No. 955 : Complaint presented by the World Federation of Trade Unions;[67] (v) Case No. 1214 : Complaint presented by eleven National Trade Union Federation;[68] (vi) Case No. 1246 : Complaint presented by World Federation of Teachers Union;[69] (vii) Case No. 1259 : Complaints presented by the Trade Unions International of Transport Workers;[70] (viii) Case No. 1326: Complaints presented by the World Federation of Teachers' Unions and the Sramik Karmachari Okkya Parisad.[71]

From study of the above cases it has been evident that the allegations in the various complaints concerned the arrests and detention of trade unionists and the infringement of trade union rights imposed by legislative enactment's. In cases Nos. 955 and 1246 the Government furnished the

---

66. For details of the case, see, ILO, *Official Bulletin*, Series B, Vol. LX, No. 3, 57-61 (1977); Vol. LXI, No. 3, 108-13 (1978); Vol. LXII, No. 2, 49-52 (1979); Vol. LXIII, No. 1, 45-47 (1980); Vol. LXIII, No. 3, 71-73 (1980); Vol. LXIV, No. 3, 7-8 (1981).
67. For details of the case, see, ILO, *Official Bulletin*, Series B, Vol. LXIII, No. 3, 12-13 (1980).
68. For details of the case, see, ILO, *Official Bulletin*, Series B, Vol. LXVI, No. 3, 89-93 (1983).
69. For details of the case, see, ILO, *Official Bulletin*, Series B, Vol. LXVII, No. 2, 22-23 (1984).
70. For details of the case, see, ILO, *Official Bulletin*, Series B, Vol. LXII, No. 3, 18-20 (1984).
71. For details of the case see, ILO, *Official Bulletin*, Series B, Vol. LXVIII, No. 3, 308-312 (1985); Vol. LXIX, 1986, No. 1, 34-40 (1986).

information that the detainees were not arrested for their trade union activities but for political activities and misappropriation of funds respectively. In case No. 1259 the Government released the detainee before reporting to the CFA. So did the Government in case No. 955. The consideration of case No. 729 by the CFA was of no practical value as the Presidential Order No. 55 of 1972 prohibiting strikes in public sector was withdrawn before the case came up for consideration and the Government having deferred the implementation of its labour policy of 1973. Case No. 816, although concerned serious allegations such as arrest and killing of many trade unionists, was not examined on merits by the CFA as the complainant subsequently did not wish the case to be examined. In case No. 861 the CFA continued the examination of the case until it was satisfied that all information have been provided and insisted that the Government should furnish details of the grounds of arrests and detention of the detainees. The CFA in all the cases pursued till the Government released the detainees. Thus, in the cases discussed above, the Government released all the detainees at some point during the pendency of the case and informed the CFA accordingly.

The question now arises, how far the CFA can be credited for this? Actually, there is no way of summarising the success of the procedure in quantitative terms as neither the Government nor the CFA make any public announcement on the issue. The conclusion is to be inferred from the context. Thus, the communication of complaints followed by subsequent release of arrested persons as mentioned in various complaints, whatever be the time

gap, may be considered to have had some bearing on the decision of the Government. The procedure has been of significance as it has shown the awareness and concern of the working class of their rights and on the other hand caused the Government to explain its position in an international forum. Also, it must be emphasised that the procedure has been utilized by some national and world Trade Union federations and the more and more use of it in the event of violation of Trade Union rights may result in making the procedure more effective.

But at the same time it may be argued that the release of various detained alleged trade unionists resulted not because of the CFA procedures but because the purposes for which they were arrested by the Government in power were achieved. Regarding allegations concerning legislative incompatibility with the ILO Conventions, the CFA in cases Nos. 1214, 1246 and 1326 requested the Government to amend the legislation. The Committee of Experts indeed has repeatedly pointed out the various legislative incompatibilities in the domestic law vis-a-vis ILO Conventions which we have detailed earlier in our discussion. But in its attempts, the CFA failed to evoke any positive response from the Government. There is hardly any indication that the attempts by the CFA influenced Government's decisions or policy making. Accordingly, so far as Bangladesh is concerned, from the cases discussed above, no positive conclusion can be reached as to the success of the CFA procedure.

5. SUMMARY AND CONCLUSION

From the above discussion it is evident that the ILO supervisory procedure has generally failed to ensure

compliance with the ratified Conventions by the successive Governments. However, the investigation into the Government's record of compliance with the reporting procedure under Article 22 of the ILO Constitution has shown that the Government of Bangladesh has complied with this aspect of supervision. By communicating regularly a set of specified data, successive Governments have made it possible for the ILO to acquire essential information regarding compliance with the ratified Conventions. The reports have constituted the basis of a regular system of ongoing supervision.

In discharging its supervisory role, the Committee of Experts has on no occasion condemned the Government when it considered that certain provisions of a Convention have been violated. Rather, it has directed questions and comments to the Government in restrained terms when it found that provisions of the Convention were not being fully implemented. The Committee has stated in its report that it 'hopes' or 'trusts' that 'measures will be taken to ensure application of the Convention' or has stated that it would be 'glad' or grateful' if the Government 'would supply further information'. While the Committee's communication with the Government has always been polite, they have also been persistent when the Committee believed that a continued discrepancy existed. Comments have continued in consecutive years if the Committee has not been satisfied with the Government's response. Failure to bring laws into line with the Convention has led the Committee to express 'concern' or note 'with regret'. Improvements in the implementation have been noted 'with interest' or 'with satisfaction.'

The Committee may thus be said to have developed a

stylized understated language to express its views. When it notes with 'concern' or 'with regret', these phrases are meant to be understood as a serious criticism of the Government's failure to implement a Convention. Although, Committee's circumspect language in referring to Government's noncompliance may sometimes be criticised as being excessively diplomatic, it must be emphasised that a report which gives the Government direction for further action may be of far more practical value than a formal condemnation of past action or inaction. This is so because the fundamental purpose of supervision is to secure effective implementation of the ratified Conventions and not to apply sanctions against the offending State. This is an important feature which distinguishes the executive function of the ILO from the executive function of the national State where sanction is an important element in the enforcement of legislative and executive decisions. The absence of punitive element in the implementation of the decisions of the ILO may be seen by some as a weakness, but it should be recognised that it is more difficult to apply sanctions against a State than an individual and what is important is to secure the effective application and implementation of institutional decisions rather than to punish a State for non-compliance by the import of sanctions.

