

# THE DHAKA UNIVERSITY STUDIES PART - F

Vol. II

No. 1

June, 1991

**Md. Nurul Haq**

Some Legal Aspects of Muslim Marriage in the Indian Sub-continent

**M. Ershadul Bari**

International Concern for the Promotion and Protection of Human Rights

**A. B. M. Mafizul Islam Fatwari**

Status of Fundamental Rights under the Constitution of Pakistan, 1956

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Human Rights & Women in the Indian Sub-continent



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**PART - F**  
**VOLUME II No 1**  
**JUNE 1991**

The Dhaka University Studies Part F is a journal of the Faculty of Law,  
Dhaka University. It is a quarterly journal of law and legal  
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THE DHAKA UNIVERSITY STUDIES  
PART - F  
VOLUME 10 No 1  
JUNE 1981

The Dhaka University Studies Part-F is a Journal of the Faculty of Law, published in June. The Journal contains research based papers on Law and Legal topics,

Typed manuscripts for publication should be submitted to the Editorial office, Science Annexe Building, Faculty of Law, Dhaka University.

The Editor and the Editorial Board do not bear any responsibility for the views expressed by the contributors.

Editorial and Business Office: Editorial Office: Room No. 110, Science Annexe Building, Dhaka University, Dhaka-1000. Tel. 501296.

Published by the Registrar, University of Dhaka and printed by Sumi Printing Press & Packaging 9, Nilkhet, Babupura . Dhaka. Phone no - 861670, 506072.



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## SOME LEGAL ASPECTS OF MUSLIM MARRIAGE IN INDIAN SUB-CONTINENT—A REVIEW

by

Md. Nurul Haq

### Introduction :

Among the Arabs *nikha*, marriage was a wide term comprising many different forms of sexual relationship but in Muslim law marriage has a very definite legal meaning. It is, therefore, essential that for appreciating a proper concept of marriage the legal aspects of it must be properly understood.

In this Article we shall deal with some legal aspects of Muslim marriage and at the same time attempts will be made as to how far these legal aspects of Muslim marriage have been affected by legislations and judicial decisions.

### A. Legal competence

Puberty and sound mind are the two basic attributes of legal competence to contract a marriage in Muslim law. Puberty is a physical phenomenon to be ascertained by evidence. It is generally presumed that a person who has completed the fifteen years of age has attained puberty in the absence of evidence to the contrary.<sup>1</sup> Muslim law recognises the possibility of attaining puberty by a boy or a girl before the age of 15 years<sup>2</sup>. For a boy the earliest possible age of puberty is, generally, twelve years and for a girl nine years<sup>3</sup>. A person who has not attained puberty is called *nabalah*.

When there is no evidence to the contrary a person is presumed to have attained puberty at the age of fifteen<sup>4</sup>. Independent of evidence as to puberty a minor of either sex is considered adult on the completion of fifteen years.<sup>5</sup> In the absence of evidence to the contrary a Muslim girl is presumed to have

1. *Mst Atiqa begum V Mohammad Ibrahim* A. I. R. 1916 P.C. 250; *Yusuf V. Zainab* A. I. R. 1923 Lah 102.
2. *Zaitun V Shaikh Kawal* 9 (1924) 22 A.L.J. 423.
3. *Nawab Sadiq Ali V. Jai Kishori* (1928) 30 Bom L.R. 1346 (1351).
4. *Mt. Aliqa Begum V Mohammad Ibrahim* A.I.R. 1916 P.C. 250; *Yusuf V Zainab* A.I.R. 1923 Lah P. 102.
5. *In re lovejoay Patel* A.I.R. 1944 Lah p. 33. I.L.R. 1943 cal 554



attained puberty at the age of fifteen. Of course, it is a question of fact in each case and a girl may reach the puberty stage even earlier.<sup>6</sup>

Persons (both male and female) who are neither minors nor insanes can, under all schools of Muslims Law, freely marry personally and without any body else's consent<sup>7</sup> and such a girl too can freely marry personally and without anybody else's consent under the Hanafi and Ithna Ashari laws<sup>8</sup>.

There is no rule requiring that such persons must contract their marriage personally; others can lawfully act on behalf of such a person. For his or her marriage the consent of such a person must be obtained. The marriage will be void if the consent is obtained by fraud<sup>9</sup>. It can be ratified by the person concerned expressly or impliedly (as by consummation); forced consummation cannot be regarded as ratification.<sup>10</sup> An insane (male or female, minor or major) cannot contract a marriage without the intervention of and the consent of his or her marriage guardian.<sup>11</sup> The marriage of minor person cannot take place without the consent of his or her marriage guardian under none of the schools of Muslim law.<sup>12</sup> The persons of unsound mind are in almost all respect treated by law at same level as minors.

At Muslim law the marriage guardian of an insane person or of a minor of 5 can contract a marriage on his or her behalf with or without his or her consent. In Ismaili law the marriage guardian of an Ismaili major girl cannot contract her marriage without her consent. The marriage will be void if the guardian does so.<sup>13</sup>

A minor cannot contract marriage. The consent to the marriage of a minor must be given by his guardian<sup>14</sup>. A marriage contracted by a girl before she had attained majority was no marriage at all in the eye of law.<sup>15</sup>

In *Abdul Sattar V Mst Wakila Bibi*<sup>16</sup> it was held: "one of the most important principles is that a minor girl contracted in marriage retains the option of

6. *Behram Khan V. AKhtar Begum* P.L.D. 1952 Lah p. 548

7. *Mohd. Ibrahim V. Ghulam* Muntaz A.I.R. 1922 All p. 368.

8. *Ibid.*

9. *Kulsoom Bibi V. Abdul Kadir* 1921 Bom. p. 205;

10. *Abdul Latif V. Niaz Ahmed* (1910) 39 All p. 343

11. *Jogu Bibi V. Mesel* (1936) 1641 C.P. 957

12. *Ibid.*

13. Faiz Badruddin Tyabji's Muslim law (4th edn. 1969) p. 47

14. *Jogu Bibi V. Mesel Sheikh* (1936), 63, Cal L.J. 415; 164 I. C. p. 957

15. *Allah Diwanya V Kammon Mia*, P.L.D. 1957 Lah p. 651

16. 17 D.L.R. (W.P.) 1965 p. 73



puberty up to the age of 18 years until she expresses her consent or disapprobation in express terms. In other words, the right of annulment continues until she expressly ratifies it say by express words or by cohabiting with the husband, or by asking for her dower or maintenance."

In this case the learned judge observed that he was fortified in his view by the following passage which occurs in the Hedaya (Grady's) page 38: "the right of option in a virgin after maturity is done away with by the same circumstances, nor until she expresses his approbation by word or by deed, cohabiting with her and so forth; and in like manner the right of option of the female after maturity (in a case where the husband has enjoyed her before she attained to that state), is not annulled until she expresses her consent or disapprobation in express terms (as if she were to say 'I approve' or 'I disapprove' or until her consent be virtually shown by her conduct in admitting the husband to carnal connection and so forth."<sup>17</sup> The same view was approved in *Abdul Karim V Mst Amina Bibi*.<sup>18</sup>

This option of puberty can be exercised in a variety of ways. This view finds support from the decision of Privy Council in the case *Malka Jahan Sahiba V Mohammad Askaree Khan*<sup>19</sup> wherein their lordships of Privy Council laid down that where a minor girl has been contracted in marriage, the matter ought to be propounded her on her attaining majority so that she may advisedly give or withhold her assent". The judge observed<sup>19</sup> that the concluding words, "she may advisedly give or withhold her assent" are very significant. In other words, there must be some clear evidence that the minor has assented to the marriage and in absence of any such evidence it will be reasonable for court by parity of reasons to assume that the assent has been withheld, in particular, in case where the marriage has remained unconsummated. The withholding of assent can be expressed in variety of ways. It may be indicated by the act that without having recourse to institution of suit for dissolution of marriage the girl may, where there has been no consummation and provided also that she is not more than 18 years, get married as held in *Mohammad V Emperor*.<sup>21</sup> It may be indicated by serving a notice on the husband through an attorney or publishing a notice in News paper that the option of puberty has been exercised.

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17. Ibid.

18. 157 I. C. p. 694

19. 1873 L. R. I. A. Sup Vol. 192

21. 140 I. C. P. 617



It may be manifested by the mere institution of a suit for dissolution of marriage which may eventually be discussed in a suit under order IX rule 3 C.P.C.<sup>22</sup> In deciding the case *Abdus Sattar V. Mst Wakila Bibi*<sup>23</sup> the judge observed that he might borrow the words of Mr. Justice Johnstone in *Mst Hasna Bibi V Fazal Elahi*<sup>24</sup> "the bringing of the suit is in itself an exercise of that option and it cannot be held that there has been any unreasonable delay". In respect of the exercise of option of puberty the same decision was taken in *Mst Sarwar Jan V Abdul Majid*.<sup>25</sup>

In *Shafullah V Emperor*<sup>26</sup> the Allahabad High Court held that marriage by a woman with another man or attaining puberty was sufficient to constitute repudiation.

The Dissolution of Muslim Marriage Act, 1939 requires a regular suit to be filed for the exercise of option of repudiation and decree is necessary<sup>27</sup>. It has, however, been held in Lahore that section 2 of the Dissolution of Muslim Marriage Act, 1939 does not imply that a girl has no right to exercise the option of puberty independently of the Act. A declaration given by the court under section 494 B. P. C. is, therefore, sufficient.<sup>28</sup> In *Mst Munni V. Habib Khan*<sup>29</sup> it was held that repudiation of marriage without the aid of the court and if the matter comes to court the court does not dissolve the marriage by its own decree but recognises the termination of the marriage. Similarly, *Mufeezad Din Mondol V Mst Rohima Bibi*<sup>30</sup> it was held that no decree is required to confirm the repudiation of marriage of a Muslim woman performed during her minority but the order of the judge is necessary to impress on the act of a judicial imprimatur.

Now, we shall discuss the impact of legislative enactments on the right of option of puberty. Prior to the enactment of Dissolution of Muslim Marriage Act, 1939 among the Hanafis, the right of girl when contracted in marriage by her father or grandfather was hedged with the condition that she was given away in marriage either carelessly or wickedly. But this condition has been

22. *Abdus Sattar V Mst Wakila Bibi* 17 D.L.R. (W.P.) 1965 p. 73

23. Ibid.

24. 121 I. C. P. 381

25. 17 D.L.R. (W.P.) 1965 p. 76-78

26. A.I.R 1934 All p. 589

27. *Ahmad Moosa V Lilaram* A.I.R. 1942 Sind 92 p. 95.

28.

29. P. L. D. 1956 Lah p. 403

30. (1958) 33 C. L. J. 37



done away with by section 2(vii) of the Act with the result that all distinction between marriage of a girl by her father or grandfather or another guardian of the marriage has for the relevant purposes been abolished.<sup>31</sup>

Thus by the Dissolution of Muslim Marriage Act, 1939 all restrictions on the option of puberty in the case of a minor girl whose marriage has been arranged by a father or grandfather has been abolished, and under section 2(vii) of the Act a wife is entitled to the dissolution of her marriage if she proves the following facts, namely: (i) the marriage has not been consummated; (ii) the marriage took place before she attains the age of 15 years (now 16 years by amendment) and (iii) she has repudiated the marriage before attaining the age of 18 years (It should be mentioned here that by section 13(b) of Muslim Family Laws Ordinance, 1961 the age limit be raised from fifteen to 16 years by amendment of the provision of Dissolution of Muslim Marriage Act, 1939).

The general principles under the Muslim law is that puberty is presumed in the absence of evidence on the completion of the age of 15 years and, therefore, it was open to a party to lead evidence that in any particular case the puberty of a girl was attained earlier or later than 15 years but clause (vii) of the section 2 of the Act does not fetter to the attainment of puberty of the girl but has laid it down that in any case where a marriage of a girl is given by her father or other guardian before she attained the age of 15 years, she will have the right to repudiate the marriage before she attains the age of 18 years. Under Muslim law there is a presumption of rebuttal. Clause (vii) of section 2 of the Act adopts fifteen years as the fixed age of the puberty without an opportunity of rebuttal. This clause does not speak of puberty at all but only of an age though in fact it deals with an option arising at puberty, and the only way it can be reasonably interpreted is that a woman who has before the age of 15 years been given away in marriage by her guardian is allowed to repudiate her marriage for a period of three years after she attains the age of 15 years and before she attains the age of 18 years. The Clause cultivates the right over proof of puberty.<sup>32</sup>

Muslim law prescribes no limitation for obtaining a judicial decree on the ground of option of puberty. All that is required is that the minor should exercise the right as soon as she attains puberty or becomes acquainted with her possession of a right. The Dissolution of Muslim Marriage Act, too, does not provide any period of limitation within which such a suit should be brought.

<sup>31</sup> *Mst Sardar Bano V Saifullah Khan* 21 D. L. R. (1969) p. 118.

<sup>32</sup> *Mst Daulan V Dasa* 1956 D. L. r. (W. P.) 77



All that clause (vii) of section 2 of the Act says is that the minor should have been married by the guardian before the age of 15 and should have exercised the option of puberty before the age of 18. Otherwise she can bring a suit to get a judicial recognition of her exercising the right at any time after she has become 18. Of course, delay in bringing the suit will create difficulties in the way of proving that the right was exercised before the minor attained the age of 18. But the decision in each case will depend upon its circumstances.<sup>33</sup>

Now, we shall deal with the impact of legislative enactments on the minor's marriage and on puberty. The Majority Act, 1875 leaves the rules of Muslim law relating to minor's marriage wholly unaffected. So if it otherwise lawful at Muslim law the marriage of a Muslim who has not attained statutory majority as per provision of the Act of 1875 will not be void or invalid.

The provisions of the Child Marriage Restraint Act, 1929 (popularly known as the Sarda Act) do conflict with the rules of Muslim law relating to minor's marriage. As per provisions of this Act everyman below the age of 18 years, as also every girl below the age of 16 years is a child; every person below the age of 18 years is a minor and every marriage either party to which is a child is a child marriage. The Act declares the following to be guilty of offences:

1. Any person who directs, conducts or performs a child marriage.
2. Any male who, not being a minor contracts a child marriage.
3. Having lawful and unlawful charge of a minor any person who permits, promotes or negligently fails to prevent his or her marriage (unless contrary be proved negligent failure to prevent it to be

It is true that the said Act does not permit the marriage of a girl below the age of 16 years but if any girl below the age of 16 years marriage in violation of that law the marriage itself does not become invalid on that score although the adult husband contracting the marriage or the persons who have solemnised the marriage may be held criminally liable.<sup>34</sup>

The Muslims are not exempted from any of the provisions of the Act of 1929 and so when a Muslim marriage can be treated as child marriage under the provisions of this Act the person or persons responsible for it (including the bridegroom if he is not a child, the marriage guardian, if any, the Qazi and the vakil) may be prosecuted. The violation of the provisions of this Act is punishable but if it is not otherwise unlawful according to Muslim law, the marriage itself will remain wholly valid in either case. No provision of this Act

33. *Mst Sarwar Jan V Abdul Majid* P. L. D. 1965 (W. P.) Pesh. 5 p.10

34. *Mst Bakshi V Bashir Ahmed and another* 22 D. L. R (S. C) 1970 p. 291.



says or suggests that a marriage in violation of the provisions of this Act of 1929 will be invalid.

The Act aims at the restraint of performance of certain marriage. Though the word restraint is used in the preamble yet restraining of the child marriage is not the sole object of the Act. The Act, also, aims at penalising the person who commits the breach of the provisions of the Act. The object of the Act is, therefore, twofold. It restrains the solemnization of the child marriage as per section 12 of the Act, and penalizes the offenders under section 3 to 6 of the Act, when the marriage is duly solemnized. Yet the Act does not declare such marriages invalid, even though they are celebrated in contravention of the provisions of the Act. The Act merely imposes certain penalties on persons bringing about such marriage.<sup>35</sup> The reason is to quote the words of their Lordships of the Allahabad High Court : <sup>36</sup> "a distinction must be observed between the performance of the act and the act itself. The Child Marriage Restraint Act aims at the restraint of the solemnization of child marriage. It does not affect the validity of the marriages after they have been performed". Therefore, the question of validity of the marriages is beyond the scope of this Act.<sup>37</sup> In the case *Birupakshya V Kunja Behan* <sup>38</sup> the Orissa High Court held that "it is undisputed that the marriage is a valid marriage, that the Child Marriage Restraint Act, 1929 does not affect the validity of the marriage even though it may be in contravention of the provisions of the Act. In spite of the marriage being valid, it is apparent from the provisions of the Act that the marriage in contravention of the provisions of the Act is a criminal act punishable under law. To attract the penal provisions of the Act the performance of the child marriage is sufficient. It is no matter that such marriage was not valid under the personal law or custom or religion. The reason is that the Child Marriage Restraint Act aims at, and deals with, the restraint of the performance of child marriages and penalizes the marriages duly performed in contravention of the provisions of the Act. It has nothing to do with the validity or invalidity of the marriage. The question of validity or invalidity is beyond the scope of the Act."<sup>39</sup> Therefore, the defence that the child marriage which is celebrated, is invalid marriage, is no defence to the offence under the Act.

35. *Moti V Boni* A. I. R. 1936 All 852

36. *Ram Baran V Sital Pathak* A. I. R. 1939 All 340

37. *Ibid.*

38. A. I. R. 1961 Orissa 104

39. *Munshi Ram V Emperor* A. I. R. 1936 All p. 11



The original Act of 1929 which was commonly known as Sarda Act was passed with the object of restraining the child marriages. It had nothing to do with the prevention of the solemnization of child marriages. Subsequently the Act was amended by Act VII of 1938. The amendment was made in subsection (2) of section 1. The object of the amendment was to make the Act applicable to the persons mentioned therein, irrespective of the place where the marriage was celebrated. Prior to this amendment, there was a conflict of decisions as to the applicability of the Act. The conflicting decisions of Madraj, Bombay and Nagpur High Courts were in respect of the applicability of the Act to child marriage celebrated outside British India i. e. in French territory or in a native state, where such marriages were not declared offences.

The Madraj High Court's view was that the Act applied to marriages celebrated outside British India. The contrary view was expressed by Nagpur<sup>40</sup> and Bombay<sup>41</sup> High Courts that the solemnization of child marriage outside British India is not an offence. On this conflict of decisions, the legislature by amendment of section 1(2) by the amending Act VII of 1938 adopted the view of Madraj High Court. As a result of which the evasion of law by solemnizing a child marriage outside "British India" in different native states was made impossible.

Under the Act of 1929 there was a prohibition to contract a girl in marriage who is below the age of 14. Section 12(1)(a) of the Muslim Family Laws Ordinance, 1961 amends the provision of section 2(a) of the child Marriage Restraint Act, 1929 and raises the age limit of a girl from fourteen to 16 years. But if the guardians exercising their traditional powers in defiance of these provisions, give the minors in marriage such a marriage remains valid under the Muslim Family Laws Ordinance, 1961.