Our analysis of the observations of the Committee of Experts and CFA clearly indicate that ILO standards have hardly exerted any influence upon the policies and behaviour of the Government of Bangladesh. Such apparent indifference to its international obligations on the part of any Government must be subversive of the integrity of the entire international regime for the protection of the right to

freedom of association. But this experience serves to emphasize the unpleasant but inescapable reality that international standards relating to freedom of association can be efficacious only to the extent that national Governments are prepared to allow them to be so or to the extent that workers are able to push for them. In other words, the ILO can only be as effective an instrument for progress as its member states and other constituents want it to be and it can have no more influence on national legislation that its member states want it to have.

It is thus apparent that a state cannot be impelled by the ILO to bring about changes in domestic law in harmony with the ratified Conventions or to act upon the views of its supervisory bodies. From international viewpoint, it is not satisfactory either for the ILO or for the state concerned to leave the unresolved issues resulting delay in the implementation of ratified Conventions. It can be said of the ILO procedure, that it subsists with the issues for too long in an effort to secure compliance of the Conventions. But this is perhaps the only way of handling an intractable situation and does in fact result in keeping the situation open for reconsideration. The law's delays have been a legitimate grievance throughout history, but justice delayed is less justice denied than the hurried rough justice. It appears that only by taking his kind of long view can we hope to make a lasting reality of international action for the protection of the right to freedom of association at national level.

The Dhaka University Studies Part-F, Vol VIII (1) 125-155 June-1997

DOWRY IN BANGLADESH : HOW MANY MORE DEATHS TO ITS END ?

Dr. Nusrat Ameen

1. INTRODUCTION : CONCEPT OF DOWRY

Dowry is a pattern of marriage payments settled openly or discreetly before the wedding. A significant feature of dowry is that it constitutes of an elaborate series of payments extending over a long period of time. The first set of giving commences with the engagement and concludes with the departure of the bride to her husband's home. Although the presentations at the time of marriage may seem most conspicuous, the term dowry covers the total "transfer of wealth" from the bride's family to the groom's, a mandatory obligation that the bride-giver's must fulfil. The second series of payments are those which persist long after marriage in the form of gifts at festivals, birth of grandchildren and so on. The giving of dowry marks a unilateral relationship between the bride-givers and the groom-side as it does not impose any obligation upon the recipient to reciprocate the gesture.

Despite the successive legislative interventions to make the legal definition of dowry more responsive to the social reality of dowry, the courts remained hesitant to label all giving as an offence. The criminal sanctions against dowry divested the term of its legitimacy derived from culture and tradition. Consequently, it became necessary to define dowry in a way that would criminalise the grossness but keep outside the purview of the law, the traditional system

and status quo it preserves.

In search of an answer to the endless abuse that centres around dowry and dowry related problems we must consider the international responses to such abusive behaviour. In the international arena the adoption of a Declaration on violence by the 1993 United Nation Conference on Human Rights in Vienna the United Nation's Human Rights Commission appointed a special Rapporteur for violence against women. Her mandate extended to three broad areas including family violence (for example, domestic violence, genital mutilation), community violence (for example, religious extremism, rape, trafficking in women) and state sponsored violence (for example, gender-based violence in detention, armed conflicts).

The Rapporteur's submissions to the United Nation Human Rights Commission are expected to draw attention to the causes of gender violence and their incidence in different countries. This process of reporting on human rights violations was set up to make state parties accountable and responsible to the United Nation for violence against women caused by economic, political or social factors.

The United Nations in the World's Women 1995 Trends and Statistics published a data regarding "National Action in Response to Violence Against Women" and where the relevant information regarding the situation in Bangladesh and other South Asian countries is quoted in order to understand the existing plight of legal situation - 'no general domestic violence law is present in Bangladesh but law prohibiting dowry harassment and cruelty to women passed' (Statistical Division of the United Nations Secretariat based on information provided as of September 1993).

We ourselves need to understand the causes of gender violence and to enforce accountability within our own society. In search of such a solution to aware the public of magnitude of the problem and to make state mechanism accountable, this article deals with the issue of dowry and the consequent deteriorating condition of women in Bangladeshi society.

The maltreatment of women over the question of dowry needs to be addressed in detail. This is a cruelty perpetuated on women without any reason at all and in any case without they, in any way, being responsible for the situation or even capable of providing a solution to the problem either before or after the marriage.

In the Encyclopeadia Britannica[1] dowry is defined as a term denoting the 'property, whether realty or personal, that a wife brings to her husband on marriage'. Similarly, the Encyclopaedia Americana[2] defines dowry as 'the property that the bride's family gives to the groom or his family upon marriage'. Dowry is thus the property which the husband receives from his wife and her family upon marriage. However, in Bangladesh law dowry has been given an extended meaning : it is defined as something given or taken in consideration of marriage and thus if the bride-wallas (relatives of the bride) also receive money it will be dowry.

The concept of dowry in Bangladesh probably originated from an ancient Hindu custom, an approved marriage

1. VII Encyclopeadia Britannica 619 (1970).
2. IX Encyclopeadia Americana 321 (1969).

among **Hindus** has always been considered to be a *Kanyadaan* that is gift of the daughter. According to *Dharmashastra* (code of religion) The meritorious act of *kanyadaan* is not complete till the bridegroom is given *varadakhshina* in the form of cash or kind. This was out of love and affection and in the honour of the bridegroom. The quantum varied in accordance with the financial position of the bride's father. Similarly, articles were given to the bride which constituted *stridhan* that is property of the bride. These were meant to provide financial security to the couple in adverse circumstances. However, no compulsion whatsoever was exercised by the bridegroom and his family to obtain *varadakhshina* and *stridhan*. In course of time, these two aspects of Hindu marriage assumed the name of 'dowry'[3]

2 DOWRY AND SOCIETY

The social interpretation of dowry today is that, whatever is presented whether before or after marriage under demand, compulsion or social pressure as consideration for the marriage can be said to be dowry. The concept of dowry has not only spread rapidly among the Hindus but also to the other communities in the sub-continent. Thus, the predominantly Muslim Bangladesh inherited the menace from the Hindu society which gives *"pon"* during the daughter's marriage since she does not inherit her father's property.

3. Anjume, Javed 1991 : XII Delhi Law Review 179-183; Shrinivasan, Parvati : The Menace of Dowry, in Justice Raj, Sebasti (ed.) In Quest for Gender Justice 91 (Madras, 1991).

In several parts of Bangladesh, where Muslim society had been less influenced by Hindu manners and customs, it was the groom's family and not the bride's, which used to pay for marriage expenses and offer presents. A study made by BARD (a non-government organisation) in early sixties shows that before 1935, the Muslim groom's family never demanded dowry from the bride's family. However, at present Muslim society in Bangladesh no longer lags behind the Hindu community. Dowry has become a custom essential in all marriages.

It is more or less known that in the Indian subcontinent the most common term for bride wealth is *'stridhan'*. What is not known is that in Bangladesh the word for the bride-price is *'pon'*. The etymological implications of the word are enormous. At one level *pon* means *sankalpa* or *pratigya*, that is a commitment, both individual and social, making a wish or will explicit. It has instantly legal and moral implications. If one expresses a wish, it is a moral duty or legal compulsion to execute that will. If an object or a woman is willed it will have to be executed properly.

How is it executed ? That leads us to another level of the meaning of the term *'pon'*. If one wills an object or a woman as his property, then there is a price to be paid to appropriate the thing. Objects, things or women are equated at the same level, they are nature-lacking subjectivity. Therefore, they can be "owned" after an appropriate price is paid. But in pre-capitalist cultures they were not yet reduced into pure and abstract commodities. Because they were still considered as *sampatti, dhan* or wealth. That means, their use value was more important than their exchange value.

Once the bride-price is paid a man could appropriate the productive and reproductive labour of woman to produce goods and children in the household.[4]

Despite this past picture, which is not at all rosy, women in the pre-capitalist culture had immense value and power compared to the degradation they are suffering now in the global system of capital and the commitment of life at every level of social interaction. For example, in Bangladesh she was the invisible queen of agriculture because she controlled the seeds, their conservation, preservation, regeneration and breeding. She was the one who cared for the live-stocks, poultry, trees, herbs and medicine apart from producing and raising the children. It is true that her subjectivity was not recognised, but she had a 'role' to play, and she played that 'role'. And most importantly, the role was recognised socially and culturally. That was also a reason she was often divined as *'devi'* in Bengal. Despite the patriarchal structuring of the social relations and the cultural practices, women had a material space for herself within the socio-economic milieu of the past.

The investigation into *pon/joutuk* or bride-price/dowry is illuminating. It can more clearly highlight the transformation of the status of women historically as well as her increasing degradation. The question is, what happened at the material basis of the society that has devalued women so much that she is considered a liability for the husbands as well as to the society? Has she been rendered insignificant and

4. Goody, Jack and Tambia, S. J., Bridewealth and Dowry 61 (London, 1973).

worthless for the economy despite the roaring demands of the mainstream development to recognise her 'worth'.

Her contribution to the economy is not recognised by the national income accounts or by the economists, because she is not in the 'market'[5]. So the right liberals and a section of the left argue that women will have to be integrated into 'development', meaning in the capitalist sphere of the economy.[6] But capitalism, the global explosion of the commodity relation, is precisely the cause of her degradation. The old economy where she was valuable, where she was considered as 'wealth', since her value producing activities were socially and legally recognised in pon or bride-price, has disintegrated rapidly. The singular most important cause in this respect is that the change did occur through systematic violence of 'development'. In the process reversal of the bride-price-dowry occurred.

The socio-cultural heritage (from the Hindu custom) of which these attitudes are a part may be responsible for the multiple social disadvantages of women in Bangladeshi society. These are again aggravated in the traditional

---

5. Lindenbaum, Shirley : The Social and Economic Status of Women in Bangladesh. Ford Foundation. 1-31 (1974 Dhaka); Wallace, B.R. Ahsan, Hossain S. and Ahsan, E., The Invisible Resource : Women and Work in Rural Bangladesh. Westview press 115-127 (1987, London); Abdullah, Taherunnesa and Zeidenstein, Sondra IV Village Women in Bangladesh; Prospect for Change. Women in Development, 249 (1982, Oxford).

6. Ahmed, R : Women's Movement in Bangladesh and the left's Understanding of the Women Question. Journal of Social Studies. 41-50 (1985).

socio-economic systems where inequality is rampant. Usually a woman is considered as a 'commodity' that is to be disposed of by her parents as early as possible after she attains puberty. She is to be transferred from one man (father) to another (husband) as a liability to be looked after. Without 'accompanying assets', that is dowry, she usually does not have much value. The phenomenon of dowry reveals the inferior status and position of women in a patriarchal society like Bangladesh.

Thus, there is no evidence to suggest that dowry is today a voluntary gift, a symbol of affection for a daughter who is leaving the home of her parents on marriage. However, there is every evidence to show that it is a unilateral transfer of resources by a girl's family at her marriage to the groom's family in recognition of the latter's generosity in inviting an amputated human being to their home permanently. Nalini Singh[7] summarises this hypothesis thus :

> "Society perceives women as economically less productive than men (or unproductive) and, there a female is regarded as a net economic drain on a family. At marriage, when the female is in transit between the two households, the family that accepts her is perceived to be saddled with a net economic liability, while the household that is losing her is in fact losing a liability. Dowry is, therefore, a

---

7. Sharma, Sudesh Kumar : Dowry System in India : A Socio-Legal Analysis, in Saraf, D.N. (ed.) Social Policy, Law and Protection of Weaker Section of Society, 315 (New Delhi, 1986).