But under the terms of section 2(VII) of the Dissolution of Muslim Marriage Act, 1939 on attaining puberty and before the age of 18 years the child concern may repudiate the marriage provided the marriage has not been consummated. A girl who had been given in marriage before the age of 15 was entitled to exercise the option under this Act (Act VIII of 1939). So Section 2 (vii) of this Act (Act VIII of 1939) has also been amended by section 13(b) of the Muslim Family Laws Ordinance and the age limit be raised from fifteen to sixteen years by amendment.

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40 *Haidar V. Syed Issa*, A. I. R. 1938 Nag 235.

41 *Narayan V Emperor* A. I. R., 1935 Bom p. 437.



The second modification effected by the Ordinance is procedural. The Muslim Family Laws Ordinance, 1961 provides further amendment to the child Marriage Restraint Act, 1929 to the effect that no court shall take cognisance of any offence under the Child Marriage Restraint Act, 1929 except on complaint made by the Union Council. These two modifications discussed above are minors.

The Guardians and Wards Act, 1890 applies to Muslim but the Act does not affect the rules of Muslim law relating to marriage-guardianship and these remain wholly unaffected even after the passing of this Act of 1890.

Therefore, this Act will not debar a guardian for marriage from bringing a regular suit in competent court to establish his right to give the minor in marriage, as against the guardian of the person of the minor. The Act does not deprive the guardians for marriage of their rights in these matters under their personal law, nor does it provide that these rights can be established only by proceedings under this Act.

Under this Act of 1890 a person who has been appointed or declared by the court as the guardian of a Muslim minor cannot act as marriage guardian of the said minor on the strength of such appointment or declaration. If the court has appointed or declared a person to be the guardian of a minor and if the same person is also the marriage-guardian of the same minor he or she can act in the latter capacity wholly independent of court's order.

According to Muslim law a person is legally competent to have 4 wives at a time. But section 6 of the Muslim Family Laws Ordinance, 1961 provides that during the continuance of an existent marriage a second marriage is prohibited without the written permission of the Arbitration Council. If the Arbitration Council is satisfied that the proposed marriage is necessary and just it may give such permission subject to such conditions, if any, as may be deemed fit. If before contracting a second marriage no permission is obtained from the council it does not render such marriage invalid or void. The Ordinance of 1961 only penalises a person in respect of marriage celebrated in contravention of the provisions of the same by making him liable to the imprisonment or fine or both.<sup>42</sup>

According to Muslim Law as it stood before the Muslim Family Laws Ordinance, 1961 marriage terminates with the expiry of iddat in the case of

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42. *Sayed Ali Newas Gardezi V Lt Col. Md. Yusuf* (1963) 15 D. L. R. (S. C.); P. L. D. (1963) S. C. p. 51.



talaq-ul ahsan and talaq-ul hasan modes of talaq and immediately in the case of talaq-ul biddat. In such a case unless the divorced wife is married to a third person and the latter in his turn divorces her again re-marriage between the parties is not allowable. This situation comes in conflict with sub-section (3) of section 7 of the Ordinance of 1961. We can illustrate the case of talaq-ul biddat. Under sub-section 3 read with sub-section 6 of the Ordinance there must be three talaq-ul biddat, each followed by a period of 90 days after which a marriage with third person would have intervened if the parties want again to be united in marriage. It should be mentioned that this is something strikingly different from what the Muslim law (shariat) was before the above mentioned Ordinance of 1961.

#### B. Registration :

Although it is not necessary under the law that any particular ceremony should be performed, the contract being completed by the offer and acceptance in presence of witnesses, as a matter of practice every marriage is generally attended with some sorts of customary ceremonies.<sup>43</sup>

It is usual in this sub-continent for a *Mulla* or Kazi to be present to officiate at the time of marriage contract and to recite benediction etc. But any such custom has not altered the law.<sup>44</sup> Some formalities are, however, usually performed.<sup>45</sup> Two vakils are generally appointed.<sup>46</sup> In the cases<sup>47</sup> it was held that no formalities by way of religious ceremony or writing are at all necessary. Marriage, moreover, is really a civil contract and no priest or kazi is necessary for its performance.<sup>48</sup> Only one ceremony called the *Nikah* is known to Muslim law for uniting a husband and wife.<sup>49</sup>

Oral marriage is perfectly valid under the classical law. In Indo-Bangladesh Qazis usually maintain registers of marriage. In the registers they record the particulars of every marriage on the invitation of the parties. The Qazi issues the copies of the record called *kabinnamas* to the parties. Certain enactments have, however, been made by the legislature of this subcontinent

43. *Razia Banu V Nowab Ara Begum* 1955 N. U. C. p. 3602 All.

44. *Radal Aurat V Queen Empress*, 19 Cal. 79 p. 81; *Alimuddin V R* 10 C. W. N. 982.

45. *Mst Ghulam Kubra V Mohd Shafi* A. I. R. 1940 Pesh 2

46. *Abdul Aziz V Ameer Begum* 66 I. C. p. 104.

47. *Maung Kaji V Ma Shwa* A. I. R. 1929 Rang p. 341; *Naiz-un-nessa V Mirza Mumtaz* A. I. R. 1922 All p. 363.

48. *Abdul Nabi V Saed Ajmat Hussien* A. I. R. 1935 Nag 123 p. 124

49. *Mst Zainaba V Abdul Rahman* A. I. R. 1945 Pesh 51 p. 52.



mostly for the purpose of preserving evidence of marriages.<sup>50</sup> Under the provisions of kazis Act, 1880 in some places the kazis were appointed officially. The statutory kazis did not possess any special status. The Government may appoint and remove kazis under the Act of 1880. The kazis appointed by the Govt. may appoint and remove deputies (*naebs*). The kazis or naeb kazis so appointed could not insist on being present at any marriage ceremony. It was the option of the parties to invite an official kazi or a non-official kazi or not to invite a kazi at all.<sup>51</sup> Before the promulgation of the Muslim Family Laws Ordinance, 1961 there was no law or enactment in Pak-Bangladesh which requires compulsory registration of a Muslim marriage with any govt. official. The Bengal Mohamman Marriage and Divorce Registration Act, 1876, Muslim Marriage and Divorce Registration Act, 1974 and other similar enactments provide facilities for voluntary registration of marriage. Gradually, it has been felt that some social and legal problems arise out of complex question relating to the validity and existence of *nikha* between certain parties. With a view to meet the situation section 5 has been incorporated in the Muslim Family Laws Ordinance, 1961. We can reproduce the object of introducing section 5 in the Muslim Family Laws Ordinance in the language of Commission which runs thus: Registration of marriage must be made compulsory as complex question relating to the validity and existence of *nikha* between certain parties arise very frequently in civil and criminal courts. It often happens that of two men each claims to be the husband of the same woman, in order to escape being convicted under section 498 of the Bangladesh Penal Code for abduction. Difficulties also arise in cases relating to inheritance. Very often one of the claimants to a large amount of property dubs the defendants as illegitimate sons; and the case is difficult to decide for lack of all documentary evidence. In suits relating to maintenance great deal of oral evidence is produced to prove that the woman claiming maintenance is not a legally married wife but a mistress or a kept. Registration would be facilitated if a standard *Nikhanama* is prescribed.

We should see here how far it has changed the classical Muslim law. Sub-section (i) of section 5 of the Ordinance makes registration of every marriage compulsory and in registering the marriage an elaborate procedure has been laid down which has to be followed strictly. If the provisions regarding registration of marriage under section 5 of the Ordinance as well as under the relevant rules made in the Family Laws Rules are violated all the persons

50. *Kasam Khan V Abdulla* 1926 Bom. p. 153; *Bikani Mian V Shuklal* 20 Cal p. 116

51. *Mohd Ismail V Moola* (1916) 43 I. A. p. 127.



namely the bridegroom, the vakil, the witnesses, any person other than Nikah Registrar when solemnizing a marriage and the Nikha Registrar shall be opened to penalties involving substantive sentence of imprisonment (Simple) and payment of fine.

The effect of registration of marriage has been explained by the court in Dr. A. L. M. Abdullah's case. In *Dr. A. L. M. Abdullah V Rokeya Khatoon*<sup>52</sup> it was held that non-registration of marriage shows that there was no valid solemnization of marriage. In this case<sup>53</sup> the marriage took place after the Family Laws Ordinance (Act VIII of 1961) came into force but it was not registered as required by the said Ordinance and this non-registration clearly shows that there was no valid solemnization though in the affidavit alleged to have been made by the defendant no. 1 before a Magistrate solemnization of marriage between the parties has been testified. But this affidavit is a unilateral document and it does not reveal that a proposal was made by one and it was accepted by the other in presence of two witnesses as prescribed by the Muslim law. Section 5 of the Muslim Family Laws Ordinance, 1961 makes it absolutely necessary that the marriage solemnized under the Muslim law shall be registered. The solemnization of marriage if validly effected might not be affected for non-registration of the marriage. But the non-registration of marriage causes a doubt on the solemnization of marriage itself.<sup>54</sup>

#### C. Consummation of marriage :

Under the Muslim law, minority means physical immaturity for the purpose of marriage; consequently there is no age limit for consummation. But at the age of fifteen, in the absence of any proof to the contrary, a Muslim is presumed to have attained puberty. The Anglo-Muslim law has affected the law relating to the age for the consummation of marriage. When the penal code was first enacted in 1860, it was made penal to have sexual intercourse with one's own wife, if her age was ten years. Subsequently the Criminal Law Amendment Act, 1891 (Act 10 of 1891) raised the age limit from 10 to 12 years and has laid down that "sexual intercourse by a man with his wife, the wife not being under twelve years of age, is not rape. The Penal Code Amendment Act 1925 (XXIX of 1925) has further raised the age from twelve to thirteen. Under the Child Marriage Restraint Act, 1929 (Act XIX of 1929) child marriage has been penalised, and by a 'child' is meant a male under eighteen years of age and female under sixteen years of age. These enactments

52. 21 D. L. R. (1969) p. 213 - 217

53. *Dr. A. L. M. Abdullah V. Rokeya Khatoon*. 21 D. L. R. (1969) p. 213-217.

54. *ibid.*



are social legislations, and though they incidentally affects the Muslim law, they are in consonance with the principle laid down by the Muslim Jurists that sexual intercourse with an immature wife should not be permitted for the sake of the safety of the person and is permitted only on the attainment of her fifteen years.

#### D. Presumption of marriage

It happens that sometimes the question may arise whether a man and a woman who have cohabited are validly married or not. In the absence of direct proof a presumption arises that there was a valid marriage where there has been prolonged and continuous cohabitation as husband and wife. A like presumption arises where a man acknowledges the woman as his wife or the issue of the union as legitimate. Where the conduct of the parties was inconsistent with the relation of husband and wife or where there is a legal prohibition the presumption does not arise.<sup>55</sup> No necessary inference in favour of their marriage can be drawn when a woman lived with her husband for sometimes and then migrated to the home of another person and cohabited with him.<sup>56</sup> The presumption will be that they were validly married<sup>57</sup> in a case where two persons live together as husband and wife for a long period and cohabit continuously as such<sup>58</sup> and are treated as husband and wife by their friends. In this case the burden of proving that their cohabitation was illegal will shift to the person who affirms its illegality. Valid marriage can be presumed and the child born during such marriage can be deemed legitimate<sup>59</sup> in case of continuous cohabitation between a man and a woman from the time when they first met, either through elopement or in consequence of an ordinary marriage before a *Moulavi*, and that cohabitation was with repute, and there is no unsurmountable obstacle to such marriage.

Before a presumption of marriage can arise from long cohabitation with habit and repute there must be some definite evidence. Before repute can arise there must be a body of neighbours, many or few, and some sort of public, large or small. The habit and repute which alone is effective, is habit and repute of that particular status which is in the country in question amounts to lawful marriage.<sup>60</sup> The presumption of lawful marriage would arise and it

55. *Abdool Razack V. Aga Melomek* 1893 21 I. A. 56.

56. *Feteht Mohammad V. Abdur Rahman Khan* 1931 Lah 223.

57. *Ma Khatoon V. Ma Mya* 1936 Rang p. 448.

58. *Khaja Hidayat V. Rajan* 3 M. I. A. p. 295, p. 319, p. 320.

59. *Ma Khatoon V. Ma Mya* 1936 Rang p. 448.

60. *Karamali Shah V. Hussainndi Shah* 1932 Sind p. 137.



would be sufficient to establish that there was a lawful marriage between them if there is no unsurmountable obstacle to their marriage and the man and woman had cohabitated with each other continuously and for a prolonged period. The above circumstances raised the presumption of lawful marriage between the father and mother of the plaintiffs.<sup>61</sup> Unless prohibition to marry is established<sup>62</sup> between them the acknowledgement of one party and the acquiescence of the other as regards their martial relationship would also give rise to the presumption of their valid marriage.

The Acknowledgement by a non-Muslim who has not embraced Islam, of a Muslim woman as his wife or her daughter as his daughter cannot legalise the marriage or raise the presumption of a valid marriage which was not legally possible.<sup>63</sup> Unless the marriage between the parties is legally impossible<sup>64</sup> acknowledgement by a Muslim that a certain woman is his married wife invests the woman with the status of a married wife.<sup>65</sup> A refusal on the part of a man to acknowledge a woman as his wife or her child as his child negatives a marital relationship and so repeals the presumption of marriage.<sup>66</sup> Although there may be no evidence of the actual fact of marriage<sup>67</sup> a marriage may be presumed when it is proved that a lady has cohabitated with a Muslim for years and has had a child by him who has been openly acknowledged and treated by him as his son. The presumption of valid marriage will not arise<sup>68</sup> if the conduct and treatment of the parties appear inconsistent with their marital relationship. In *Abdul Razak V Aga Mohammad Jaffer*<sup>69</sup> the Privy Council observes: "in the next place, it was argued that every presumption ought to be made in favour of marriage when there had been a lengthened cohabitation, specially in a case where the alleged marriage took place so long ago that it must be difficult, if not impossible, to a trustworthy account of what really occurred. There would be much force in this argument -- indeed it would be

61. *Mohd Amin V Wakil Ahmad* A. I. R. 1952 S. C. p. 358.

62. *Wasi V Sabduloonisa* 11 M. I. A. 177; *Habibur Rahman V Altaf Ali* 48 I. A. 114, 120-124; 1922 P. C. P. 159; *Netho V Bhag Singh* 75 P. L. R. 1910.

63. *Keolpati V Raja Harmon Singh* 1936 Oudh p. 298.

64. *Mohammad Ali Khan V Ghazarfar Ali* 7 O. L. J. p. 474.

65. *Mt Bashuran V Mohammad Hussain* 1941 Oudh, p. 284.

66. *Fateh Mohammed V Abdur Rahman* 1931 Lah p. 223.

67. *Secretary of State V Mt Marrium* 1937 Sind 127.

68. *Abdur Razzak V Aga Mohammad* 21 I. A. P. 56; *Fateh Mohammed V. Abdur Rahman* 12 Lah, p. 596.

69. *Ibid.*



almost irresistible -- if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife." It was held that the conduct of the parties was inconsistent with that relation and their lordships held that the presumption did not arise. Unless they were prohibited from inter marrying<sup>70</sup> a valid acknowledgement by a woman, of the paternity of a child which is the result of prolonged cohabitation with a woman, admitted to be his wife<sup>71</sup> may enable the court to presume that he was lawfully married<sup>72</sup> to the mother of the child.

When there is no *kabinnama* or the fact that the *kabinnama* is not proved, will not disprove the marriage.<sup>73</sup> It should be noted that in the absence of direct proof the rule of presumptive proof of marriage only operates. No question of presumptive proof arises<sup>74</sup> in cases where direct proof is available to negative the possibility of a valid marriage. The Privy Council lays down<sup>75</sup> that cohabitation is evidence of marriage only when it is more than a mere casual concubinage or housing together; it must be based on the theory that the man and the woman were husband and wife. There must be an admission of the woman of being the wife of the cohabitor. A mere casual concubinage<sup>76</sup> or cohabitation with a maidservant, however prolonged, will not give rise to a presumption of marriage. Lapse of time, propriety of conduct and the enjoyment of mutual confidence with powers of full management of the household affairs will not give rise to the presumption of marriage<sup>77</sup> when relationship began in concubinage. It is cohabitation and birth with treatment amounting to acknowledgement of marriage and legitimacy of the child that will be essential to establish marriage<sup>78</sup> but not mere cohabitation and birth of a child.

70. *Imambandi V Mutsaddi* 45 I. A. p. 73, 81, 82; *Habibur Rahman V Altaf Ali* 48 I. A. p. 114; 2 Cal. p. 184.

71. *Habibur Rahman V Altaf Ali* 48 I. A. p. 114; *Imambandi V Mutsadi* 45 I. A. p. 73, 81-82; *Khajooroonnissa V. Rowshan Jahan* I. A. p. 291, 311-312.

72. *Ashrufood Dowlah V Hydder Hussain* 11 M. I. A. 94; *Wisi V Sabduloonisa* 11 M. I. A. p. 177; *Khajooroonnissa V Rowshan Jahan* 2 Cal. p. 184.

73. *Ahsanullah V Najabat Ali* 1929 Cal. p. 682.

74. *Shafiullah V Nuhullah* 23 A. L. J. p. 971; *Abdul Razzak V Aga Mohammad Jaffar* 21 I. A. p. 56; *Ghanzanffar V Kaniz Fatima* 37 I. A. p. 105.

75. *Sastry V Sumbeculty* 6 App Cases 364.

76. *Jeswunt Singh Jee V Jet Singh Jee* 3 M. I. A. p. 245.

77. 11 M. I. A. p. 117.

78. *Mohammad Ali V. Shujat Ali* 46 I. C. p. 913.



In the case *Ghazanaffar Ali V Kaniz Fatima*<sup>79</sup> the Privy Council held that where the woman is a prostitute, cohabitation, however prolonged, can never give rise to the presumption of marriage. This will presume against vice and immorality when the original relationship is not bad in its origin, e. g. the fact that a Muslim woman lived with a sikh for a number of years as his wife, would give rise to the presumption of lawful marriage.<sup>80</sup> All the formalities required should be presumed to have been complied with after the lapse of a long time after the marriage.<sup>81</sup>

The effect of presumption arising from the acknowledgement is not lost and the failure does not absolve the opposite party from disproving or proving the impossibility of marriage and thereby rebutting the presumption<sup>82</sup> even if direct evidence of marriage is adduced and the court disbelieves it.

It should be noted here that the rule of presumptive proof of marriage established by judicial decisions does not affect the Muslim law of marriage. This rule does not say that to constitute a valid marriage there is no necessity of offer and acceptance, witnesses etc. This rule only provides that a valid marriage will be presumed under certain circumstances in the absence of proof to the contrary.

#### Conclusion.

In short, we may conclude that though for solving some social and legal problems arising out of complex question relating to the validity and existence of *Nikha* between certain parties, section 5 of the Muslim Family Laws Ordinance, 1961 requires compulsory registration of Muslim marriage with any government official it does not invalidate such a marriage for want of registration. So Muslim law has not been affected.

The provisions of Child Marriage Restraint Act, 1929 do conflict with the rules of Muslim law relating to minors marriage. But if the guardians exercising their traditional powers in defiance of these provisions give the minors in marriage such a marriage remains valid under the Muslim Family Laws Ordinance, 1961 and under the Child Marriage Restraint Act, 1929. So Muslim law has not been affected.

79. 37 I. A. 105.

80. *Sulakhan Singh V Santa Singh* 60 I. C. 375.

81. *Mt Beshiran V. Mohammad Hussain* 1941 Oudh p. 284.

82. *Roshanbai V Suleman Haji* 1944 Bom. p. 213.



As per provisions of Dissolution of Muslim Marriage Act, 1939 marriage contracted by any guardian can be repudiated by the female without assigning any reason whatsoever. In this case option is available in case of marriage contracted before the age of 15 (now 16). This option extends up to the age of 18 (irrespective of puberty or knowledge) and for repudiating such a marriage decree of the court is necessary. So the provisions of Act VII of 1939 affect the Muslim Law relating to option of puberty.

The Guardians and Wards Act, 1890 applies to Muslims but the Act does not affect the rules of Muslim law relating to marriage-guardianship and these remain wholly unaffected even after the passing of this Act of 1890.

Though section 6 has been incorporated in the Muslim Family Laws Ordinance, 1961 to check polygamy it does not invalidate a marriage which takes place in violation of this section.

Under sub-section (3) read with sub-section (6) of section 7 of the Muslim Family Laws Ordinance, 1961 there must be three talaq-ul biddat, each followed by a period of 90 days after which a marriage with third person could have intervened if the parties want again to be united in marriage. This is something strikingly different from what the Muslim law (Shariat) was before the Ordinance of 1961.

The rule of presumptive proof of marriage established by the judicial decisions does not affect the Muslim Law relating to marriage.



manner and to protect the barons from unfair treatment by the government, subsequently many of the rights and guarantees granted to them were extended to the common people.<sup>4</sup> For example, Article 39 of the *Magna Carta* that no freeman might be arrested, imprisoned, dispossessed, outlawed or exiled or harassed in any other way save by lawful judgment of his peers or the law of the land provided a cause for democratic interpretation as applying to all persons. Thus the *Magna Carta*, which was in no sense a people's charter and contained in addition to the preamble 63 clauses, subsequently became the "Charter of English liberties" and at present, it is considered as one of the most important landmarks in the history of human rights and free government. The struggle of the Englishmen in the 1600s also resulted in two more very significant human rights documents; the Petition of Right of 1628 and the Bill of Rights of 1689. The Petition of Right, which was adopted by the Parliament in a legal form used by persons asking for special royal grace for the redress of particular grievances as a Royal Veto feared if it were presented in the form of a bill, protected the individuals against arbitrary taxation or benevolence without parliamentary approval, arbitrary imprisonment, despotic quartering troops in private homes and from commissions for proceedings by martial law. When the English revolutionaries disposed of King James II in 1688, the Parliament with a view to consolidate the results of the Revolution and to prevent another re-emergence of arbitrary Royal rule, adopted the Bill of Rights in the form of a statute. This Bill of Rights is considered as one of the most important documents in English Constitutional history and according to Voltaire, the French writer, it "has restored each man to all the rights of nature of which he has been deprived in most monarchies. These rights are: full liberty of his person (and) of his goods; freedom to speak to the nation by the pen; freedom not to be tried under any criminal charge except by a jury formed of independent men; freedom not to be tried in any case except according to the precise terms of the law; freedom to profess peacefully any religion he wishes"<sup>5</sup> It declared as 'illegal and pernicious' the Royal power of suspending or dispensing with laws, the "levying money for or to the use of the Crown... without consent of Parliament," the arbitrary erection of royal commission and Courts, and the raising or keeping of a standing army in time of peace without the approval of the Parliament.

Thus the Petition of Right and the Bill of Rights placed limits on the King's power and gave more power to the Parliament and the Courts. They

<sup>4</sup>. Totten, Samuel and Kleg, Milton, *Human Rights*, p. 22

<sup>5</sup>. Quoted in *ibid.* P. 24



along with the *Magna Carta* constitute, in the words of Lord Chathan, as "the Bible of the English Constitution."

Apart from the writings of the 17th century English Philosopher John Locke and the works of the 18th century Philosophers like Montesquieu, Voltaire and Jean-Jacques Rousseau, practical instance of England's Revolution of 1688 and the resulting Bill of Rights had a tremendous influence providing the rationale for the wave of revolutionary agitation in the West most notably in North America and France. The American revolutionaries, triumphant over the English King who refused to allow the colonists to have a say in the governance of the colony and subjected them to unfair taxation without representation, adopted the Bill of Rights in Virginia on 12 June 1776. The Bill of Rights, which was authored by George Mason, proclaimed that "all men are by nature fully free and independent, and have certain inherent rights ... namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and obtaining happiness". It also declared that "Freedom of the press is one of the Great bulworks of liberty and can never be restrained but by the despotic governments." It stated that the sum of powers rests with the people and it is from them that power is derived. However, twenty one days after the adoption of this Bill, on 4 July 1776 (Thursday evening), the "Declaration of Independence" was proclaimed in the First Continental Congress in Philadelphia by the 13 American Colonies. The Declaration, which is primarily the work of Thomas Jefferson who is considered as the American Rousseau, contains the philosophical and legal justification for the severance of the ties which bound the colonies to the British throne. But the preamble to the American Declaration proclaimed for all human beings the two fundamental principles: On the one hand, "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," on the other hand, "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute a new Government..."

Finally, the French revolutionaries, who were the middle class and peasant people, having disposed of the nobles and King in July 1789 set forth with remarkable lucidity in the historic "Declaration of Rights of Man and of the Citizen" certain rights which they held had been denied by previous regimes. The Declaration, which was drafted by General the Marquis de



Lafayette, a close friend of the American first President George Washington who (Lafayette) shared the hardships of the American War of Independence, was adopted by the French National Assembly on 26 August, 1789. It proclaimed that "Men are born and remain free and equal in rights"<sup>6</sup> and that "The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression."<sup>7</sup> The Declaration further stated in particular: freedom from arbitrary arrest,<sup>8</sup> freedom of religion,<sup>9</sup> freedom of speech and of the press<sup>10</sup> and right to property.<sup>11</sup> In fact, the French Declaration may be described as the "younger sister" of the American Declaration as General Lafayette imitated the pronouncements of the American Revolution in the Declaration of the Rights of Man and of Citizen.<sup>12</sup> The declaration was not proclaiming freedom from bondage of this nation or, that, but of mankind in general and for the universal human rights cause. It is asserted that the French Revolution marks the end of the Middle Ages and beginning of the modern times as the Declaration, which is the greatest contribution of the Revolution, proclaimed the end of divine, heroic and feudal times.

It may be mentioned here that the content of human rights – civil, political, economic, social and cultural rights – has broadly been defined at various stages of modern history. It is noticeable that the human rights mentioned in the English Petition of Rights and the Bill of Rights, as well in the Virginia Bill of Rights and the American Declaration of Independence and in the French Declaration of the Rights of Man are all civil and political rights. Therefore, the civil and political rights are primarily associated with the English, American and French "bourgeois" revolutions of the 17th and 18th centuries. On the other hand, economic, social and cultural rights find its origins primarily in the socialist and Marxist revolutions of the early 20th century. With the socialist October revolution this new category of citizen's rights appeared in the Soviet Union and gradually through the entire world by revolutionary struggles and welfare movements ever since. The economic, social and cultural rights were enumerated in the first Soviet Constitution of 1918. They also appeared in

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6. Art., 1

7. Art., 2

8. Art., 7

9. Art., 10

10. Art., 11

11. Art., 17

12. The Declaration of the Rights of Man and of Citizen was prefixed to the French Constitution of 1791



1917 in the Mexican Constitution and, in 1919, in the Weimar Constitution. They are gradually included in most modern constitutions as "programme" or "manifesto" rights of a promotional nature with pledge to take steps to the maximum of available resources with a view to achieving progressively the full realization of these rights. It is said that "the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible".<sup>13</sup> Similarly without civil and political rights, economic, social and cultural rights could not be long ensured. Therefore, it appears that "the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent."<sup>14</sup>

However, the concept of human rights was for long entirely viewed as a matter entirely within the domestic jurisdiction of the states to grant or deny rights to their citizens and, as such, was not subject to interference from any outside pressure. But in course of time, as a result of the work of international, regional, governmental and non-governmental organisations around the globe, human rights transcend national boundaries and jurisdictions and thereby go beyond the limits of municipal public law, falling a matter of international concern to be promoted and protected within the framework of international law. The object of this paper is to trace how the concept of human rights became a matter of international concern and enforcement and how it was internationalized.

#### **Concern for Human Rights at the International Level**

##### **i. Pre- World War II Concern:**

It should be mentioned here that at first not the individual, but groups of individuals, minorities, within a state appeared to the conscience of civilized nations as in need of protection at the international level.

##### **a. The Protection of Religious Freedom**

The religious wars of the sixteenth and seventeenth centuries in Europe are considered to demonstrate the first (international) efforts to secure religious freedom for the subjects of other states. For example, the Peace of Westphalia (1648), which concluded the Thirty Years' War, established the principle of equal rights for the Roman Catholic and Protestant religions in Germany.<sup>15</sup> In

<sup>13</sup> Res. 32/130, the UN General Assembly, 1977

<sup>14</sup> Res. 421 (V), the UN General Assembly, 1955; Later reaffirmed in Res. 543 (VI).

<sup>15</sup> Weston, Burns H, "Human Rights," IV Human Rights Quarterly, (1982), p. 269.



fact, the real motive was rather to promote favoured religious creeds than to promote religious freedom for all.

In the wake of the European wars of religion, the community of nations felt the necessity for an international guarantee of the religious freedom of those populations who lived on territories transferred, under the terms of a treaty, to a state of different prevailing religion. For instance, under the Treaty of Utrecht (Netherland) of 1713 as to the cession by France of Hudson Bay and Acadia to Great Britain, the Catholic populations of those areas was given one year to depart and those who wished to remain would enjoy freedom in the practice of their religion "as far as allowed by the laws of Great Britain."<sup>16</sup> In the Treaty of Paris of 1763 between France, Great Britain, Spain and Portugal, Great Britain guaranteed her newly acquired Canadian Catholic subjects freedom of worship "as far as allowed by the laws of Great Britain." But at the Congress of Vienna the protection of minorities was expanded beyond the mere freedom of religion. Article 8 of the Treaty of Vienna of 31 May 1815 among the Netherlands, Great Britain, Russia, Prussia and Austria concluded on the subject of the Union of Belgium and the Netherlands declared the protection of all religious denominations and equal access to public employment for all citizens regardless of their religious creed. Guarantees of religious freedom and individual civil and political rights were inserted in Article 77 of the Final Act of the Congress in favour of the populations incorporated into the Swiss Cantons of Berne and Baal.

Another form of international protection of religious minorities is found in the name of "humanitarian intervention" throughout the 18th and 19th Centuries. Where a state disregarded the religious freedom of individuals subject to its jurisdiction thus offending the conscience of the family of nations, one or more states took it upon themselves to intervene on grounds of humanity on behalf of the world community. A rudimentary example of such intervention is found at the end of the 18th Century when Catherine II of Russia and the governments of Prussia and Great Britain exercised effectively their influence on the Catholic King of Poland who was persecuting his orthodox and Protestant subjects. The repeated and extensive massacres of Christians within the Turkish empire in the early 19th Century gave rise to numerous instances of intervention by Russia. The persecution of Christians by Turkey on Greek soil invoked the intervention of European states in 1829. Next year, (in 1830) at the London Conference, which recognized the independence of Greece, a protocol was signed imposing on the new State the

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<sup>16</sup> Art. 15 of Treaty.



obligation to respect the religious freedom of all its citizens and also to make public and private employment freely available to all.<sup>17</sup> Similarly, the Turkish atrocities in Armenia in 1894 aroused such international concern that finally the Turkish Government was constrained to allow representatives of Britain, Russia and France to accompany a commission of enquiry into the massacres and to adopt certain administrative reforms. Similar movements after corresponding atrocities against Armenians in Russia, induced the Russian Government to accept a scheme of reform prepared by the entente powers and applied under the supervision of European inspectors in the years immediately before the First World War.<sup>17a</sup>

Therefore it is evident that all the attempts to secure 'religious freedom' were, almost invariably, efforts by members of one religion on behalf of their co-religionists elsewhere. Protestant powers generally tried to secure religious freedoms for Protestants in Catholic countries; but not for Muslims, Buddhists or Jews.

#### b. Abolition of Slave Trade and Slavery :

Since it was ultimately realized that the slavery is inconsistent with the genius of republicanism and lessens the sense of the equal rights of mankind, there was the protracted movement both at national and international levels for its abolition.

At the national level, for the first time the slave trade was abolished in Denmark in 1802. The British Parliament passed a bill in 1807 providing for the abolition of slave trade in the British Dominions. Later, in 1833, Great Britain enacted the Abolition Act ending slavery in all British territories. The slave trade was prohibited in France by Napoleon in 1814 though the prohibition was not carried through till some years later. The 13th Amendment to the Constitution of the United States of America was adopted in 1865 outlawing slavery.

At the international level, in the Treaty of Ghent of 1814 the United States and Great Britain obligated themselves "to use their best endeavours" to promote the entire abolition of slave trade as "irreconcilable with the principles of humanity and justice." Next year, on 9 June 1815, for the first time in the

<sup>17</sup> . Russo, Alessandra Luini del, *International Protection of Human Rights* (1971) p. 17

<sup>17 a</sup> . Luard, Evan, "The Origins of International Concern over Human Rights" in Evan Luard (ed.), *The International Protection of Human Rights* (London) (1967) p. 12.



history of international conventions, at the Congress of Vienna, the Five Great Powers adopted in the Final Act of the Congress a special provision abolishing slavery only in principle, but setting no specific date for compliance. It is claimed that the intentions of the Great Five were somewhat less than purely humanitarian; their aims were to reestablish the political balance and destroy the growing economic power of Spain which thrived on slave trade in Latin America.<sup>18</sup>

The Treaty of Vienna was followed by a number of antislavery treaties, agreements and conferences. Russia, France, Prussia, Austria, and Great Britain signed the Treaty of London in 1841 to abolish slavery.<sup>19</sup> In the Ashburton Treaty of 1842, the United States and Great Britain and at the London Convention of 1845, France and Great Britain agreed to cooperate in the control of the slave trade; they pledged themselves to provide for joint surveillance along the African coasts against the continuance of the slave trade.<sup>20</sup> Antislavery provisions were adopted at the Berlin Conference on Africa in 1885 and the Brussels Conference of 1890. In the Brussels Agreement sixteen nations agreed to terminate the slave trade, with international supervision to ensure that this was performed.<sup>21</sup> After World War I, the Great Powers also at the Peace Conference felt the necessity to outlaw slavery. The Saint German Treaty of 1919 imposed an explicit international obligation on each signatory power to abolish slavery, reaffirmed later at the Geneva Conference of 1926. The latest antislavery convention was signed by 49 nations under United Nations auspices in 1956.

Thus the movement against the slave trade, which is contrary to personal freedom and the dignity of man, gradually transformed into a movement against slavery itself.

### c. Treatment of Prisoners and Wounded

During the 19th and early part of the 20th Century there was some international attempt to ensure better protection for prisoners of war and treatment of wounded in the field. The Geneva Convention of 1864 laid down rules for the amelioration of the wounded in armies in the field. The Declaration of St. Petersburg of 1868 outlawed certain types of explosives and

18. *Ibid* at p. 21.

19. Said, Abdul Aziz, "Pursuing Human Dignity" in Abdul Aziz Said (ed.), *Human Rights and World Order*, Newyork (1978), p. 2.

20. Russo, Alessandra Luini del, op. cit. p. 21.

21. Luard, Evan op. cit p. 11



inflammable bullets. The Hague Conventions of 1899 and 1907 provided detailed rules of war on land and at sea and governing the treatment of prisoners of war intending to cover not only serving men but also civilian populations, to serve "... the interests of humanity and the ever progressive needs of civilization." As the preamble declared, "the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience." Although certain conventions of war have been traced back to the Middle Ages, the Hague Conventions represented the first organized multilateral attempt among states in this field.<sup>22</sup> However, later on 12 August 1949, four humanitarian conventions were signed in Geneva to broaden and strengthen the protection of its vital interests. The first and third, revising a previous Convention of 1929, dealt with the treatment of the wounded and sick in the armed forces and of prisoners of war in wartime. The second replaced the Tenth Hague Convention of 1907 on the war at sea. The fourth, which is the most important from the viewpoint of the individual, lays down provisions relating to the treatment of civil persons in wartime prohibiting any form of deportation of civilian populations, providing judicial guarantees of human dignity, for persons in occupied territories and on the national territory of a belligerent. For the first time, it incorporates into international law the outlawing of the taking of hostages.<sup>23</sup>

#### d. International Protection of Minorities

Although the Covenant of the League of Nations, adopted after the First World War, made no mention of human rights and minority rights, the first organized system of international guarantees of national, religious, ethnical and linguistic minorities rights came into being as a prelude to the evolution of the law towards an international protection of the rights of man. The Peace Conference at Versailles in 1919 demonstrated its concern for the protection of minorities. The protection of national minorities was effected by inserting in peace treaties certain specific provisions imposing on the defeated States (i.e. Austria, Bulgaria, Hungary, Turkey) the guarantee of religious and political equality to national minorities.<sup>24</sup> Similar provisions were contained in special minorities treaties concluded by the Principal Allied and Associated Powers

<sup>22</sup> *Ibid.*, pp. 13-14

<sup>23</sup> Russo, Alessandra Luini del, *op. cit.* p. 52.

<sup>24</sup> Treaty of St. Germain (later known as Yugoslavia) of 10 September 1919 with Austria, Arts 62-69; Treaty of Neuilly of 27 November 1919 with Bulgaria, Arts 49-57; Treaty of Trianon of 4 June 1920 with Hungary, Arts 54-60; Treaty of Lausanne of 24 July 1923, with Turkey, Arts 37-44



(USA, United Kingdom, France, Italy and Japan) with States in Eastern Europe and the Balkans (e. g. Czechoslovakia, Poland and Rumania) just created by severance from defeated countries or enlarged in their territories under the provisions of the peace treaties.<sup>25</sup> The rights guaranteed by all peace treaties and minorities treaties to national minorities and minorities of language and religion, were the right to life and liberty, freedom of religion, the right to the nationality of the state of residence, equality *de jure* and *de facto* with the other national of the same state as to the exercise of civil and political rights and as to admission to private and public employment, right to maintain separate schools as well as social and charitable institutions.