> compensatory payment to the family which agrees to shelter her, hypothetically for the rest of her life. And precisely for this reason, dowry is a recurring phenomena which lasts a lifetime".

Thus society has made provision for dowry-money, ornaments and luxury items given to the bridegroom. Marriage talks often break down over disagreement on the mount of dower and/or dowry. There are reports of annulment of marriage engagements due to failure to meet the demands of bridegroom party. Reports of broken marriage engagements have led some fathers and/or daughters even to commit suicide from shame.[8]

A news item published from Dhaka appearing in the Amrita Bazar Patrika dated March 20, 1989 reported that husbands' and his families' greed for dowry was breaking up 2000,000 marriages in Bangladesh each year, according to the national association of marriage registers. The secretary general of the association said husbands were looking for a better dowry for the second marriage, abandoning their first wife. Many women file divorce petitions to escape abuse at the hands of their in-laws for failing to meet expectations of dowry. According to the survey of the association more than 60% of marriage break-ups were due to disputes over dowry; other prominent reasons were physical repression, poverty and desertion by husband. [9]

---

8. Huq, Jahanara, "Dowry and Mahr : A Social Problem in Bangladesh", Paper presented at the seminar on the Status and Legal Rights of Women in Bangladesh (Dhaka, December, 1972).
9. Ghosh, s. K., Indian Women Through the Ages. Ashish Publication. New Delhi 46 (New Deilhi, 1989).

In rural areas, among the poor, money, ornaments or household articles are often demanded as dowry (although, dowry is theoretically outlawed by Dowry Prohibition Act, 1980). Similar demands are made in urban areas; some families even demand luxury goods- a car, television, furniture, or even a job abroad or building a house for him. The miseries of the bride's parents do not end with their giving a dowry at the time of marriage. The custom demands a perennial flow of gifts from parents of the girl to the boy's family on all festivals.

In upper-class families also, there may be no dowry negotiations at the table, but the monetary dimensions of expected presents are fully standardised. This too is tantamount to a demand for dowry in disguise, resulting in mental abuse to a bride whose matrimonial baggage fails to satisfy the in-laws.

In many cases, these demands are accepted by the girl's parents, but the family undergoes economic hardship to meet the dowry; some will even arrange for a loan rather than not have their daughters marry. In several cases they continue to fulfil the demands of their daughter's in-laws forgetting that a woman cannot buy peace, not to speak of affection, by meeting the monetary demands of her in-laws. The demand may lead to constant nagging and bullying which is even more damaging to the human spirit. Sometimes dowries are demanded after the wedding ceremony. The refusal to pay could result in the daughter being divorced. Thus according to one mother.[10]

---

10. Quoted from Chen, M. and Ghaznavi, R ., Women in Food for Work : The Bangladesh Experience (Dhaka, 1977).

> "My daughters have been divorced and deserted because I have no money to buy the radios and watches demanded by my sons-in-law."

In this regard a letter worth mentioning written by one Majedul Huq to the Editor of the Bangladesh Times (a local English daily newspaper) under the caption, "The Scourge of Dowry" voices the opinion of many on this pernicious custom. Some portion of this letter, therefore, seems to be worth quoting here. He writes :[11]

> "The lives of many talented, virtuous and educated young women were wasted for their guardians could not arrange lavish dowries and consequently well placed husbands did not come their way. Symbolically speaking it may be said that the thought of providing for a daughter's dowry is the big headache of any honest but not very well off guardian. The dowry system is immoral and dehumanising also for it tempts men to consider material gains to be derived from marriage instead of the more rewarding human aspects....."

3. CONSEQUENCES OF DOWRY

Nearly ninety five years ago, Rabindranath Tagore (a Noble Prize winner of Indian literature) wrote a moving short story, *Dena-Paona*, in which the helpless heroine Niru is driven to an untimely death by her cruel in-laws.

---

11. Quoted from Ahmed, Sufia and Chowdhury, Jahanara : Women's Legal Status in Bangladesh : The Situation of Women in Bangladesh. Women for Women : A Research Study Group. Dhaka.309 (Dhaka, 1979).

simply because the dowry her father could provide was not enough to match the appetite of her husband's family. Today, notwithstanding the progress and emancipation of women, the passing of draconian laws, harsher punishments, establishment of prevention of crime against women cells, activities of women's groups in their efforts to raise the consciousness of women, and vigilant social organisations, dowry has expanded over whole of the sub-continent, and the number of dowry deaths has been increasing steadily. The newspaper reports add to the understanding of the magnitude of this issue. For example,

i) After remaining in coma for two weeks Rokeya Begum, a teenage bride of four months, died in a hospital in November, 1996, in Mymensingh district. She was too young to die and doctors said it was not a natural death. When Rokeya was brought to Mymensingh Medial College Hospital on 27th September, 1996 in critical conditions, doctors heard complaints that she was abused by her husband and in-laws because her poor family failed to meet their dowry demands.

ii) Also in October, 1996, another woman died in her father's home in Sirajgonj district from acid burns. Anwara Begum, 26 was tied to a tree when her husband and in-laws sprayed her body with acid for her inability to bring dowry money from her poor family even eight years after the marriage.[12]

These are isolated cases reported in the daily newspaper

12. The Daily Star, 3 November, 1996.

... there are still thousands which are unreported. The reported cases are merely the tip of an iceberg. Still, the tip indicates the depth of the growing dowry problem. It may be argued that the reporting does not necessarily indicate the increase of the crime rather it is the impact of better coverage due to the pressures by the women's movement in Bangladesh. Whatever the reason may be it is to be acknowledged that this crime is being committed.