The opening article of all minority treaties spelled out the obligation assumed by the State that all treaty stipulations on minorities rights be recognized as fundamental laws of the nation and that no domestic law or regulation be in conflict or paramount to those stipulations. The closing article stressed the internationalization of the system of protection of minorities placing them under the guarantee of the League with the Council of the League of Nations acting as guarantor. Minorities rights were defined as "obligations of international interest" and could "not be modified without the assent of a majority of the Council of the League."

But no right of individual petition was provided in the minorities treaties. Only any member state of the Council of the League could bring to the Council's attention any violation of the obligations, while the Council could take such action as it felt proper, and in the final resort, submit the dispute for settlement to the Permanent International Court of Justice.<sup>26</sup>

Thus minority rights were surrounded by a double international protection. They could not be whittled away by national legislature and were protected by the international guarantee of execution of the treaties. It should be stressed here that the international protection of minorities by the Council of the League was one of the first attempts to impose effective and real limitation on the absolute sovereignty of the State.<sup>27</sup>

25. Treaty of Versailles, 20 June 1919 with Poland; Treaty of Sevres of 10 August 1920 with Greece, Treaty of Paris of 9 December 1919 with Rumania.

26. Art. 12, Treaty of Versailles, 1919 with Poland.

27. Ten States (Poland, Czechoslovakia, Austria, Yugoslavia, Greece, Bulgaria, Hungary, Turkey) as a result of the conclusion of peace treaties and minority treaties accepted a limitations to their sovereignty in favour of the international protection of minorities.



It is noticeable that the obligations under the peace treaties and minorities treaties were imposed on the defeated States and the new or enlarged ones. The Great Powers and other members of the League (Victorious parties) did not undertake similar obligation. Moreover, the international protection of rights under the aegis of the League was only extended to minorities, only the rights of minorities were of international concern while the same rights, if the victims belonged to the majority of the population, could be violated by the States with impunity, out of reach of the protection of the League.<sup>28</sup>

#### e. Protection of Labour

Another form of international activity begun during the first part of the Twentieth Century which in effect aimed at to ensure the welfare of individual workers. Even in "Article 23 of the Covenant of the League of Nations, the member states accepted the obligation to "endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend" and for that purpose to "establish and maintain the necessary international organisations"; and also "to secure just treatment of the native inhabitants of territories under their control." The International Labour Organisation, created and established under the League in 1919, devoted itself above all to preserving labour standards, reducing hours of work, ensuring safety and health protection, the conditions of work of women and children, occupational diseases, social insurance, the promotion of collective bargaining procedures and other matters affecting the welfare of individual workers.<sup>29</sup>

#### ii. Post-World War II Concern

It should be mentioned here that all the Pre-World War II concern for and efforts in the protection of religious freedom, protection for war prisoners and treatment of wounded, protection of minorities and labour cannot be described as universal as they were not general human rights to which all members of the human family were entitled. But during and after World War II it was the concern for man, for the human person which emerged at the centre of international affairs as a common denominator in the search for a better world of tomorrow.

The nations of the world, stunned by the atrocities committed against humanity in the course of World War II by fascist States (Italy, Germany),

28. Quoted in Russo, A. L. d., *op. cit.* p. 26

29. Luard, Evan, *op. cit.* p. 18



realized that the protection of individual freedoms could no longer be left to the sole discretion of states. The laws authorizing the dispossession and extermination of Jews and other minorities, the laws permitting arbitrary police search and seizure, the laws condoning imprisonment, torture and execution without public trial in Nazi Germany aroused the unanimous indignation and a wave of public opinion arose demanding the establishment of organized international protection for human rights. It was realized that there could be no real and enduring peace among the nations of the world without the acknowledgement of the human dignity and worth of the individuals who made up these nations and that a nation which systematically denies the rights of its own citizens could not be realistically depended on to recognise the rights of other nations and their peoples. As Professor Schwelb observed :

"Hitler and Mussolini's records proved, moreover, how close a relationship exists between outrageous behaviour by a government towards its own subjects and aggression against other nations, between respect for human rights and the maintenance of peace."<sup>30</sup>

In fact, the Second World War became a crusade against tyranny, a crusade for human rights. Political leaders and legal scholars looked to the international protection of human rights both as an end in itself and as a means of ensuring international peace. Their conviction was set out in a number of statements, declarations and proposals made while the war was still being fought. For example, in his celebrated address of 6 January 1941, President Roosevelt announced that America was ready to stand up in defence of the "four essential human freedoms"---- freedom of speech, freedom of worship, freedom from want, freedom from fear--"everywhere in the world" which were "the necessary conditions of peace and no distant millennium". His closing words were :

"Freedom means the supremacy of Human Rights everywhere, our support goes to those who struggle to gain those rights or keep them." Later, in the same year, in the Atlantic Charter of 14 August 1941, which was later subscribed to and endorsed by 47 nations, President Roosevelt (of the USA) and Prime Minister Churchill (of the UK) expressed their hope that after the final destruction of the Nazi tyranny, there would be established "a peace which will afford to all nations the means of dwelling in safety within their own boundaries and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want." One year later

30. Quoted in Petrenko, Alex, "The Human Rights Provisions of the United Nations Charter, IX Manitoba Law Journal, (1978) p. 53.



in the Declaration by the United Nations, signed on 1 January 1942 by 26 nations (including the four Great Powers, the US, the UK, the USSR and China) then at war and subsequently adhered to by 21 other nations, the signatory Governments expressed their conviction "that complete victory over the enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands."

#### a. The United Nations Charter

The task of the Conference that met in October 1944 at a great wooded estate known as Dumbarton Oaks, in Washington, D.C, was to draft the constitution of an international organization which was to succeed the League of Nations. The Dumbarton Oaks proposals ---- the blueprint for the establishment of the new world organization, the United Nations, prepared by the representatives of the US, UK, USSR and China ----- indicated among the purposes of the organization that it should "promote respect for human rights and fundamental freedoms."<sup>31</sup>

The United Nations Conference on International Organization, which met in San Francisco in April 1945, in drafting the Charter ( of the United Nations) greatly enlarged and broadened the objectives of the United Nations as a whole revolving around a central idea, that peace cannot be established in a durable fashion so long as oppression, injustice and economic distress prevail in the world. Although the proposal put forward by the delegations of Chile, Cuba and Panama (Panama even urged the incorporation of bill of rights) to ensure the protection of specified human rights by the United Nations was explicitly rejected at the Charter - drafting San Francisco Conference, the Charter embodies nine direct references to the concept of human rights and fundamental freedoms in the Preamble, Articles 1(3), 8, 13(1) (b), 55(c), 56, 62 (2), 68 and 76(c). That is why it is said that

"The idea of the recognition and protection of Human Rights is woven like a golden thread throughout the entire Charter as one of the principal objectives of the United Nations Organization."<sup>32</sup>

The responsibility for international implementation of the obligation of promoting and encouraging respect for human rights and for fundamental

<sup>31</sup>. Chapter 9 of the 1944 Dumbarton Oak's Proposals.

<sup>32</sup>. Lauterpacht, Human Rights and the Charter of the United Nations, Report, Human Rights Committee, Brussel's Conference, International Law Association, 1948, Passim.



freedoms for all is vested in the General Assembly,<sup>33</sup> and under its authority in the Economic and Social Council,<sup>34</sup> and Trusteeship Council.<sup>35</sup>

The Charter of the United Nations is the first international instrument in which the nations of the world community agreed to promote human rights and fundamental freedoms on an international level. Since it is the statute of an intergovernmental organisation, the Charter has the status of a multilateral treaty, imposing on its State Parties binding obligations under international law. Under Article 56, "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55," i.e. to "promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

Although human rights constitutes a theme which recurs again and again throughout the Charter and is singular in its predominance, the Charter contains no definition, or catalogue, of the human rights and fundamental freedoms.

#### **b. The Universal Declaration of Human Rights**

The Economic and Social Council established the Human Rights Commission on 16 February 1946 in compliance with Article 68 of the Charter and charged it with the duty of drafting an international bill of rights. The Commission, which met in its first session on 27 January 1947, decided late in 1947, to apply the term "International Bill of Human Rights" to a declaration of human rights, a convention on human rights (the 1951 session of the General Assembly directed that there be two separate covenants: one on political and civil rights and the other on economic, social and cultural rights) and international measures of implementation.

The Human Rights Commission prepared under the chairpersonship of Mrs. Eleanor Roosevelt, the text of the Universal Declaration of Human Rights. The Declaration of the Universal Declaration of Human Rights – the first stage of the three staged rocket -- was adopted by the General Assembly in Paris, France, on 10 December 1948 without dissenting voice. While 48 out of 56 members voted in favour, the whole of the communist block (Byelorussia, Ukraine, the USSR, Czechoslovakia, Yugoslavia, Poland), Saudi Arabia and South Africa, abstained in the vote. The declaration, which

33. Art. 13(1) (b), the Charter

34. Arts 62(2) and 68, *ibid.*

35. Art 76 (c), *ibid.*



was adopted "as a common standard of achievement for all peoples and all nations," is based on the philosophy that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."<sup>36</sup>

Articles 3 to 21 of the Declaration set forth 19 civil and political rights to which all human beings are entitled "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>37</sup> On the other hand, Articles 22 to 27 of the Declaration recognized 6 economic, social and cultural rights to which everyone is entitled "as a member of society," as they are indispensable for human dignity and the free development of personality. These are to be realized "through national effort and international co-operation."

The adoption of the Declaration, with which began the real history of human rights at the level of international law, was probably "the major achievement of the United Nations"<sup>38</sup> as in less than two years, the organization had been able to reconcile the clashing ideologies of member states regarding the contents of the Declaration. In fact, in an attempt to conciliate diverse ideologies of member states, the terms defining each right have been kept general and noncommittal. However, the Declaration is an informal instrument appended to the Charter of the United Nations and its purpose is to explain the contents of the human rights provisions of the Charter. According to Prof. René Cassin of France, who was the person most responsible for the draft of the instrument, the Declaration was "an authoritative interpretation of the Charter." It is nothing less than a monument to humankind, a veritable *Magna Carta* enumerating specific standards of achievement in the civil, political, economic, social and cultural fields that had never been attempted before and which are valid for all members of the human family."

The influence of the Declaration is deeper and more lasting than any political document or legal instrument. "Since its proclamation in 1948, the Universal Declaration of Human Rights has become one of the best-known and most influential documents of all times. It has exercised a powerful influence throughout the world, both internationally and nationally. Its provisions have been cited as justification for actions taken by the United

36. Art. 1, the Universal Declaration

37. Art. 2, *ibid.*

38. Goodrich, L. M., *The United Nations*, New York (1959) p. 324



Nations and many other international organizations, and have inspired the preparation of international human rights instruments both within and outside the United Nations system .... There are also many instances of citation of the Declaration, or certain of its clauses, as a standard of conduct or as a yardstick by which to measure the degree of respect for, and compliance with international human rights standards..... The influence of the Universal Declaration of Human Rights is also apparant in a number of national Constitutions enacted since 1948, in municipal legislation, and in decisions of national and international courts." <sup>39</sup> Thus the Declaration has become a true common denominator shared by all peoples, a permanent and universal point of reference, and constitutes the central document for the cause of human rights.

The Declaration is not a treaty and was not meant to have binding international force, as evidenced in the fact that the General Assembly had given the Commission on Human Rights a mandate to prepare conventions dealing with the same human rights. As Mrs Roosevelt said that the declaration "was not a treaty or international agreement and did not impose legal obligations ; it was rather a statement of principles of inalienable human rights setting up a common standard of achievement for all peoples and all nations." In fact, the Declaration can now be considered as forming part of customary international law because of its general acceptance on all levels and of its political authority which is now second only to that of the Charter itself. As Sir Humphrey Waldock observed :

"this constant and widespread recognition of the principles of the Universal Declaration clothes it, in my opinion, in the character of customary law." <sup>40</sup>

The final statement of the Assembly for Human Rights which met in Montreal, Canada, in March 1968, in celebration of the International Year of Human Rights declared that

"the Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order and has over the years become a part of customary international law."

Next month, the International Conference on Human Rights met in Tehran, which was attended by delegations from eighty-four States,

<sup>39</sup> . Office of Public Information, United Nations, *The United Nations and Human Rights*, New York (1978) pp. 24 -26.

<sup>40</sup> . Waldock, Sir Humphrey Waldock, *The International and Comparative Law Quarterly*, Supplementary Publication no 11, (1965) p. 15.



unanimously adopted the Proclamation of Tehran (1968). Article 2 of the Proclamation states that :

"The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community."<sup>41</sup>

The Declaration, as mentioned earlier, recognizes four kinds of human rights ---- civil, political, economic, social and cultural. But in the democratic nations of Europe and North America, civil and political rights and freedoms such as voting, a speedy and fair trial, freedom of speech and movement and so on, are considered highly important and some of these nations place much less value on economic rights such as making sure that all of their citizens have a place to live, enough to eat and good health care. It should be kept in mind that "a society in which there is widespread economic insecurity can turn freedom into a barren and lifeless right for millions of people." However, on the other hand, Socialist countries place a much higher priority on such economic and social rights as the right to have enough food, full employment, and adequate housing and health care. But they do not place such a high priority on political and civil rights. As a result of this, while most of their citizens may have jobs, food and a place to live, many are not able to express their views freely, travel where they want, vote or practice the religion of their choice.

#### c. International Covenants on Human Rights

Following the adoption of the Universal Declaration of Human Rights, the UN Commission on Human Rights worked assiduously drafting and redrafting the remainder of the International Bill of Human Rights : the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol to the Civil and Political Covenant. Both the Covenants and the Optional Protocol were unanimously adopted by the General Assembly on 16 December 1966 and opened for signature and ratification for three days later (on 19 December 1966). The Covenants were to enter into force three months after ratification by 35 countries and unfortunately a period of nearly ten years was to pass before the number of thirty-five ratifications was achieved. The International Covenant on Economic, Social and Cultural Rights entered into

<sup>41</sup> . Assembly for Human Rights, Montreal Statement, drafted by Louis B. Sohn of Harvard Law School; Final Act of the International Conference on Human Rights, Tehran, 20 April -13 May 1968, UN DOC. A/CONF. 32/41



force on 3 January 1976. The International Covenant on Civil and Political Rights and the Optional Protocol thereto, came into force simultaneously on 23 March 1976. By 30 June 1989, the International Covenant on Economic, Social and Cultural Rights had been ratified or acceded to by 92 States, the International Covenant on Civil and Political Rights by 87 States and the Optional Protocol by 45 States. Bangladesh has not yet ratified to these instruments.

Although the two International Covenants on Human Rights are based on the Universal Declaration of Human Rights, the rights covered are not identical. The most important right mentioned in both Covenants and not contained in the Declaration is the right of peoples' to self-determination. Similarly, the International Covenant on Civil and Political Rights includes a number of rights that are not listed in the Declaration, among them the right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion and to use their own language. On the other hand, some rights listed in the Universal Declaration such as the right to own property and the right to asylum, are not included among the rights recognized in the covenant.

Article 6 to 15 of the International Covenant on Economic, Social and Cultural Rights set forth 9 rights which the ratifying countries will undertake to recognize. On the other hand Articles 6-27 of the International Covenant on Civil and Political Rights provide for 21 rights.

The nature of the rights and freedom set out in the two covenants is substantially different. Thus the economic, social and cultural rights are formulated in general terms with an overall clause providing for permissible limitations as determined by law in a democratic society and solely for general welfare purposes. The civil and political rights are defined in a more precise manner setting out in the instance of each right the specific permissible limitation necessary to protect national security, public order, public health or morals, or the rights and freedom of others. Thus the rights and freedoms set out in the International Covenants on Human Rights are not absolute and are in each case subject to limitations.

Although the two International Covenants on Human Rights were adopted to put into binding legal form the rights proclaimed in the Declaration, obligations of the ratifying states under the Covenants are not identical. The Covenant on Civil and Political Rights imposes an absolute and immediate obligation on each of the State Parties to "respect and ensure" the rights enumerated "to all individuals within its territories and subject to its



jurisdiction" and to take the necessary steps for their implementation by legislative or other measure. In addition each State is bound to assure in case of violation, effective remedies at the domestic level and the right of access to a judicial, administrative or legislative authority in order to have such remedies determined and enforced.<sup>42</sup>

On the other hand, the obligation assumed by the State Parties under the International Covenant on Economic, Social and Cultural Rights is "qualified and progressive": each of them only "undertakes to take steps, individually and through international assistance and cooperation .... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the .... Covenant by all appropriate means, including particularly the adoption of legislative measures."<sup>43</sup> Thus the Covenant is essentially a "promotional convention," stipulating objectives more than standards and requiring implementation over time rather than all at once as the rights enumerated require direct expenditure by the State.

Another basic difference between the Covenants is in the nature of the measure of implementation. Although the International Covenant on Economic, Social and Cultural Rights contains no provisions for interpretation and application, Articles 16 and 22 of the Covenant provide for a system of periodic reports by Member States on the measures adopted and the progress made in achieving the observance of the rights recognized. The reports submitted to the Secretary-General will then be transmitted to the Economic and Social Council for consideration and to the specialized agencies of which the State concerned is also a member. The Committee on Economic, Social and Cultural Rights, an 18-member body of independent experts set up by the Council to assist it in implementing the Covenant, studies the reports and discusses them with representatives of the Governments concerned. The Committee makes recommendations to the Council on helping State Parties to put the Covenant's rights into effect. However, the reports may also be transmitted to the Commission on Human Rights for study and general recommendations and may form the subject of reports and recommendations of the ECOSOC to the General Assembly on the status of Human Rights in the State Parties to the Covenant.

To secure the proper observance of its provisions, the International Covenant on Civil and Political Rights calls for the establishment of a Human Rights Committee, an international organ composed of 18 members (serving

<sup>42</sup> Art. 2, the International Covenant on Civil and Political Rights.

<sup>43</sup> Art. 2, the International Covenant on Economic, Social and Cultural Rights.



in their individual expert capacity) elected by the State Parties to the Covenant. It is the duty of the Committee to study the reports to be submitted by the States on the measures they have adopted to give effect to the protected rights and on the progress made in the enjoyment of these rights. Such reports must be submitted through the Secretary-General to the Human Rights Committee on its request. However, the Committee submits the reports with its comments to all Member States; it may also transmit them to the Economic and Social Council and through the Secretary-General to the specialized agencies.<sup>44</sup> Moreover, the Human Rights Committee has competence to consider "communication" by one State Party that another State Party is not fulfilling its obligations under the Covenant. The Committee shall acquire such authority only after ten States Parties have made declarations that they recognize its competence to receive and consider such communication. It shall make available its good offices to the States Parties concerned with a view to reaching an amicable solution of the matter which is satisfactory for them. If this result is not brought about, the Committee shall submit a report to the State Parties concerned within 12 months. It is to be noted that this report has no binding effect whatever on the State Parties.