These cases give a sad picture of how women have become prey to the dowry custom. It is found that even when dowry is not demanded at marriage it becomes an issue afterwards. The in-laws are also a part of such demand. Nevertheless, "The poor, both men and women, ranked dowry as their third most acute problem and their fourth resolvable aim for government action," said the 1996 report of the UNDP on human development in Bangladesh. Quoting a survey the report said, "anecdotal evidence suggest that dowry is increasing in both frequency and size of the payments". Ain-O-Shalish Kendrra, a voluntary organisation advocating against social oppression, reported 370 cases of violence against women in 1995 and 25% of these were due to unmet dowry demands.

The menace is not only killing helpless women, Dowry practice has many other consequences, the UNDP observes : physical, psychological and sexual abuse of women, divorce, men having several wives, female suicide and parents becoming landless. Abandoned and divorced destitute women are often forced into occupations such as prostitution to survive. A recent survey by the Bangladesh Institute of Development Studies (BIDS) lists dowry as one of the five 'most common crisis' events responsible for

income erosion in rural areas. It spreads because of traditional societal outlook of considering women a burden to family. "Dowry is the single most convincing reason for parents considering that- a daughter is a burden", says the UNDP report.

"For millions in Bangladesh, dowry leads to treatment as inferior human beings and consequent feelings of inferiority from birth onwards. Dowry is a financial transaction, perpetuated by economic need or greed and agreed only because women are socially valued as inferior beings", says the report. "Rising unemployment, landlessness, the growing monetization of the economy and commercialisation of societies have all contributed to the growing popularity of dowry practice", observes UNDP report.

4. Dowry : A Crime

The concept of dowry has been well illustrated by the respondents in the work of Singh [13] . .... "the system which devalues women and denies them social and economic independence, which makes marriage a dire necessity for women, even at the price of their lives" is responsible for dowry. ..... "society which comprises both men and women is responsible for this crime". .... what is to be blamed is "the entire social set-up with its legal, political, administrative, whatever rules and norms". .... "social customs which have been largely shaped by men" is

---

13. Singh, Indu Prakash : Social Spectrum. Women's Oppression, Men Responsible 75-108 (New Delhi, 1988).

responsible for dowry. .... it is "the institution of family (patriarchy) and social values of people that is people's ideas on marriage, women, social status, consumerism which is responsible for dowry".

The value of human beings is now measured by the wealth they possess; and the amount of dowry provided is seen as a reflection of the social status of the bride's family. In this social climate demands by a woman's prospective in-laws are, therefore, escalating. The dowry issue has another different aspect that also is quite important. Daughters of poor families, which are unable to provide dowries, cannot hope to marry; and families without sons pay dowries for their daughters but receive nothing to make up for this loss. This places some families in a very real difficulty. These difficulties were explained by Jamila Verghese,[14] who has written a book on dowry murder. Thus not only married women suffer under the dowry system. Those unmarried women for whom a dowry cannot be provided also suffer because they can have no hope of marriage. Parents who pay a dowry for their daughter hope to compensate by receiving one when their sons marry. It is not easy to break out of this truly vicious circle.

Dowry is thus an open crime now. Number of rising cases from the statistics indicates its prevalence. The brutality associated with dowry to the wife is 'normal' and 'common'. Demands and harassment for dowry in cash or kind of housewives by their husbands and in-laws are common in

---

14. Verghese, Jamila, Her gold and Her Body (New Delhi, 1980).

both rural and urban areas.[15] In spite of the legal penalties for giving or receiving dowry, the custom continues. The intention of the parents out of affection and concern for their daughters lead them to do as much as they can to ensure a 'good husband'. In the process they become dowry givers. If dowry helps them to get a 'good husband' then they do it even by selling land, live-stocks, trees or other saleable property or even by going into debt with the money lenders.

On the other hand, the man's family, when they are looking for a bride is also searching for economic security for their son. These same parents probably have paid dowry for their own daughters. Therefore, they also want to compensate the loss of property through to son's marriage. So the demand for dowry in cash or kind is coming out of the need for economic solvency in the family. The bride personifies here the movement of the property. The property is transferred from the fathers/brothers of the girls to the father-in law/husband. In the process women own nothing in the end. Women have become a source to acquire property among and between families.

Dowry has its different forms-from kind to cash. While in the early seventies the dowry constituted among the poor a cycle and a radio, nowadays it is only a cash money from taka 5,000 to taka 30,000. Among the better off families, in the seventies the dowry often constituted furniture. In the

---

15. Akanda, Latifa and Shamim, Ishrat : Women and Violence : A Comparative Study of Rural and Urban Violence Against Women in Bangladesh, 9 (Dhaka, 1985).

eighties and nineties the demands are for payment of ticket for Middle East or an investment capital for business within the country. Many victims of dowry offences were left by their husbands merely because the parents of these unfortunate women could not provide their son-in-law with an air ticket or failed to set up a business for them. Since dowry has become related to employment provision for the groom, it has become a never ending demand.

A report in the Daily Star, newspaper on 3rd July, 1996 stated that, two hundred and ten housewives have been killed during a span of five years (1991-1996) in 12 police stations of Jamalpur and Sherpur districts in Bangladesh. This has been disclosed by different marriage register offices, police stations control room and judicial courts of these districts. The main causes of such killings have been identified as disputes over demand for dowry. 72 housewives were murdered by their husbands and 82 by in-laws. On the other hand, 30 husbands have been killed over dowry disputes. The cases on trial are awaiting conviction, some have been convicted. A number of incidents, however, remained out of judicial action for non-filing of cases by the part concerned. However, causes of this indifference to move to the court were identified as huge monetary involvement and lengthy judicial process. It is learnt that most cases are settled through village Shalish.

Statistics from Daily Star, a daily newspaper, 3rd July, 1996 also show that cases of divorce are on the increase in these districts. Out of 15000 cases of divorce over dowry disputes 505 took place within one year of marriage, 712 in two years of marriage and 299 within three years of marriage. A survey on the incidents of divorce cases

showed that 80% of them occurred in the lower-income group over dowry disputes. The survey also revealed that female child is considered a burden on parents of poor families. So to get rid of the mouth and also to avoid higher demand of dowry girls are married at an early age. Although there exist anti-dowry law in the country penalising the offence, 80% of poor families fix dowry openly in form of cash or kind. Another survey found approximately 80% of marriages in two areas of Rangpur district in Rajshahi Division in the north of Bangladesh required dowries. Early marriage of girls and divorce are a direct consequence of dowry demands. More than 20,000 marriages were terminated during the last five years (1991-1996) in five thanas of Barguna district in Barisal Division in the south of Bangladesh. The main reasons being dowry, polygamy and adultery of husbands. Parents also reportedly marry off their infant daughters to avoid paying higher dowry prices in the future. A recent study found that 50% of the women in Bangladesh are married before the age of 16 (legal age is 18) while 98% are married by the age of 24.[16]

5. DOWRY DEATHS AND THE POLICE

Most dowry deaths occur in the privacy of the husband's home and with the collusion of his family members. Courts, therefore, admit their inability to convict anyone for lack of proof. Sometimes, the police are so callous in conducting investigations that even the courts cast a serious reflection on the efficiency and integrity of the police authorities. For example, as many as 42 cases of unnatural death (UD) have been instituted in Chatmohar thana alone under

16. Ain-O-Shalish Kendra : Annual Report, 1996.

Pabna district in the northern part of Bangladesh during January to September, 1995. Due to want of proper investigation, The Daily Star, October 30, 1995 states that the mysteries behind these cases remain unearthed.

The Chairman of the Chatmohar thana said that suicide of young women is rampant in his locality due to many reasons, namely, poverty, family problems, torture upon women for dowry by husbands and secret killing or murder. Saiful Islam, a young Gano forum (a political party) leader investigated these and found that 28 out of the 42 were young women who allegedly committed suicide or simply UD (Unidentified death) cases were recorded in thana with no or extremely meagre follow-up action by the authorities concerned.

The police hardly sends dead bodies for post-mortem examination. Without holding such examination, they are found to procure an application from the interested quarters and hand over the bodies to them without performing post-mortem examination unless they are compelled. In such cases, the interested quarters rush to the doctors holding post-mortem examination, get them influenced through various means and procure a report favourable to serve their purpose. Thus, many murder cases are passed as suicide. Shamim[17] also found in her study that, in family violence cases body of the women never reach for post-mortem; even if they do, they are passed as suicide cases.

Though many dowry deaths go unreported, the number of

---

17. Shamim, Ishrat, Case Study on Violence in the Family. (A report prepared by Shamim, I), 5-6 (Dhaka, 1987).

those that are reported is enough to unnerve our society. Such incidents have their origins in social, economic and psychological factors too deep-rooted to be tackled by amending the law. The genesis of such deaths lies in the tension created by persistent demands, accompanied by torture for dowry. Many murders of wives for dowry or other reasons are disguised as suicides and some are even called "accidents", as if they are natural deaths in some epidemic. Suicides of young brides due to inhuman treatment by husbands and in-laws either due to dowry demands or family mal-adjustments have not been documented in detail but such incidents do occur.

In Bangladesh, suicide cases are given least publicity, though rampant and deaths are sometimes reported as a short news item without the cause being disclosed.[18] Suicides are usually committed by those who have gone beyond the limit of tolerance, being treated and neglected most cruelly, both mentally and physically. Suicide is looked upon with much prejudice in a Muslim society like Bangladesh since Islam prohibits this action. As such they are falsely represented as accidents by the family concerned for the family does not want to bear the burden of social stigma.

The table below shows the dowry related violence in Bangladesh during January to December, 1995.

---

18. Akanda, Latifa and Shamim, Ishart : Women and Violence : A Comparative Study of Rural and Urban Violence Against Women in Bangladesh, 24-25 (Dhaka, 1985).

TABLE : Dowry Related Violence Reported in 8 Newspapers between January-December 1995 in Bangladesh.

Nature of Violence	Number of incidents	Number of police case filed
Engagement broken	1	0
Physical torture	20	16
Physical torture and expelled from home	5	3
Sold to traffickers	1	0
Disappeared	1	1
Suicide	4	3
Threatened with death	2	1
Death	60	55
TOTAL	94	79

It is apparent from the statistics that dowry offences are increasing. The trend of apparent increase in violence over the years raises an issue whether the noted increase in both family and non-family violence against women, reflects an actual increase in number and frequency of such incidents during the period or whether it reflects better coverage resulting from pressures brought on the newspapers by women's groups. The police, lawyers, agency officers and doctors felt that for certain types of violence the reported increase perhaps reflected better coverage due to an increasing willingness in people to disclose and discuss facts which were previously 'hidden', such as rape. Other types of violence especially spousal

abuse though widely prevalent in the UK,[19] in the USA[20], in India[21] are gravely underreported in all these countries and elsewhere. However, it is true that figures showing an increase reflects the existing situation.

6. DOWRY AND THE LAWS IN BANGLADESH

In Bangladesh dowry is unconstitutional as well as illegal. There are many legislation to safeguard this evil but still it is prevalent in society in a large scale. There are Dowry Prohibition Act, 1980, Cruelty to Women (Deterrent Punishment) Ordinance, 1983 [However, the Cruelty Ordinance has been repealed by the Repression Against Women and Children (Special Provision) Act of 1995. Nevertheless, cases pending under the previous Ordinance shall be tried as if it had not been repealed], the Penal Code (Second Amendment Ordinance), Family Court Ordinance, 1985 and recently another Act namely, Repression Against Women and Children (special Provision) Act, 1995 came into force. Yet dowry caused death to Anwara and Rokeya and hundreds of others like them. The provision of even the death penalty has not been able to deter dowry violence.