The Optional Protocol to the International Covenant on Civil and Political Rights, which was to enter into force after ratification by 10 countries, provides that any State Party can, by ratification of the Protocol, recognize the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violations of any rights set forth in the Covenant. The State concerned shall be informed of the communication by the Committee and within six months shall submit a written explanation and a statement of any remedies provided in the case. After consideration behind closed doors and out of the presence of the Parties, the Committee shall submit a report containing its conclusions on the work done, including a statement of the facts and the Committee's views. It is claimed that by the very broad term "views" the Committee has been assigned extensive powers to decide for itself the firmness of the conclusions it wants to draw in the individual cases. Therefore, it can be said that the Committee has a much better basis for dealing with individual communications than with state communications.

Thus it appears that the word consistently used in the Covenants is the neutral one of "communication" rather than "application" or "petition".

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44. Arts. 28-39



#### d. Other UN Human Rights Conventions and Declarations

In addition to the International Bill of Human Rights, the United Nations has drafted, promulgated, and now helps to implement over sixty human rights instruments dealing with the prevention and punishment of the crime of genocide; the human treatment of military and civilian personnel in time of war; the status of refugees; the protection and reduction of stateless persons; the abolition of slavery; forced labour and discrimination in employment and occupation; the elimination of all forms of racial discrimination and the suppression and punishment of the crime of apartheid; the elimination of discrimination in education; the promotion of the political rights of women and the elimination of all forms of discrimination against women; and the promotion of equality of opportunity, treatment of migrant workers and the rights of the child.

Subsequent to the Universal Declaration, the UN General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples' (1960) and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970). Of course these Declarations are not devoted exclusively to human rights consideration.

#### Conclusions

The foregoing discussion reveals that the pre-World War I international attempt to preserve certain rights of the individuals remained for the most part spasmodic and unorganized and was concentrated only on matters arousing specially intense feelings which can not be considered as universal in nature. Only from the end of the Second World War, specially after the establishment of the United Nations, did much concern begin to be expressed in a permanent and institutionalized form for the ideal of general rights to which all were entitled. Beginning with the Universal Declaration of Human Rights, the United Nations has presided over the promulgation of over 60 major international human rights instruments by which governments promise other nations that they will not violate the fundamental rights of their own citizens. Thus the last half of the 20th Century may fairly be said to mark the birth of the international as well as the universal recognition of human rights.

It should be stressed here that the protection of human rights of the people 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 force



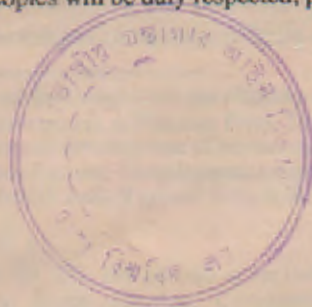
nations to honour all the rights of their citizens. The implementation of international human rights law depends for the most part on the voluntary consent of the nations ; the mechanism for the observance or enforcement of human rights are yet in their infancy. Thus it seems that until there is some machinery that has such power or until the world becomes a more perfect place, the violations and abuses of human rights will continue to be fact of life.

But that does not mean that violations of human rights cannot be slowed down or, in some cases, prevented. In order for that to happen people across the globe will have to speak up against such infringements. It is public opinion, especially when the nationals of several countries are involved, which alone is capable of forcing States to respect human rights. For in today's world, the most effective sanction against the violation of human rights remains, whether one likes it or not, public opinion.

Moreover, it is resistance to oppression, when organized procedures are inadequate, which constitutes the supreme guarantee of human rights. Officially enshrined in the Declaration of Independence of the USA of 4 July 1776, resistance to oppression acquired its real significance as a guarantee of human rights under the French Revolution. Thus, the Declaration of 24 June 1793 proclaims : "Resistance to oppression is the consequence of other human rights." And it adds the following much quoted provision:

"When the government violates the rights of the people, insurrection is for the people and for each section of the people the holiest of rights and the most indispensable of duties."

Therefore, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."<sup>45</sup> Let us hope that eventually the acts of concerned nations and citizens may bring about a time when the dignity and rights of all peoples will be duly respected, promoted and protected.



<sup>45</sup> . Preambular paragraph of the Universal Declaration of Human Rights, 1948.



In accordance with the provisions of the Cabinet Mission Plan, an Advisory Committee was constituted under the chairmanship of Sardar Patel, and the Advisory Committee appointed a sub-committee under the chairmanship of Acharya B. J. Kripalani to report on fundamental rights. On the basis of the report of this sub-committee, the Advisory Committee prepared the Interim Report on Fundamental Rights<sup>9</sup> which it submitted to the Constituent Assembly on the 29th April, 1947. The acceptance of the Interim Report on Fundamental Rights by the Constituent Assembly demonstrated its good intention which was inspired and influenced by the marked resurgence of interest in human rights during 1940's by the ideas and ideals of the Atlantic Charter, the United Nations Charter and the activities of the United Nations Human Rights Commission.<sup>10</sup>

However, the Advisory Committee proceeded further to work on the fundamental rights, but during that time India was divided into two independent dominions, India and Pakistan in accordance with the provisions of the Indian Independence Act, 1947.<sup>11</sup> Two days before the creation of Pakistan, on the 12th August, 1947, the Constituent Assembly of Pakistan set up various committees one being Committee on the Fundamental Rights and on Matters relating to Minorities. In March, 1949, the Constituent Assembly of Pakistan adopted the Objective Resolution. One clause of the Objective Resolution called for equality of status and opportunity, equality before the law, social, political and economic justice, and subject to law and morality, freedom of expression, faith, worship and association. Though rights of the minorities to profess and practise their religions and to develop their cultures were to be safeguarded, it was provided that the principles of democracy freedom, equality, tolerance and social justice as enunciated by Islam should be fully observed so that the Muslims should be enabled to order their lives in accordance with the teachings and requirements of Islam as set out in the Holy *Quran* and the *Sunnah*.<sup>12</sup>

"Authority could be cited for the view that this would involve giving non-Muslims protection to follow their own avocations, to follow their own religions, and enjoy the benefits of their personal law, but not rights of

9. *Interim Report of the Advisory Committee on the Subject of Fundamental Rights*. See Reports of the Committees, First Series, pp. 20-34.

10. D. Bosu, "constitutional Protection of Civil Rights in India" (1958) 1, No. 2, *Journal of the International Commission of Jurists*, 60.

11. 10 & 11 Geo. VI C. 30.

12. For the text of the *Objective Resolution* see G. W. Choudhury, *Documents and Speeches on the Constitution of Pakistan* (Dhaka: Green Book House, 1967) at p. 23.



citizenship."<sup>13</sup>

The Constituent Assembly on the 6th October, 1950, adopted the Interim Report of the Committee on Fundamental Rights and on Matters relating to Minorities,<sup>14</sup> and on the 7th September, 1954, the Assembly also adopted another Report of the Committee.<sup>15</sup> On the basis of these two Reports a number of justiciable fundamental rights were drafted and ultimately incorporated in Part II of the Constitution of Pakistan, 1956.

## 2. Explanation of some Terms Relating to Fundamental Rights

Before enumeration of the fundamental rights as set in Part II of the Constitution, the term 'State' for the purpose of its application to this Part, was extensively defined to include the Federal Government, Parliament, the Provincial Governments, the Provincial Legislatures and all local or other authorities in Pakistan.<sup>16</sup> It is evident from this extensive scope for the application of the term 'State' that not only it was the legislative action, but also the executive and administrative action taken at the instance of any of the agencies mentioned in Article 3 of the Constitution of Pakistan on, 1956, that could be challenged on the ground that it was in conflict with any of the fundamental rights guaranteed by the Part II of the Constitution of Pakistan, 1956.

In regard to the interpretation of Article 3 the question arose whether the definition of the term 'State' included judicial authorities. Judiciary under the Constitution of 1956 was not, having regard to the scheme and arrangement of its various provisions, made a part of the government machinery, but had been treated in a separate Part of the Constitution.<sup>17</sup> The entire Constitution had to be interpreted by the judiciary and it was the final authority upon matters affecting judicial determination of the scope of constitutional provisions. The Supreme Court was the highest judicial authority and its pronouncements were constitutionally declared binding on all organs and authorities set up under the Constitution and these could not be challenged by them on any ground whatsoever the only way to do this was to commence review proceedings before the Supreme Court itself. If this line of reasoning was correct the

13. Alan Gledhill, *Pakistan: The Development of Its Laws and Constitution* (London, Stevens and Sons Ltd., 1967) at p. 68.

14. For the text of the *Interim Report of the Committee on Fundamental Rights and on Matters relating to Minorities* see G. W. Choudhury, *op. cit.* at p. 174.

15. *Ibid.*, at p. 278.

16. Article 3 of the Constitution of Pakistan, 1956.

17. Part IX and Arts. 148-178, *ibid.*



definition of the word 'State' in Article 3 would not be so construed as to include the Supreme Court within the scope of its application.<sup>18</sup>

The Constitution declared that any existing law, or any custom or usage having the force of law, in so far as it was inconsistent with the provisions of Part II of the Constitution, was, to the extent of such inconsistency, to be void.<sup>19</sup> Existing law had been defined as any Act, Ordinance, order, bye-law, rule, regulation, or notification which immediately before the Constitution Day had the force of law in the whole or any part of Pakistan.<sup>20</sup> Thus, in effect, the entire *corpus juris* of Pakistan existing immediately before the Constitution Day, and any custom or usage having the force of law, survived under Article 224 of the Constitution subject to the overriding constitutional limitation contained in Article 4 with the result that the extent to which any law was contravenient with the provisions of Part II of the Constitution would be inoperative and void.<sup>21</sup>

It would be noticed that portion of the existing law which was inconsistent with rights guaranteed by Part II of the Constitution as being unconstitutional, because that portion of law, after the Constitution Day, would confer no right, impose no duty, afford no protection, and would, in effect, not be a legal basis for doing any thing. It was as if, from that day it had never been on the Statute Book.

The Constitution also declared that laws relating to the members of Armed Forces, or Forces charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or maintenance of discipline among them, had been excepted from the operation of Article 4 by clause (3) to that Article.

It would be noticed that while in clause (1) to the Article 4 the word 'inconsistency' was used, clause (2) used the word 'contravention', the reason being that while the former embraced existing as well as future laws, the latter only applied to future laws, and since the position envisaged by clause (2) was one where a future law came in conflict with an existing fundamental right, the word 'contravention' had been deliberately used to indicate the violation of an existing right.<sup>22</sup> Thus, any law was void to the extent of such contravention

18. *Ratilal v. State of Bombay*, AIR 1953 Bombay 242; *State of Punjab v. Ajaib Singh*, AIR (1953) S. C. 10.

19. Article 4(1) of the Constitution of Pakistan, 1956.

20. Article 224, *ibid.*

21. Article 4(2), *ibid.*

22. M. Munir, *Constitution of the Islamic Republic of Pakistan* (Lahore: All Pakistan Legal Decisions, 1965) at p. 87.



and not void *ab initio* like legislation which suffered from the incident of an inherent lack of power.<sup>23</sup> The law was void only to the extent of the inconsistency or contravention and not the whole of it, if its other parts were severable from the offending part.<sup>24</sup> If the other parts were not severable in the sense that they could not be worked without the offending part, the law would be void.<sup>25</sup>

### 3. Equality of Persons

Articles 5 to 21 of the Constitution of 1956 described a number of fundamental rights which could be categorised under the following heads: (1) equality of persons; (2) protection of property; (3) political rights; (4) cultural and religious rights; and (5) protection of life and personal liberty.

The Constitution declared that all citizen were equal before law and were entitled to equal protection of law.<sup>26</sup> The corresponding Indian provision prohibits the state from denying to any person equality before the law or equal protection of the laws within the territory of India.<sup>27</sup> The equality provision of the Fourteenth Amendment to the Constitution of the United States forbids the States from denying to any person within their jurisdiction the equal protection of the laws.<sup>28</sup> The rule of equality before the law was enunciated by A.V. Dicey as a part of his thesis on the rule of law. As propounded by him, the doctrine of equality before the law means "not only that... on man is above the law, but... every man, whatever he his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."<sup>29</sup>

23. *Province of East Pakistan v. Md. Mehdi Ali Khan and Other*, PLD 1959 S. C. 378; *Shakur Din v. Government of West Pakistan*, PLD 1965 Lahore 522.

24. *State of Bombay v. Balsara*, AIR 1951 S. C. 318.

25. Actually the word 'void' was borrowed by the Constitutions of India and Pakistan from the judgment of Chief Justice Marshall in the case of *Marbury v. Madison*, (1803) 1 Cranch 137 where his lordship observed: "Certainly all those who have framed within written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such Government must be, that an Act of the Legislature, repugnant to the Constitution, is void." See also *Ramesh Thapper v. State of Madras*, AIR 1950 S. C. 124; *Farid Ahmed v. Government of West Pakistan* PLD 1965 Lahore 135; *Akhlaque Hussain Advocate, In the Matter of*, PLD 1965 Lahore 174.

26. Article 5 of the Constitution of Pakistan 1956.

27. Article 14 of the Constitution of India, 1949.

28. For the text of the Fourteenth Amendment to the Constitution of the United States of America, adopted in 1868, see Bruce Allyn Findlay and Esther Blair Findlay, *Your Rugged Constitution* (Stanford: Stanford University Press, 1950), p. 228.

29. A. V. Dicey *An Introduction to the Study of the Law of the Constitution* (London: Macmillan and Co. 1968) at p. 193.



The principle stated in Article 5 of the Constitution of 1956 was a combination of the English concept of 'equality before the law' and of the American concept of 'equal protection of the laws', which were not independent or severable. If 'equality before the law' was to be the ideal for legislature to attain, it might come in conflict with the notion of 'equal protection of the laws' — for in a society which was riddled with inequalities of all kinds to insist upon rigid adherence to 'equal protection of the laws' might, in effect, mean perpetuation of just the sort of inequality which the framers of the Constitution of 1956 set out to eradicate. 'Equality before the law', therefore, could have no content other than the one which was compatible with the due maintenance of the guarantee of 'equal protection of the laws'.<sup>30</sup> However, the right contained in Article 5 of the Constitution of 1956 embraced two rules: first, the provision did not mean that all laws would apply to all the subjects or that all the subjects might have the same rights and liabilities; secondly, that a citizen's right as a human being were not affected by reason of his descent, religion, social or official status, economic condition or place of birth or residence; and further that all citizens equally subject to the general rule. From the above it is apparent that equality clause permitted classification,<sup>31</sup> and all classifications proceeded on inequality. For whatever also equal protection of law might mean, it certainly did not mean under Article 5 of the Constitution of 1956 equality of operation of legislation upon all the citizens of the State who by nature, attainment or circumstances differed from one another.<sup>32</sup> Thus, the result of equal protection of the laws was inequality before the law.<sup>33</sup>

In spite of this inequality, the Constitution of 1956 declared that there would be no discrimination against any citizen on the ground only of race, religion, caste, sex or place of birth in respect of access to places of public entertainment or resort.<sup>34</sup> Untouchability was abolished and its practice in any

30. A. K. Brohi, *Fundamental Law of Pakistan* (Lahore: Din Mohammad, 1958) at p. 34.

31. Akhlaq Hussain, *In the Matter of*, PLD 1955 Lahore 147; *Naseem Mahmood v. Principal, King Edward Medical College*, PLD 1965 Lahore 272; *Zain Noorani v. Secretary of National Assembly*, PLD 1957 Kar. 1; *Progress of Pakistan Company v. Registrar, Joint Stock Companies, Karachi*, PLD 1958 Lahore 887.

32. *Jibendra Kishore v. Province of East Pakistan*, PLD 1957 S. C. 9; *Naseem Mahmood v. Principal, King Edward Medical College*, *ibid*; *Sheikh Shamsul Haq v. Province of East Pakistan*, PLD 1959 Dac. 75.

33. *Amerunnissa v. Mahbub*, AIR 1953 S. C. 91; *Chiranjit Lal v. Union of India*, AIR 1951 1951 S. C. 41. *State of Bombay v. Balsara*, AIR 1951 S. C. 318.

34. Article 14(1) of the Constitution of 1956.



form was forbidden.<sup>35</sup> Equal protection of law recognised that any citizen otherwise qualified for appointment in the service of Pakistan, should not be discriminated on the grounds of race, religion, caste, sex, residence or place of birth.<sup>36</sup> There was some qualifications to this rule : (1) for a period of 15 years beginning from the Constitution Day, posts might be reserved for persons belonging to any class or area, where such class or area was under-represented in the service of Pakistan,<sup>37</sup> (b) in the interest of any service, specific posts or services might be reserved for members of either sex,<sup>38</sup> and (c) the Constitution permitted a provincial government or any local or other authority to make rules that residence in the province concerned should be an indispensable qualification for service under the government or authority.<sup>39</sup> Moreover, public officers, for the purpose of carrying out their duties, were given certain powers which other people did not possess.<sup>40</sup>

From the above it is evident that equality under the provisions of the Constitution of 1956 did not imply mechanical equality or "mathematical nicety". Discrimination or classification, as discussed above, was permitted provided it was not arbitrary. If a law provided any discrimination in favour of or against a class, the classification was to be made on a real difference having a reasonable basis on its subject-matter.

#### 4. Protection of Property

The Constitution of Pakistan, 1956, guaranteed that every citizen, subject to reasonable restrictions imposed by law in the public interest, was to have right to acquire, hold and dispose of property.<sup>41</sup> It declared that no person was to be deprived of his property "save in accordance with the law,"<sup>42</sup> and no property was to be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which would either itself provide for compensation or specify the principles on which and the manner in which compensation was to be determined and given.<sup>43</sup> The above rule governing acquisition or taking possession of property only for public purpose

35 . Article 20, *ibid.*

36 . Article 17(1) *ibid.*

37 . Proviso to Article 17(1), *ibid.*

38 . *Ibid.*

39 . Article 17(2), *ibid.*

40 . *Jibendra Kishore v. Province of East Pakistan, op. cit.*

41 . Article 11(b) of the Constitution of 1956.

42 . Article 15(1), *ibid.*

43 . Article 15(2), *ibid.*



and on payment of compensation did not apply to : (a) any law under which a person might be deprived of property with a view to preventing danger to life, property or public health; (b) any acquisition or administration of property which was or was deemed to be evacuee property under any law; (c) any law where the property of another person might be taken in management for his benefit; and (d) any law that was in force before the Constitution.<sup>44</sup> The right to acquire, hold and dispose of property, which corresponded to that recognised by Article 19(1) (f) and 19(5) of the Indian Constitution, intended to "immovable property, or any commercial or industrial undertaking or any interest in any such undertaking."<sup>45</sup> This right to property as contained in Article 15 of the Constitution of 1956 has two essential parts, the one prohibiting the deprivation of property "except in accordance with law" and the other prescribing that a law which authorised compulsory acquisition of property or taking of its possession would provide for compensation either fixing the amount or by specifying the principles on which and the manner in which compensation was to be determined and given. Broadly considered, the first part corresponded to the power which in American jurisprudence is called the police power of the State and the second the power of *eminent domain*. In other words, Article 15(1) applied to cases where the property of persons could be deprived of and the State had not to pay any compensation, for it was not acquiring or taking possession of the property, which while Article 15(2) applied to those cases where the State was acquiring or taking possession of the property and, therefore, the law was to provide compensation.