All these legislation are mostly concerned with the technicality of the law than the depth of dowry violence

---

19. Dobash, R. E. and Dobash, R. P. : Violence Against Women : A Case Against Patriarchy, 133 (New York, 1979).
20. Straus et. al : Behind Closed Doors : Violence in the American Family. Doubleday, 44 (New York, 1980).
21. Ahuja, Ram : Crime Against Women, 99-121 (Jaipur, 1987).

perpetrated against women. As per Dowry Prohibition Act, 1980, both giving and taking of dowry are punishable offences. Lawyers have found the fact that by making both parties liable under the Act makes it less likely that a complaint will be filed. Even when one party is innocent, the other party may threaten to file a counter complaint.

6.1. DOWRY AND THE JUDICIARY

Reported cases concerning the issue of dowry have primarily wrestled with two issues, whether what is demanded as dowry constituted dowry within the strict definition of the Act or whether such demands were made for consideration of the marriage, thus coming within the ambit Act. This raises a concern that the courts are more keen on the technicalities in the application of the Act. The question remains whether the courts are really concerned with providing protection to the parties, namely women victims. The phrase 'consideration for marriage' creates havoc with the lives of young women, for example, where it has been noticed in one case that a woman burnt to death due to the inability of her parents to provide a scooter for their son-in-law, the magistrate dismissed the case on the ground that the demand for scooter by the bridegroom two days before the bride was burnt to death was not in consideration of marriage and therefore, it did not amount to dowry.[22]

In the case of *Firoza Begum Vs. Hormuz Ali*[23] it was observed that mere allegation made by the wife that her

---

22. "Fighting The Unbeatable", Eve's Weekly, 20-26 December, 1981.

23. 40 DLR, 161 (1988).

husband (the accused) had beaten her while demanding dowry and ousted her from the house, in the absence of any allegation that the accused and caused or attempted to cause death or grievous injury to her, meant that the case did not come within the purview of section 6 of Cruelty to Women (Deterrent Punishment) Ordinance, 1983. It is evident from this case that the judges are not regarding beating for demanding dowry as sufficient evidence of cruelty under the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 unless the beating is grievous. However, it is relevant to mention that, although the case does not fall under the Cruelty to Women (Deterrent Punishment) Ordinance of 1983, it evidently comes within the scope of the Dowry Prohibition Act of 1980 and therefore punishable. It is to be observed that the confusion regarding the jurisdiction of instituting these cases are in the minds of pleaders or the victims, otherwise, why the case was instituted under the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 ? Is it done with the intention to inflict more severe punishment to the offenders ?

Moreover, even where a woman file a case and the courts finally decide the matter it is often found that husbands are rarely imprisoned for a significant period or fined for their violent deeds. This also portrays of patriarchal attitude of judiciary.

One such case under the Dowry Prohibition Act, 1980, is where Jahanara Begum from an affluent family filed a case in 1983, against her husband after several years of marriage. The husband demanded a rice mill, an oil mill and 63 decimals of landed property to be given to him or else he would divorce her. The husband was convicted by the court for demanding dowry, but it only imposed ninety

days imprisonment.[24] Again, in 1984 Zohra Begum's husband was accorded minimal punishment on the charge of demanding huge dowry in cash.[25] These women have broken the traditional convention but the punishment accorded seems not worth going to court for.

In any case, by the time one is dealing with a "dowry death" it is too late. If serious and urgent attention is given to the question of demands, particularly demands for property or valuable security made during the subsistence of the marriage- unequivocally bringing such demands within the definition of "dowry" in section 2 and the prohibition of section 4, whether or not there is any "agreement" involved and whether such demands are in consideration of marriage - perhaps the situation can be dealt with while the woman is still alive and help to ensure that she does not become a "dowry death" victim.

The uneven development of law in family matters as seen by Smart[26] is apparent in the cases below where the

24. Shamim, Ishrat : Case Study on Violence in the Family. (A report prepared by Shamim I), 11 (Dhaka, 1987).

25. Id. at 11.

26. Smart, Carol : The Ties that Bind : Law, Marriage and the Reproduction of Patriarchal Relations. Routledge and Kegan Paul. London. 1984 also Smart, Carol : Law, Crime and Sexuality. Essays in Feminism. Sage Publications. London. 1995 [By 'uneven development' of law smart (1995 : 125) means the inadequacy of law to achieve the desired changes in cases of women's issues. Different laws look in different directions, and their application may vary depending on the class, religion or sex of the subject. For these reasons, for example, a specific law against wife abuse could have positive effects in the lives of some women even though in other areas, for example, dowry or kidnapping, the law appears to fail to have any direct beneficial effect.]

contradictory nature of law is manifest. On the one hand law ensures justice to women and on the other it is patterned by patriarchy which confines family matters to the private sphere. Therefore this confusion also affects the attitudes of court to deal with family issues like dowry. The first reported case in Bangladesh on the issue is that of *Mihirlal Poddar v. Zhunu Rani.*[27] Where the High Court in Dhaka interpreted section 2 of the Act to exclude any demand which was not demonstrably a consideration for marriage itself from the ambit of the section. The High Court of Barisal, however, on almost similar facts, preferred the opposite conclusion three years later in the case of *Rezaul Karim* v. Mosammat Taslima Begam.[28] Here the court took recourse to the spirit of the law as manifesting a desire of the legislature to prohibit dowry in any form whatsoever and expanded the meaning of marriage beyond the actual ceremony and initial creation of the status of husband and wife.

The court in the latter case reasoned that the expression 'in consideration for the marriage' should be given an extended meaning since otherwise the scheme of the whole Act which prohibits demand of dowry by the husband would be frustrated and become redundant.[29] A crafty husband, the court explained, could always make his demand after the marriage in order to avoid the law, threatening not to 'take her home or refusing otherwise to

---

27. 37 DLR, 227 (1985).