44. Article 15(3), *ibid*.

45. Article 15(4), *ibid*.

Property has been defined and interpreted in a number of cases. Rich in the case of *Minister of State for the Army v. Dalziel*, (1944) 68 CLR 261, at p. 285 defines property in the following words : "Property, in relation to land, is a bundle of rights exercisable with respect to the land".

Dixon J. in the case of *Bank of New South Wales v. the Commonwealth*, (1948) 76 CLR I at p. 349 used the word property not only to cover "specific estate or interest in land recognized at law or in equity and . . . specific form of property in a chattel or chose in action similarly recognized, but that it extends innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession of property."

For the Indian view see the Judgments in the cases of *State of West Bengal v. Subodh Gopal*, AIR 1954 S. C. 92; *Chiranjit Lal v. Union of India*, AIR 1951 S. C. 44 etc.



It follows that the State under Article 15(1) of the Constitution could not deprive a person of his property merely by executive action; it was to show a valid law and compliance with it in support of the action.<sup>46</sup> Article 15(2) enjoined that property could only be acquired or taken possession of for a public purpose by means of a law which fixed the compensation payable or settled the principles upon which it was to be paid. The intention of the limitation that acquisition was to be for a public purpose was to make the issue as to the existence or non-existence of a public purpose to be a justiciable one - it was, in fact, made a condition precedent to be complied with before the power to acquire could be exercised.<sup>47</sup>

Thus, a court of law was not prevented upon an issue being raised that the acquisition was not in fact, in connection with a purpose, from enquiring into the allegation made in that behalf; but at the outset, the court would presume that the acquisition was for a public purpose and would give effect to that presumption unless that presumption be rebutted by the production of proper evidence. If it could be proved from the nature of the case that property had been, in fact, acquired by the State, not for a public purpose, but for a private one, the law would be declared as invalid as offending against Article 15(2) of the Constitution of 1956.<sup>48</sup> Any provision of law which was designed to exclude the jurisdiction of courts to enquire into the allegation that the State had acquired property for purposes other than public purposes, would itself be *ultra vires* of the powers of the legislature and on that account would be ineffective.

### 5. Political Rights

Under the category of political rights the following fundamental rights were introduced in the Constitution of Pakistan, 1956.

(a) Every citizen was guaranteed the right to freedom of speech and expression, subject to any reasonable restrictions imposed by law in the interest of security of Pakistan, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation and incitement to an

46. *Mir Abdul Hossain Khan v. Province of West Pakistan*, PLD 1958; *Government of Pakistan v. Syed Akhlaque Hussain*, PLD 1965 S. C. 527; *Gujrat Bus Service Lts. v. Province of West Pakistan*, PLD 1957 Lahore 345.

47. *Abdul Hamid v. State of West Bengal*, AIR 1953 Calcutta 223; *State of Bihar v. Kameshwar Singh*, AIR 1952 S. C. 252.

48. *Ajit Kumar Das v. Province of East Pakistan*, PLD 1958 Dacca 280; *Jogesh Chandra v. Province of East Pakistan*, PLD 1957 Dacca 404.



offence.<sup>49</sup> Article 8 of the Constitution of 1956 corresponding to Article 19(1) a and (2) of the Indian Constitution did not separately mention freedom of the press; but it would seem that the freedom of the press would flow logically from the citizen's right to freedom of speech and expression -- for, after all, freedom of the press meant nothing more than one's ability to express oneself in print. Press was, thus, under the provision of the Constitution in much the same position as the ordinary citizen; it had no special privilege. This rule was followed from the English law.<sup>50</sup>

The Constitution of 1956 imposed reasonable restrictions because it never intended to constitute an absolute licence to speak and to publish anything that one pleased and freed from all legal liability therefor. There was no absolute test for determining reasonableness of restriction. It was open for the courts to decide the reasonableness of a case.<sup>51</sup> Restriction which did not have any relation to any of the objects mentioned in Article 8 would seem unconstitutional<sup>52</sup> and neither the legislature nor the government could impose any restriction on the freedom of speech or expression except for the purposes mentioned in Article 8.<sup>53</sup> Thus, the freedom of speech and expression as contained in Article 8 of the Constitution of 1956 were not absolute and unqualified rights, but were relative, that is, freedom of speech and expression were not absolute all times and in all circumstances, and it did not mean that one could talk and distribute where, when how one chose.

(b) The Constitution of 1956 provided that every citizen was to have the right to assemble freely provided that the assembly was for a peaceful purpose and without arms and that it was made not in contravention of any restriction

49 . Article 8 of the Constitution of Pakistan, 1956.

50 . *Arnold v. King*, (1914)41/ I. A. 149.

In England "the law of the press as it exists . . . is merely part of the law of libel, and it is well worth while to trace out with some care the restrictions imposed by the law of libel on the freedom of the press, by which expression I mean a person's right to make any statement he likes in books and newspapers".

See A. V. Dicey, *op. cit.*, at p. 241.

Following the English principle the first Amendment to the Constitution (1791) of United States of America provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." and these rights are also secured against abridgement by the States by that provision of the Fourteenth Amendment to the Constitution which prohibits a State from depriving a person of liberty without due process of law.

51 . *Tofazzal Hossain v. Government of East Pakistan*, PLD 1956 Dacca 68; *Nawabzada Nasrullah Khan v. Prince of West Pakistan* PLD 1965 Lahore 642.

52 . *Mahmud Zaman v. D. M. Lahore*, PLD 1958 Lahore 651.

53 . *Zabunnissa v. Pakistan*, PLD 1958 S. C. 35.



imposed by law in the interest of public order.<sup>54</sup> The corresponding Indian provision is Article 19(1) (b) and (c). The right to peaceful assembly is guaranteed by the First Amendment to the Constitution of the United States of America against abridgement by Congress. The due process clause of the Fourteenth Amendment to the Constitution protects the people of a State against State action similar to that which Congress is prohibited from taking by the first Amendment.

The Constitution of 1956 provided that the restrictions imposed upon the freedom of assembly was to be reasonable, and it was for the court to decide in each case whether the restriction questioned was reasonable or otherwise. In deciding this, the court would have to take into consideration the conditions prevailing at the time, the nature, extent and duration of the restrictions all the surrounding circumstances,<sup>55</sup> for example, freedom of assembly might be restricted to a greater extent in times of national emergency than in more normal times. The restriction was to be certain and well-defined and imposed directly by the law rather than by the discretionary authority of the police or other executive authority. In this respect Brandeis J. observed :

"... Although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral."<sup>56</sup>

The view of A. V. Dicey is also commendable :

"The ... restrictions which arise from the paramount necessity for preserving ... peace are, whatever their extent, ... in reality nothing else than restraints, which, for the sake of preserving the peace, are imposed upon the ordinary freedom of individuals."<sup>57</sup>

But the principle that a meeting which was otherwise in every respect lawful and peaceable, was not rendered unlawful merely by the possible or probable misconduct of wrongdoers who in order to prevent the meeting were determined to break the peace, was well-established. Hence, it follows that in general an otherwise lawful public meeting could not be forbidden or broken up by the magistrates simply because the meeting might probably or naturally lead to a breach of the peace on the part of the wrongdoers. But public meeting

54 . Article 9 of the Constitution of Pakistan, 1956.

55 . *Abdul Hameed Qadri v. District Magistrate, Lahore*, PLD 1957 Lahore 213; *Nawabzada Nasrullah Khan v. Government of West Pakistan*, *op. cit.*

56 . *Whitney v. California*, (1927) 274 US 357 per Brandeis J. at p. 375.

57 . A. V. Dicey, *op. cit.*, at p. 279.



which, from the conduct of those engaged in it, as for example, through their marching together in arms, or through their intention to excite a breach of the peace on the part of opponents, filled peaceable citizens with reasonable fear that the peace would be broken, was an unlawful assembly in which police power was seen to prevent the breach of the peace.<sup>58</sup>

(c) According to the provision of the Constitution of Pakistan, 1956 every citizen was to have the right to form association or union, subject to any reasonable restriction imposed by law in the interest of morality or public order.<sup>59</sup> The corresponding Indian provision is Article (19(1)(c) and (4). In the Constitution of the United States of America freedom of association is not specifically mentioned. It is a result of the application of the due process clause to the right to liberty recognised by the Fourteenth Amendment to the Constitution.<sup>60</sup>

An association under the provision of Article 10 of the Constitution of Pakistan, 1956, might take the form of a political party, company, an institute, a firm, society or club, or it might just be an association of persons. Whether the right to form an association included the right to form companies was considered in the case of *Progress of Pakistan Co. Ltd. v. Registrar, Joint-Stock Companies, Karachi*, where Kaikaus J. held:

"I have no doubt, having regard to the ordinary meaning of the word 'association' and to the meaning which is generally assigned to it in legal literature that it does include the formation of the companies. . . In the absence of any limitation or qualification there is no reason why any particular kind of association be excepted from the connotation of the word 'association' as used in Article 10."<sup>61</sup>

The right to form trade unions was within the constitutional limits. The right to join implied a right to refuse to join. The right to strike was not a fundamental right and from the right to form a trade union the right to collective bargaining did not necessarily follow. The carrying on of an illegal strike would not be a proper exercise of the right to freedom of association, because a strike would invoke questions of public order, it was easily susceptible to the regulation of the State.<sup>62</sup>

58. *Beatty v. Gillbanks*, (19882) 15 Cox 138; *Wise v. Dunning*, (1902) 1 K. B. 167; *Duncan v. Jones*, (1936) 1KB 218.

59. Article 10 of the Constitution of 1956.

60. *National Association v. Alabama*, (1958)357 U. S. 447.

61. *Progress of Pakistan Co. Ltd. v. Registrar, Joint-stock Companies, Karachi*, PLD 1958 Lahore 887, per Kaikaus J. at p. 902.

62. *All-India Bank Employees' Association v. National Industrial Tribunal*, AIR 1962 S. C. 171; *National Labour Relations Board v. Jones*, (1937)301 US 1.



Freedom of association was made subject to reasonable restrictions that might be imposed by law in the interest of morality or public order. As regards morality in the case of *Mehtab Jan v. Municipal Committee*, Kayani C. J. remarked:

"Morality or decency are as fundamental as the fundamental rights themselves, and in the context of our Constitution, bearing in mind the Preamble and the directive principles, a fundamental right is like the moon and morality like the disk of light surrounding it."<sup>63</sup>

Kaikaus J. in the case *Progress of Pakistan Co. Ltd. v. Registrar, Joint-Stock Companies, Karachi*, in this respect also observed.

"An Act would be said to be enacted in the interest of morality if the object of the Act was to prevent people from behaving in an immoral manner."<sup>64</sup>

As regards reasonableness of restriction Indian Courts laid down some principles. In the case of *Ramakrishnaiah v. President, District Board of Nellore*, their Lordships observed:

It is well established that the exercise of any of the fundamental rights like the right of free speech, right of freedom of religion or the right of freedom of association cannot be made subject to the discretionary control of administrative or executive authority which can grant or withhold permission to exercise such right at its discretion. It is equally well established that there cannot be any restriction on the exercise of such a right which consists in a previous restraint on such exercise and which is [sic.] the nature administrative censorship. The guaranteed freedoms cannot be abridged or abrogated by exercise of official discretion."<sup>65</sup>

The same pattern of reasonings has been given by the Supreme Court of India in the case of *State of Madras v. V. G. Row*.<sup>66</sup> In this case section 16 of the Criminal Law Amendment Act, 1908, which authorised the provincial government to declare an association unlawful if in the opinion of the said

63. *Mehtab Jan v. Municipal Committee, Rawalpindi*, PLD 1958 Lahore 929, per Kayani C. J. at p. 933.

64. *Progress of Pakistan Co. Ltd. v. Registrar, Joint-Stock Companies, Karachi*, *op. cit.* at p. 903.

65. *Ramakrishnaiah v. President, District Board of Nellore*, AIR 1952 Madras 253 at p. 254.

66. AIR 1952 S. C. 196.



government it has as its object interference with the maintenance of law and order, has been declared to be unconstitutional interference with the right of freedom of association. The same view of this matter was also taken in Pakistan in the case of *Abul A'la Maudoodi v. Government of West Pakistan*<sup>67</sup> affirming the case of *Tamizuddin Ahmed v. Government of East Pakistan*.<sup>68</sup>

From the above it is apparent that under Article 10 the Constitution of Pakistan, 1956, guaranteed freedom of association but that freedom was subject to reasonable restriction imposed by law on the ground of morality and public order. The question whether a restriction was reasonable or not was, therefore, for the court to determine, and in determining it the court had to examine not only reasonableness of the law itself but also the reasonableness of the mode of application of the restriction, whether such mode was prescribed by the law or not.

(b) Every citizen was entitled to engage in any lawful profession and occupation and to conduct any lawful trade or business. But the State might by law -- prescribe qualifications for the practice of a profession or occupation; regulate any trade or profession by a licensing system; regulate any trade, commerce or industry in the interest of free competition; and assume for itself or grant to government controlled corporation, the monopoly complete or partial of any trade, business, industry or service.<sup>69</sup> The fundamental right to trade, business or profession was defined by the Constitution of 1956 in terms materially different from those of the corresponding American and Indian provisions. In the United States of America, the right to follow a profession, calling or occupation, or to carry on any trade or business, is inferred from the liberty and property provisions of the Fourteenth Amendment to the Constitution, whereas in India the exercise of the right is made subject to reasonable restrictions in the interest of the general public.<sup>70</sup> The differences between the right contained in Article 12 of the Constitution of Pakistan, 1956, and the right contained in Article 19(1)(g) and (6) are summarised in the following points :

- "1. The Indian provision does not use the word 'lawful' before 'profession', 'occupation', 'trade', and 'business';

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67. PLD 1964 S. C. 673 an appeal from *Abul A'la Maudoodi v. Government of West Pakistan*, PLD 1964 Karachi 498.

68. PLD 1964 Dacca 795

69. Article 12 of the Constitution of Pakistan, 1956.

70. Article 19(1) (g) and (6) of Indian Constitution.



2. In Pakistan, a trade or profession may be regulated by a licensing system, whereas in India, its exercise is subject to any law, existing or future, imposing reasonable restrictions in the interest of general public;
3. In Pakistan, 'trade', 'commerce' and 'industry' may be regulated in the interest of free competition, but in the Indian provision no such words have been used."<sup>71</sup>

The term 'lawful' that occurred before the words 'profession' and 'trade' as incorporated in Article 12 of the Constitution of Pakistan, 1956, had due effect of enabling the State completely to ban a profession, occupation, trade or business by declaring it to be unlawful' as incorporated in article 12, Kaikaus J. in the case of *Progress of Pakistan Co. Ltd. v. Registrar, Joint-Stock Companies, Karachi*, observed:

"The Article entitles the citizens of Pakistan to carry on any business, trade, or profession with this condition only that the individual acts involved in it are not unlawful. If an act invoked in a business, trade, profession, or occupation, is such that if performed otherwise than as a part of a business, trade, profession or occupation, it is unlawful, then it cannot become lawful just because it is performed as a part of a business, trade or profession, that is, as a part of activity indulged in for the purpose of profit or income."<sup>72</sup>

Under the provisions of Article 12 of the Constitution of 1956, it is evident that the legislature might forbid by law, any profession, occupation, trade or business,<sup>73</sup> and a fortiori a profession or business which was immoral<sup>74</sup> or which was inherently dangerous or injurious to public health or welfare. A law was not constitutionally void merely because it prohibited or restricted a profession, occupation, trade or business, as the legislature was fully competent to ban, in the social or public interest, wholly or partially, any profession, trade or business by declaring it unlawful otherwise than by a licensing Act.<sup>75</sup>

(e) Every citizen was to have the right to move freely throughout Pakistan and

71. *M. Munir, op. cit. at p. 127*

72. *Progress of Pakistan Co. Ltd. v. Registrar, Joint-Stock Companies, Karachi, op. cit., per Kaikaus, J. at p. 910.*

73. *Mektab Jan v. Municipal Committee Rawalpindi, op. cit.*

74. *Ibid.; cf. Sardran v. Municipality, Lyallpur, P. L. D. 1964 S. C. 397.*

75. *East and West Steamship Co. v. Pakistan, PLD 1958 S. C. 41; Shahabud Din v. Pakistan, PLD 1957 Karachi 854 approved in Ghulam Zamin v. A. B. Khondker, PLD 1965 1965 Dacca 156.*



to reside and settle in any part thereof. The right was subject to any law which might impose any reasonable restriction in the public interest.<sup>76</sup> The corresponding Indian provision is Article 19(1)(d), (1) e and (5). The right to freedom of movement has not been guaranteed by the Constitution of the United States of America; but the Supreme Court of the United States of America has indirectly given its judicial recognition<sup>77</sup> by interpreting due process clause as provided in the Fifth Amendment to the Constitution. Although right to freedom of movement and residence was guaranteed to every citizen but that right was subject to reasonable restrictions imposed by law in the public interest. But the question whether a law imposing reasonable restrictions on the freedom of movement and residence of a citizen was justiciable, and in determining this question the court had to look at the nature and the extent of the restriction, the manner in which it was imposed, the nature of the right alleged to have been infringed and the underlying purpose of the restriction imposed. In this respect A. R. Cornelius J., as he then was, in the case of *East and West Steamship Company v. Pakistan* observed :

"The reasonable restriction, in the sense of Article 11 is one which is imposed with due regard to the public requirement which it is designed to meet. Anything which is arbitrary or excessive will of course be outside the bounds of reasons in the relevant regard, but in considering the disadvantage imposed upon the subject in relation to the advantage which the public derives, it is necessary that the court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the individual, the court should consider whether is a reasonable restraint, in the sense not bearing excessively on the subject and at the same time being the minimum that is required to preserve the public interest"<sup>78</sup>

In the case of *Rao Mahroz Akhtar v. District Magistrate, Dera Ghazi Khan* Rahman C. J. observed that "the issue of reasonableness is a justiciable issue admittedly, and the Court can, therefore, go into the question whether the restrictions impugned have the character of reasonableness or not. . ."<sup>79</sup> Similar view was also expressed by the same Judge in the case of *Bazal*

76 . Article 11(9) of the Constitution of Pakistan, 1956.

77 . *Edwards v. California*, (1941) 314 US 160; *Ex Parte Endo*, (1944) 323 US 283; *Kent v. Dulles*, (1958) 357 US 116; *Aptheker v. Secretary of States*, (1964) 378 US 500.

78 . *East and West Steamship Company v. Pakistan*, op. cit. per A. R. Cornelius J., as he then was, at p. 74.

79 . *Rao Mahroz Akhtar v. District Magistrate, Dera Ghazi Khan*, PLD 1957 Lahore 676 per Rahman C. J. at p. 682.



*Ahmad Ayyubi v. Province of West Pakistan*.<sup>80</sup>

It should be noted in this connection that the right to freedom of movement and residence was limited to the citizens of Pakistan. A person invoking this right, therefore, had to show that he was a citizen of Pakistan as defined by law relating to citizenship. The status of citizenship on which the existence or continuance of the right rested was not one of the fundamental rights guaranteed to any one. If a law was properly passed by the legislature affecting the status of citizenship of a class of persons in the country the validity of that law could not be challenged on the ground that it affected the fundamental rights of those whose citizenship was thereby terminated. That was why, the High Court of Lahore in a later case on the freedom of movement as guaranteed by the Constitution of Pakistan, 1962, made the point clear in the following words :

"The liberty of free movement in a person to go abroad is strictly subject to and regulated and controlled by the provision of any valid law for the time being in force in the country. He is bound by and subject to the law of the land, which must be obeyed."<sup>81</sup>

Thus, though the court could question the validity of reasonableness of restrictions imposed by law on the right to freedom of movement, but it could not challenge a law properly passed by the legislature affecting the status of citizenship of a person because the status of citizenship was a not fundamental right guaranteed by the Constitution of 1962 to any person. Hence, power of the court in upholding the right to freedom of movement of any person was limited and such limitation had made that right a qualified right, not an absolute and unqualified right.

#### 6. Cultural and Religious Rights

(a) Any section of citizens, having a distinct language, script or culture, was to have the right to preserve it.<sup>82</sup> The corresponding Indian provision is Article 29(1). Though there is no specific provision in the Constitution of the United States of America similar to the present Article, it has been held that a statute which forbids the use of any language other than specified one in all schools in a State constitutes an unreasonable restriction upon the liberty guaranteed by the due process clause of the Fourteenth Amendment to the Constitution as it interferes, *inter alia*, with the opportunities of pupils to acquire knowledge,

80 . PLD 1957 Lahore 388.

81 . *Abul A'la Maudoodi v. State Bank of Pakistan*, PLD 1969 Lahore 908.

82 . Article 19 of the Constitution of Pakistan, 1956.



and with the power of parents to control the education of their own.<sup>83</sup>

The object of Article 19 of the Constitution of 1956 was to give cultural protection not only to the technical minorities or religious communities in the minority, but also to linguistic minorities. The Article made it clear that if there could be a cultural or linguistic minority, which wanted to preserve its own language and culture, the State would not by law impose upon it any other culture which might be local or otherwise. This Article did not entitle a person or community speaking a regional language to claim that a University in his area or its area should make such language as one of the media of examination.<sup>84</sup> In such a case it could not be contended that the petitioners had been debarred from preserving their language. The right to conserve a language included the right to agitate for the protection of that language, including political agitation. The right was an absolute right and was not subject to reasonable restriction.

(b) The Constitution of Pakistan, 1956, provided that subject to law, public order and morality -- every citizen was to have the right to profess, practice and propagate any religion; and every religious denomination was to have the right to establish, maintain and manage its religious institutions.<sup>85</sup> These rights roughly corresponded to those mentioned in Articles 25(1) and 26(a) and (b) of Indian Constitution and in the First Amendment to the Constitution of the United States of America.

Religion in its broadest sense includes all forms of belief in the existence of superior beings exercising power over human beings by volition, and imposing rules of conduct, with future rewards and punishments. In the case of *Commissioner, Hindu Religious Endowment v. L. T. Swamiar*, it was held that "religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent First Cause."<sup>86</sup> These religions also enjoy constitutional protection. Hence, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself keeping apart secular and

83. *Meyer v. Nebraska*, (1923) 26 U. S. 390.

84. *Muhammad Hussain Asani v. University of Karachi*, PLD. 1957 Karachi. 611.

85. Article 18 of the Constitution of Pakistan, 1956.

86. *Commissioner, Hindu Religious Endowment v. L. T. Swamiar*, AIR 1954 S. C. 282. at p. 290.



superstitious practices.<sup>87</sup> The right to this sort of religion, however, was subject to three important restrictions -- law, public order and morality which implied that the right to religion was subordinated in the interests of ordered government. In this respect Mohammad Munir in the case of *Jibendra Kishore v. Province of East Pakistan* observed :

"The Article appears . . . to proceed on the well-known principle that while legislature may not interfere with mere profession or believe, law may step in when professions break out in open practices inviting breaches of peace or when belief, whether in publicly practising a religion or running a religious institution, leads to overt acts against public order."<sup>88</sup>

Further, if in the performance of religious rituals, some secular steps were to be taken, as for instance, procuring foreign exchange for a pilgrimage, then these steps might be regulated by law.<sup>89</sup> This argument found support in the case of *Adelaide Company v. Commonwealth* where Latham C. J. of the Australian High Court observed that "... though the civil government should not interfere with religious opinions, it nevertheless may deal, as it pleases, with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion."<sup>90</sup>

Article 18 of the Constitution of 1956 provided that every religious denomination had the right to maintain and manage its own religious institutions in accordance with its own religion. Religious denomination has been defined in the *Oxford Dictionary* as "a collection of individual classed together under the same name . . . a religious sect or body having a common faith and organisation and designed by a distinctive name."<sup>91</sup> This definition was approved in the case of *Commissioner, Hindu Religious Endowments v. L. T. Swamiar*.<sup>92</sup> In the case of *Jibendra Kishore v. Province of East Pakistan*,<sup>93</sup> the Supreme Court of Pakistan assumed that Muslims as a whole

87. *Ratilal v. State of Bombay*, AIR 1954 S. C. 388; *Durgah Committee v. Hussain Ali*, (1961) 11 S. C.R 171.

For a detailed discussion on religion see Syed Ameer Ali, *The Spirit of Islam*, (London, Methuen & Co. Ltd. 1967), pp. XVII - LXXI.

88. PLD 1957 SC 9, per Mohammed Munir C. J. at p. 43.

89. *Abdul Ghani v. Islamic Republic of Pakistan*, PLD 1958 Lahore 584.

90. *Adelaide Company v. Commonwealth*, (1943) 67 CLR 116 per Latham C. J. at p. 127.

91. *The Oxford English Dictionary* (Oxford: the Charendon Press, 1961) Vol. III p. 195.

92. *Op. cit.*

93. *Op. cit.*



constituted a religious denomination; so, too, did Hindus as a body. The expression religious denomination from the point of view of *Waf-al-aulad* was also considered in the case of *Mahdi Ali Khan v. Province of East Pakistan*,<sup>94</sup> where it was held that *Wakfs* including *Wakfs-al-aulad* were religious institutions within the meaning of Article 18 of the Constitution of 1956.

(c) In accordance with the provisions of the Constitution of 1956, every religious community or denomination was to have the right to establish and maintain educational institutions of its own choice, and the State was not to deny recognition to any such institution on the ground that it belonged to that denomination.<sup>95</sup> The Constitution declared that no citizen was to be denied admission to any State aided educational institution on the ground of race, religion, caste, or place of birth, unless this was the consequence of a public authority making special provision for backward classes of citizens.<sup>96</sup>

The right guaranteed by Article 13 of the Constitution of 1956 was absolute in terms and it was not made subject to any reasonable restriction. But the State had the right to deny recognition to any educational institution on grounds other than that, the management of such institution vested in a particular community or denomination and this power to deny recognition was inherent in the power to make such regulations as might be necessary to make the institution an effective vehicle of education for the community concerned, and other persons who resorted to.<sup>97</sup>

If an educational institution received aid from public revenues, it could not refuse admission to a student merely on the ground of his race, religion, caste, or place of birth. It might, however, regulate the admission on the ground of other factors, as for instance, merit or residence.<sup>98</sup> But if the institution was wholly unaided, it might deny admission even on the above grounds, and recognition would not be denied to it merely for the reason that it was aided by a particular community. If the institution was State-aided and the citizen had the academic qualifications but was refused admission only on grounds of religion, race, caste, language or any of them, then there was a

94. PLD 1958 Dacca 203.

95. Article 13(5) of the Constitution of Pakistan, 1956.

96. Article 13(3), *ibid*.

97. *Sidhray Bhai Sabhai v. State of Gujrat*, AIR 1963 S. C. 540; *Ramanikanta v. Gauhati University*, AIR 1951 Assam 163; *Subha v. State of Bihar*, AIR 1958 Pat. 359.

98. *Naseem Mahmood v. Principal, King Edward Medical College*, PLD 1965 Lahore 272.



clear breach of fundamental right under the provision of this article.<sup>99</sup>

(d) The Constitution provided that no person was compelled to pay taxes for the maintenance or propagation of any religion other than his own.<sup>1</sup> In getting concessions or exemptions from taxation for religious institutions, there was to be no discrimination against any community.<sup>2</sup> The safeguard as contained in Article 21 of the Constitution of 1956 was to some extent different from that of India. In Pakistan this safeguard was against a special tax, i.e., a tax levied for the promotion of a particular religion and prohibition was against its collection from the members of a different religious community. persons belonging to the religion thus benefitted might, therefore, be taxed. The provision would not be applicable where the tax had not been levied or the purpose of propagating or maintaining any religion. In India under the provision of Article 27 there is a complete ban against tax, for the purpose of promoting any particular religion.

### 7. Protection of Life and personal liberty

(a) The Constitution of Pakistan, 1956, declared that no person was to be deprived of life or liberty save in accordance with law.<sup>3</sup> This provision amounted to a proposition that no person was to take the life or liberty of another person except under a law authorising him to do so. "There must be a provision in a statute or statutory instrument justifying any sentence of death or imprisonment or arrest of any person."<sup>4</sup> The corresponding Indian provision is that "no person shall be deprived of his life or personal liberty except according to procedure established by law."<sup>5</sup> The phrase except according to procedure established by law was probably borrowed from the American-made Japanese Constitution which declares that no person shall be deprived of life or liberty except according to procedure established by law. Article 5(2) of the Constitution of Pakistan, 1956, therefore, would not afford protection against competent legislative action. Law under the provision of the said Article was not used to mean principles of natural justice outside the realm of positive law, it was equivalent to State-made law. However, the phrase sought to restrain the hands of the executive in the case of any possible attempt to deprive a person of his liberty otherwise than under the authority of a

99. State of Madras v. Champakam, (1951) S. C. R. 525.

1. Article 21 of the Constitution of Pakistan, 1956.

2. Article 13(4), *ibid.*

3. Article 5(2) of The Constitution of Pakistan, 1956.

4. Alan Gledhill, *Pakistan: the Development of its Law and the Constitution*, 1967 at p. 129.

5. Article 21 of The Indian Constitution, 1949.



statute. Thus, in the case of *Sakhi Daler Khan v. Superintendent*,<sup>6</sup> the High Court of West Pakistan, Lahore, held that the deprivation of life or liberty was not permissible unless it was done in accordance with law. The Court also held that it had jurisdiction to interfere whenever a person, whether he was a citizen or not, was deprived of his life or liberty by any authority in flagrant violation of the law under which it purported to act.

(b) The Constitution of Pakistan, 1956, provided protection against retrospective offences or punishment. This meant that no person was to be punished for an act which was not punishable when the offence was committed, or subjected to a punishment greater than that was prescribed when the act was done.<sup>7</sup> The corresponding Indian provision is Article 20 of the Constitution. The operation of Article 6 of the Constitution of Pakistan, 1956, was much more limited than that of American provision which enjoins that "no *ex post facto* law shall be passed".<sup>8</sup>

The underlying principle contained in Article 6 of the Constitution of Pakistan, 1956, was derived from the maxim "*nulla poena, nullum crimen sine lege*" which means no person shall be punished except in pursuance of a statute which fixed a penalty for criminal behaviour. The principle contained in the said Article included two prohibitions. The first was that no person could be convicted for doing an act not declared by statute to be an offence at the time when it was done. The second prohibition was that no person was to suffer a heavier penalty than that provided by statute in force at the time of the commission of the offence.

Article 6 of the Constitution of Pakistan, 1956, contained an exception to the proposition that the legislature could pass laws with retrospective effect but it could not nullify Article 6 by passing "law which have the effect of making punishable an act which was not punishable at the time of his commission."<sup>9</sup> Here the petitioner was prosecuted under the penalty clauses contained in section 167(8), (81) of the Sea Customs Act, 1878 (Act VIII of 1878), which were amended after the Constitution of Pakistan, 1956, came into force and

6. PLD 1957 Lahore 813.

In this case the authority acting under section 3 of the Recovery of Abducted Persons Ordinance, 1949, took into custody of person who, in the opinion of the Court, was not an abducted person.

7. Article 6 of the Constitution of Pakistan, 1956.

8. Article 1, Section 9(3) of the Constitution of the United States of America. There is a similar prohibition against the State in Article 1, Section 10(3) of the said Constitution.

9. *Hasan Ali v. Collector of Land Customs*, P L D 1958 Lahore 553, per S. A. Rahman c. g. at pp. 557-558.



the alleged offence was committed. S. A. Rahman C. J. in this respect observed:

"The Constitution is an organic instrument which has to be interpreted after taking into consideration all its parts, as a whole. The fundamental rights guaranteed in Part II of the Constitution cannot be whittled away by any legislation passed subsequently to the Constitution Day. We, therefore, hold that the contention raised on behalf of the respondents is unsound and to the extent that the amending legislation comes within the mischief of Article 6 of the Constitution, it is void. The result is that despite this amending legislation the act of the petitioner... could not have been visited with any penalty mentioned in Items 8 and 81 of section 167 of the Act. For the purpose of the present case, those Items must be regarded as still being in an unamended form. The act in question was certainly not punishable under these Items as they stood before the amendment in the face of Article 5 of the Constitution and it could not be made punishable by a measure enacted even with the object of turning the illegal provisions into conformity with the Constitution in the fact of Article 6"<sup>10</sup>

The correctness of the conclusion reached in this case was doubted by Mohammad Munir C. J. in the case of *Kalipada Saha v. The State* where his Lordship held:

"The change of procedure brought about by Act XI of 1950 (Foreign Exchange Regulation (Amendment) Act under which appellants have been convicted by a tribunal does not... amount to a retrospective enhancement of punishment, and the sentences imposed by the Tribunal are perfectly legal. Reliance was placed ... on a judgment of the High Court of West Pakistan in *Hasan Ali v. Collector of Land Customs*... but having carefully examined that decision we cannot accept its *ratio decidendi* as sound"<sup>11</sup>

In accordance with the general principle that the constitutional prohibition against *ex post facto* laws was not to prevent the legislature from making changes in procedure, it was well-settled that changes in relation to the constitution of judicial tribunals were generally to be considered as relating to the remedy only. Therefore, without coming within the terms of the constitutional prohibition, the legislature might abolish old courts and create new ones, enlarge and diminish the power of any existing court, create appellate jurisdiction where none existed before, transfer jurisdiction from one

10 . *Ibid.* at p. 558.

11 . P L D 1959 S. C.3422 per Mohammad Munir C. J. at p. 325.



court or tribunal to another, make changes as to the venue, and generally, effect any other changes in the modes of procedure or in the instrumentality of justice, so long as all the substantial protection with which the existing law surrounded a person accused of crime were left unimpaired. What was prohibited under Article 6 of the Constitution of Pakistan, 1956, was the passing of a law, making a past act or omission punishable. A new procedure for the trial of past acts and omission which amounted to offences was therefore, not prohibited.<sup>12</sup>

(c) The Constitution of Pakistan, 1956, prohibited slavery and all forms of forced labour except for public purposes.<sup>13</sup> Corresponding Indian provision is Article 23. The underlying principle of Article 16 was derived from the Thirteenth Amendment to the Constitution of the United States of America which provides that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Explaining the provisions as contained in this Thirteenth Amendment Hugh J. observed:

"The 13th Amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other."<sup>14</sup>

Thus, the purpose of the Thirteenth Amendment is not merely to end slavery but to maintain a system of completely free and voluntary labour throughout the country. It does not prohibit forced labour as a punishment for crime, nor does it prevent a State from lawfully punishing the calling of a strike for an illegal purpose.<sup>15</sup>

Before the Constitution of Pakistan, 1956, was came into force slavery and forced labour were prohibited under the Indian Slavery Act, 1843 (Act V of 1843), and Indian Penal Code, 1860 (Act XVI of 1860). According to the

12. Shiy Bahadur v. the State of Vindhya Pradesh, A I R 1953 S. C. 394.

13. Clauses (1) and (2) of Article 16 of the Constitution of Pakistan, 1956.

14. Bailey v. Alabama, (1911) 219 US 210 per Hugh J. at p. 242.

15. Pollock v. Williams, (1944) US 4: US V. Reynolds, (1914) 235 US 133; Dorchy v. Kansas, (1926) 272 US 306; City of Detroit v. Division, 26 of Amalgamated Assn, (1952) 344 US 805.



provisions of the Indian Slavery Act, 1843, no public officer in execution of any decree or order of court, or for the enforcement of any demand of rent or revenue could sell or cause to be sold any person on the ground that person was in a state of slavery; property and services of another person as a slave could be enforced by the civil or criminal courts, no person would be dispossessed of, or prevented from taking possession of, any property on the ground that such person or that the person from whom the property might have been derived was a slave; and any act which would be a penal offence if done to a free man would be equally an offence if done to any person of the pretext of his being in a state of slavery. 16 Section 374 of the Indian Penal Code, 1860, which laid down that "whoever unlawfully compels any person to labour against the will of that person, shall be punished..." would seem to be in keeping with the constitutional principle against forced labour.

In the case of *Dalmia Cement Limited v. The Dalmia Cement Factory Workers' Union*, it was considered whether compulsory overtime work in any industrial establishment infringed article 16 of the Constitution of Pakistan, 1956. It was held that to work overtime in addition to his normal daily routine hours under a contract did not raise the question of force labour attacking the letter or spirit of Article 16 of the said Constitution. Shahabuddin J. in this respect observed:

"Service if he is held to the liability under the contract. It was not contended that the workmen were not of the conditions of employment mentioned in the Standing Order. It appears to me that the Union itself realised the weakness of their demand that compulsory overtime should be stopped and therefore modified its position by asking for better terms for such work, a point which the Tribunal did not consider apparently because it was not referred to it."<sup>17</sup>

Article 16(2) had subjected the prohibition against forced labour to the State's requirement of compulsory service for public purposes. The expression public purpose was wide enough to cover compulsory military service,<sup>18</sup> police service for the defence of the State,<sup>19</sup> compulsory service of seamen in

16. See sections 1-4 of the Indian Slavery Act, 1843. For the text of the Act see Ministry of Law and Parliamentary Affairs, Government of Pakistan, *The Pakistan Code* Vol. I (Rawalpindi: Government of Pakistan Press, 1965) at p. 23.

17. PL D. 1958 S. C. 153, per Shahabuddin J. at p. 157.

18. *Burley v. Perry*, (1916) 240 US 328; *Dulal Samanta v. D. M.*, AIR 1958 Calcutta 365.