28. 40 DLR, 360 (1988), BLD, 35 (1989)

29. Id. at 362-63.

give her the status of wife'.[30] Much more remarkable is where the court in this case elucidates the meaning of marriage in the light of section 2 of the Act, citing marriage as ... 'not only the ceremony of marriage but also the newly created legal status for both the husband and wife, to be continued, asserted and recognised to be available always in everyday life, till death separates one from the other or till the marriage subsists.[31] The conflict, thus arising in different courts is rather obvious.[32]

However, judges in the Appellate Division of the Supreme Court have now ensured in the case of *Abul Basher Howlader v State and Another*[33] that, not only the taking or giving of dowry or abetment thereof before or at the time of marriage is made an offence but also the demand thereof after the marriage. Thereafter, in a very recent case of *Salam Mollick Md. v. State.*[34] it was "....settled that if dowry is demanded after the marriage then also the offence under section 4 will be committed ..." despite the fact that plea was taken that no offence was committed in the light of the said section. In this case the couple was married on 24.10.87 and dowry of taka 50,000 was demanded on 25.1.91. The wife was abused and was sent to her parents along with her minor daughter and was refused to be taken

---

30. Id. at 360.
31. Id. at 360.
32. Malik, Shahdeen : "Conflict of Decision Need Resolution". Dhaka Law Report Journal, 57 (1990).
33. 46 DLR (AD), 169 (1994).
34. 48 SLR, 329 (1996).

back unless the demand was met. It was held that the demand amounted to dowry demand and thereafter the accused were found guilty accordingly.

6.2. DEFECTS IN THE LAW

Procedural flaws exist as well. Under the Act of 1980, offences are only cognizable if a complaint is filed with a First Class Magistrate. This is in contrast to a normal criminal case which may be lodged with police. Because of this procedural requirement, those wishing to report a violation of the Dowry Act cannot do so at the local police station. Rather they most likely must employ the services of a lawyer to register the complaint. Given that the victims of dowry demand are often very poor and their inaccessibility to law enforcing agents makes the Act ineffective and often fail to protect the victims from dowry demand.

Section 2(f) of the Repression Against Women and Children (Special Provision) Act, 1995 and section 2 of the Dowry Prohibition Act, 1980 is of same nature regarding the definition of dowry. However, the difference lies in the penalty provided in them. Both Acts penalise the offence of giving, taking and demanding dowry. The Dowry Prohibition Act, 1980 provides imprisonment of one year or fine which may extend up to 50000 taka or both (section 2 of Ordinance no 26 of 1986 enhanced the punishment-see before). The 1995 Act lays down that, a) for causing death for dowry the offender shall be punishable with death penalty, b) for attempting to cause death for dowry, the offender shall be punishable with imprisonment for life and c)for causing grievous hurt for dowry the offender shall be punishable with imprisonment for 14 years which cannot be less than 5 years and also liable to fine. Nevertheless, the Cruelty to

Women (Deterrent Punishment) Ordinance, 1983 also provided server penalties for dowry offences. Section 6 of this Ordinance provides death penalty, transportation for life or rigorous imprisonment for a term which may extend to 14 years and also fine for such offences. The much confusion regarding the time of committing the offence has been settled by the courts (in 1994 and 1996) and now demanding dowry even after marriage comes within the purview of this offence.

It may be appreciated that, the new legislation lays down penalty for causing death or grievous hurt for dowry. But it may noted also that, the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 does not make the offence punishable if there is no allegation of attempt to cause death or grievous hurt while demanding dowry.[35] Moreover, causing simple hurt does not attract the provision of the Ordinance of 1983.[36] The above observation also applies in the new legislation of 1995, which ignores to punish the offence of causing simple hurt in demanding dowry.

One pertinent point to ponder in the discussion is that, out of 511 sections in the Penal Code, 10 sections provide death penalty, namely, section 121,132,194,302, 303,305,307,326A,396. Whereas 10 death penalties are prescribed within the ambit of 12 sections under the Repression against Women and Children (Special Provision) Act of 1995. The effectiveness and beneficiary character of the Act in providing severe punishment is too

---

35. Firoza Begum v. Harmuz Ali and another, BLD, 122 (1988).

36. Dr. Atikur Rahman v. The State, BLD HCD, 303 (1994).

early to judge as the Act is too young. However, it is a much debated question whether severe penalties can solve the problem and free the society from all such evils? However, the enforcement of such penalties indicates the intolerable behaviour and the consequence to be faced for committing the same. It may be noted that, this Act was passed in the face of demands from various sections of society after the death of Noorjahan and others by the so-called *fatwa shalishes*.[37] For enforcement of any legislation the entire legal system is viewed as the fundamental tool in solving the problem of violence against women. And therefore a young researcher argues that.[38]

> "Only new laws may prove to be a mere piece of paper, a mere addition in the number of special laws dealing with violence against women because of the gap that exists between formal legal rights and the law in practice. Enforcement of law depends to a large extent on the exercise of police discretion while interpretation of law is left to advocates, magistrates and judges. The effectiveness and utilisation of legal remedies depend on the commitment of the police, advocates and judiciary to the letters of law and commitment of the community towards the attitudinal charge in case of violence against women".

7. CONCLUSION

In conclusion it is evident to quote an international survey:

---

37. Press Report of Government of Bangladesh.
38. The Daily Star, 27 October, 1996.

"While legislative change is necessary, it is not always enough to realise the rights of women. Gaps remain between legal provision and social practice. Dowry remains as a scourge even though laws prohibiting dowry have been operative since 1984", says UNDP report.

Dowry and other oppression of women are basically a social problem and can be solved only by society. A change of outlook is required. In Bangladesh, the legislation has been amended several times, but unless there is a fundamental change in the traditional subordinate status of women, discrimination and oppression, and cases of murder on account of dowry or other reasons will continue to happen and go largely unpunished.

Legislation is crucial but equally important is social awareness. A number of NGO's have undertaken legal education programmes to make women conscious about their rights and various legal issues including Dowry Act. However, studies show that there has been little impact to date.

UNDP advocates the women's movement and NGO's need to take up the dowry issue in a more forceful and united manner. There should be assertive lobbying to push dowry issue in parliament to change social attitudes and to identify specific achievable aims. Educational programmes can help create an atmosphere where dowry taking and giving is looked down on by society.