19. *Dulal Samanta v. D. M.*, *ibid.*



fulfilment of their contracts,<sup>20</sup> conscription for social services,<sup>21</sup> compulsory work to build public highways<sup>22</sup>, assistance for the collection of tax imposed etc.<sup>23</sup>

From the above, it is apparent that the Constitution of Pakistan, 1956, guaranteed protection of life and liberty. There were also provisions for the curtailment of these fundamental rights. These rights were not absolute except one — prohibition against slavery. The forced labour was also prohibited, but a qualifying clause was provided to this right, that means, the State might require compulsory service from the people for public purposes.

(d) The Constitution of Pakistan, 1956, provided that no person who was arrested was to be detained in custody without being informed, as soon as might be, of the grounds for such arrest, nor was he to be denied the right to consult and be defended by a legal practitioner of his choice.<sup>24</sup> It also provided that every person who was arrested and detained in custody was to be produced before the nearest Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate, and no such person was to be detained in custody beyond the said period without the authority of a Magistrate.<sup>25</sup> These safeguards did not apply to any person— who for the time being was an enemy alien; or who was arrested or detained under any law providing for preventive detention.<sup>26</sup> The corresponding Indian provisions are clauses (1), (2) and (3) of Article 22.<sup>27</sup> The similar provision has been contained in the Sixth Amendment to the Constitution of the United States of

20. *Robertson v. Baldwin*, (1897) 156 U. S. 275.

21. *State v. Jorwar*, *op. cit.*

22. *Butler v. Perry*, *op. cit.* *Billings v. Truesdale*, (1944) 321 US 542.

23. *Atma Ram v. State of Bihar*, AIR 1952 Pat. 359.

For details see F. K. M. A. Munim, *Rights of the Citizen under the Constitution and Law* at pp. 80-83.

24. Article 7(1) of the Constitution of Pakistan, 1956.

25. Article 7(2), *ibid.*

26. Article 7(3), *ibid.*

27. According to the view of the Supreme Court of India Article 22(1) gives to persons arrested a two-fold protection the first is that an accused person shall not be detained in custody without being told the grounds of such an arrest and the other is that he shall be entitled to consult and to be defended by a legal practitioner of his choice. Article 22(2) gives a third protection and it is that every person arrested and detained in custody must be produced before the nearest Magistrate within twenty-four hours, excluding the time necessary for the journey from the place of arrest to the court of Magistrate.

See *State of Madhya Pradesh v. Shobharam*, AIR 1966 S. C. 1910.



America which provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ... to be informed of the nature and cause of the accusation, to be confronted with the witness against him to have compulsory process for obtaining witnesses in the favour and to have the assistance of counsel for his defence."

The superior courts of Pakistan in a number of cases became protectors of every person from being unlawfully arrested and was empowered to keep watch whether the constitutional provisions in regard to arrest were strictly complied with. Thus, in the cases of *Ghulam Muhammad Khan Loondkhawar v. State*,<sup>28</sup> *Jhumma Khan Baluch v. Government of West Pakistan*,<sup>29</sup> *Behram Khan v. State*,<sup>30</sup> *Bazal Ahmad Ayyubi v. Province of West Pakistan*,<sup>31</sup> *Khair Muhammad Khan v. Government of West Pakistan*,<sup>32</sup> *Mosleh Uddin Sikder v. Chief Secretary, Government of East Pakistan*,<sup>33</sup> it was held that if the constitutional provisions were not complied with, arrest of any person whether made by the Government, police officer or Private individual was to be declared by the courts as illegal, and in regard to arrest any law which was found to be inconsistent with the constitutional provisions was also to be declared as invalid and such law would not be involved to jeopardize the freedom of any person.

(e) As regards persons proceeded against under any law relating to preventive detention, the safeguards contained in the constitution of Pakistan, 1956, were as follows: (i) that no person detained under any such law could be detained for a period exceeding three months unless, before the expiration of that period, the government obtained from the appropriate Advisory Board the opinion that there was sufficient cause for such detention;<sup>34</sup> (ii) that the authority which ordered the detention was, "as soon as may be", to communicate to the arrested person the grounds for his detention, unless the disclosure of any particular ground was against the public interest and to afford him the earlier opportunity of making a representation against his detention.<sup>35</sup>

The legislative competence to make a law relating to preventive detention as

28. PLD 1957 Lahore 497.

29. PLD 1957 Karachi 939.

30. PLD 1957 Karachi 709.

31. PLD 1957 Lahore 388.

32. PLD 1956 Lahore 668.

33. PLD 1957 Dacca 101.

34. Article 7(4) of the Constitution of Pakistan, 1956.

35. Article 7(5), *ibid.* Corresponding Indian provision is Article 22 of the Constitution of India, 1949.



derived from the First Schedule to the Constitution of Pakistan, 1956,<sup>36</sup> and all that Article 7(4) and Article 7(5) provided were merely the restraints or limitation on the exercise of this power to legislate in regard to preventive detention by prescribing certain safeguards. A law providing for preventive detention was, on the face of it, to show that it conformed to the pattern prescribed in the said Constitution. Thus, a law which imposed restrictions on the personal liberty of a subject was to be strictly and rigorously complied with, and unless such order was passed in strict conformity with the provisions of the detention law, however, framed in their character they might appear to be, and all the statutory obligations enjoyed on the detaining authority were carried out to the letter, the order would not be upheld.<sup>37</sup>

The Constitution contained the provision of formation of an Advisory Board to express an opinion whether there was sufficient cause for detention or not. The expression Advisory Board was defined in the Constitution in the following words: "... the appropriate Advisory Board" means in the case of a person detained under a Central Act or an Act of Parliament, a Board consisting of persons appointed by the Chief Justice of Pakistan, or, in the case of a person detained under a Provincial Act or an Act of a Provincial Legislature, a Board consisting of persons appointed by the Chief Justice of the High Court for the Province."<sup>38</sup> The setting up of an Advisory Board to determine whether preventive detention was justified was considered as a sufficient safeguard against arbitrary detention under any law of preventive detention. The President, the Chief Executive, and the Chief Justice of Pakistan or of the High Court of the Province concerned were under a constitutional obligation to constitute an Advisory Board. In this respect the Supreme Court of Pakistan observed:

"The clause (4) of Article 7 of the Constitution of Pakistan, 1956 imposes a condition upon the power of detention without trial vested in authorities under existing law, viz., that the satisfaction of a detaining authority regarding the need for detaining a particular person shall not by itself be sufficient for continuing that detention beyond an initial period of three months, unless an advisory Board, as prescribed, has concurred in the opinion held by the detaining authority in that respect"<sup>39</sup>

36. See Item No. 18 of the Federal List and Item No. 5 of the Provincial List of the Fifth schedule of the Constitution of Pakistan, 1956.

37. *Seraj Uddin v. State*, PLD 1957 Lahore 962.

38. Explanation of Article 7(4) of the constitution of Pakistan, 1956.

39. *Abdul Aziz v. Province of West Pakistan*, PLD 1958 S.C. 499, per A. R. Cornelius, J., at p. 513.



The superior courts of Pakistan in a number of cases tried to uphold right of the people against the arbitrary detention. Thus, in the cases of *Ghulam Muhammad Khan Loondkhawar v. the State*,<sup>40</sup> *Fazal Ahmad Ghazi v. the State*,<sup>41</sup> *Abdul Aziz v. D.M., Lahore*,<sup>42</sup> *Abdul Aziz v. Province of West Pakistan*,<sup>43</sup> *Abdul Quddus Bihari v. the Chief Commissioner of Karachi*<sup>44</sup> took a valiant stand against arbitrary detention made by the authorities.

Thus, though the Constitution of Pakistan 1956, contained provisions for preventive detention of a person, but these were subject to certain procedures which were to be strictly complied with. If any person was deprived of this liberty otherwise than in strict conformity with the requirements of the constitution, the court would be in a position to declare that the person, preventively detained had been deprived of his liberty otherwise than "in accordance with law" under Article 7(5) of the said Constitution. So in formulation the constitutional provisions two things were taken into consideration: first, for the security of the State or of public interest, preventive detention of a person was justifies; secondly, deprivation of this personal liberty was not to be made arbitrarily or capriciously by the detaining authority. In doing so, a balance had been maintained in the Constitution of Pakistan, 1956, which contained provisions for preventive detention but provided at the same time safeguards against arbitrary deprivation of personal liberty.

#### 8. Enforcement and Suspension of Fundamental Rights

Article 33 of the Constitution of Pakistan, 1956, corresponding to Article 32 of the Indian constitution had virtually made the Supreme Court of Pakistan the custodian of fundamental rights guaranteed in Part II of the Constitution, and had made the very right to move the Supreme Court by means of appropriate proceedings commenced for the enforcement of those rights itself a fundamental right. Article 170 of the Constitution, corresponding to Article 226 of the Indian Constitution, had also conferred on the High Court the power to issue to any person or authority, including in appropriate cases any government such directions, orders, or writs for the enforcement of fundamental rights and any ther purposes. The jurisdiction affirmed by these

40. *Op. cit.*

41. PLD 1957 Karachi 190.

42. PLD 1958 Lahore 104.

43. PLD 1958 S.C. 499.

44. PLD 1956 Karachi 533.



two Articles was analogous to the one which the Court of the Queen's Bench division exercises in England.<sup>45</sup> There was this difference between the jurisdiction of the Supreme Court of Pakistan and that of any High Court that whereas the right to invoke the Supreme Court's jurisdiction was itself a fundamental right, and the right to apply to the High Court was not, and that while the Supreme Court was under an obligation to grant appropriate relief by the writ method, the High Court had a discretion of granting or refusing such relief. From the above it is also apparent that if the petitioner had some rights other than the fundamental rights to enforce, he would find that High Court forum more appropriate for his purposes than the Supreme Court. If the Supreme Court found that no fundamental right as provided in Part II of the Constitutions to have been infringed, it was to stay its hands and the petitioner might then have to go to the High Court to obtain relief in respect of the violation of his ordinary rights.

Thus, the power of the High Court as provided in Article 170 of the Constitution of 1956 was very wide. They were not limited to the cases of safeguarding the constitutional rights as specified in part II of the Constitution. There was ample power vested in the Court to issue directions to an executive authority when such an authority was not exercising its powers *bona fide* for the purpose contemplated by law or was influenced by extraneous and irrelevant considerations and when injustice had resulted.<sup>46</sup> The scope of powers and jurisdiction of the High Court as conferred by Article 170 had been considered in a number of cases. In the case of *A. K. M. Fazlul Qader Chowdhury v. Government of Pakistan*<sup>47</sup> the High Court of East Pakistan held that since Article 170 was expressly limited to conferring power upon the High Court to issue to any person upon or authority including in appropriate cases any government, directions, orders and writs throughout the territories in relation to which it exercised jurisdiction, the Court could not exercise that power to issue writs etc. to government of Pakistan or to Secretary, Ministry of Law, because, they were not within the territories in which the High Court of East Pakistan exercises jurisdiction.

As to the interpretation of Article 170 A. R. Cornelius J., as he then was, in the case of *State of Pakistan v. Mehrajuddin*:

"It seems that it could not have been the intention of the framers of the

45 . See Sections 7, 8 and 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, I & II Geo. 6, C. 63.

46 . *Muhammad Ayub Dhar v. Dy. Commr. Attock*, PLD 1957 Pesh. 63.

47 . PLD 1957 Dacca 342.



Constitution of 1956 when they enacted Article 170 containing specific references to five writs... to give to the High Courts of Pakistan an incomplete power of overriding everything contained in the law and practice delimiting the functions and jurisdictions of the High Courts, and all other laws defining legal rights and jurisdictions generally... The addition of the words 'directions' and 'orders' seems to be clearly relatable to the amendment of the English law in 1938 by which certain writs were abolished, but orders of the same kind were directed to be issued. We cannot conceive that by the wording of Article 170, anything more was intended than was carried into effect by the amendment of the English law of 1938."<sup>48</sup>

Mr. Justice Shahabuddin expressed similar views in the case of *Government of Pakistan v. Begum Justice Soofi* :

"Article 170 of the last Constitution no doubt referred to direction and orders... in addition to the standard writs, but does not mean that High Courts could issue any order or direction regardless of the nature of the act impugned before it. It is necessary that the order should *per se* be of a nature falling within the jurisdiction of the Court under *certiorari* or *mandamus*, etc. and any order to be made would necessarily be an order in the nature of *certiorari* or *mandamus* etc."<sup>49</sup>

But this interpretation of the scope of Article 170 of the Constitution of 1956 which limited the jurisdiction of the High Court was considered in the case of *Tariq Transport Co. v. Sargodha Bhera Bus Service* where Mr. M. Munir C. J. observed:

"From the language of the Article... it seems ... to be perfectly clear that the power of the High Court to issue directions, orders and writs is not limited to writs in the English form but extends to the making of orders restraining or directing any authority or government which may be discharging executive functions under statute. But this cannot be taken to mean that purely executive action cannot be controlled by the High Court."<sup>50</sup>

Similar view was expressed in the case of *Diwan Ziaul Haq v. Government of West Pakistan*.<sup>51</sup> In the case of *Ahmad Saeed Kirmani v. Chowdhury Fazle*

48. *State of Pakistan v. Mehrajuddin*, PLD 1959 S.C. 147, per A.R. Cornelius J., as he then was, pp. 161-162.

49. *Government of Pakistan v. Begum Justice Soofi*, PLD 1959 S.C. 237 per Shahabuddin J. at p. 241.

50. *Tariq Transport Co. v. Sargodha Bhera Bus Service*, PLD 1958 S.C. 437 per M. Munir J. at p. 462.

51. PLD 1956 Lahore 358.



*Elahi*,<sup>52</sup> it was held that the courts were not powerless with regard to examining the validity or otherwise of the proceedings in the Assembly, and in this way the doctrine enunciated in the case of *Tariq Transport Co. and Diwan Ziaul Haq* was expanded. An impressive interpretation of Article 170 of the Constitution of 1956 was made by Mr. Justice Kaikus in the case of *Syed Hadi Ali v. Government of West Pakistan*<sup>53</sup> where it was held that under Article 170 the jurisdiction of the High Court was not limited to the issue of the well-known writs. His lordship opined that as the object of that Article was to enable the High Courts to enforce observance of law by the officers, an appropriate order could be passed to compel such observance. "By making this interpretation, Justice Kaikus laid the foundation of a genuine rule of law in Pakistan."<sup>54</sup>

The formula of the interpretation of Article 170 of the Constitution of 1956 as advanced by Kaikus J. in the case of *Syed Hadi Ali*, also found support in the case of *Messrs. Frontier Textile Mills v. Textile Commissioner, Government of West Pakistan* where it was observed that the powers conferred by Article 170 were very wide and could be involved even where the order in question was not of a judicial or quasi-judicial nature and was issued by an authority in an administrative capacity. Masud Ahmad J., extending the clarification observed:

"The decision... of the question as to whether the discretion was exercised justly, fairly and reasonably, on a correct interpretation of and in accordance with law and without any discrimination. The fact that authority, which passed the order in question was acting in an administrative capacity would not be enough to oust the jurisdiction of the High Court, especially when the question of exercise of the fundamental right of the petitioner... is invoked"<sup>55</sup>

From the above it is clear that with the addition of writ jurisdiction to the Supreme Court and the High Courts of Pakistan under Articles 22 and 170 "the idea of the administrative law as a separate institution received stimulus"<sup>56</sup> because the said Courts of Pakistan were in a position through

52. PLD 1956 Lahore 807.

53. PLD 1956 Lahore 824.

54. See S.M. Haider "Writ Jurisdiction in Pakistan", in S.M. Haider (ed.), *Public Administration and Police in Pakistan* (Peshwar: Pakistan Academy for Rural Development, 1968) at p. 182.

55. *Messrs. Frontier Textile Mills v. Textile Commissioner, Government of Pakistan*, PLD 1958 Lahore 345, per Masud Ahmad J. at p. 358.

56. Ralph Brainbanti, *Public Bureacracy and Judiciary in Pakistan* (Princeton: Princeton University Press, 1964) at p. 413.



their writ jurisdiction to control administrative discretion whenever there is an usurpation of jurisdiction, refused to exercise jurisdiction or some substantial non-observance of law.<sup>57</sup> Thus, if the order of a tribunal was passed without regard to the conditions which had to be complied with before passing the order, it was within the competence of the High Court to declare the order to be inoperative by means of the issue of an appropriate writ.<sup>58</sup> In the same way, an order of Special Tribunal under the belief that it exercised more powers than it possessed could be set aside by the issue of an appropriate writ on the ground that it was made without jurisdiction.<sup>59</sup>

The Constitution of Pakistan following the British tradition had provided for suspension of fundamental rights guaranteed in Part II of the Constitutions.<sup>60</sup> These rights could be suspended by an order of the President under Article 192(1) of the Constitution if an emergency was proclaimed under article 191 of the Constitution. So long as the order remained in force, the fundamental rights, specified in the order, could not be enforced and all pending proceedings in respect of them would remain suspended.<sup>61</sup>

### 9. Summary and Conclusion

From the above discussions and analyses it is evident that the Constitution of Pakistan, 1956, adopted a revolutionary step by incorporating a complete bill of rights which was for the first time protected by the superior courts of Pakistan. All the rights incorporated in the Constitution were not absolute and unqualified, some restrictions on the ground of reasonableness imposed by law, morality, public interest, public order etc. were also provided in most of the rights. Some of rights were absolute and unqualified. These rights could be enforced by the Supreme Court of Pakistan as well as by the High Courts of Pakistan under the provisions of Articles 22 and 170 of the Constitution. Taking into consideration of the practical situation which might have arisen into the political arena of Pakistan the Constitution contained provisions for the suspension of the fundamental rights during the continuance of emergency declared by the President of Pakistan under the provision of the Constitution. In spite of these constitutional limitations, as it has been mentioned earlier, the

57. See S. M. Haider, "A case for Administrative Law," PLD 1968 Journal 55 at p. 56.

58. *Fazle Elahi v. Custodian, Evacuee Property*, PLD 1962 Lahore 288.

59. *Mrs. Doreen Basket Ram v. Custodian*, PLD 1962, Lahore 424; *Muhammad Anis v. Chief Justice, Small Causes Court* PLD 1962 Karachi 613.

60. Article 22(3) of the Constitution of Pakistan, 1956.

61. Article 192 (1), *ibid.*



Supreme Courts of Pakistan during the continuance of the Constitution took a courageous stand in upholding the fundamental rights of the people of Pakistan.

Not only this, when the Constitution of Pakistan, 1956, was abrogated by the Proclamation of Martial law on the 7th October, 1958, the constitutional courts of Pakistan, though gave a judicial recognition to the Martial Law regime, took also a courageous stand in upholding fundamental rights of the people. In this way, the constitutional courts of Pakistan proved not only to be the guardians of the Constitution but also the protectors of the fundamental rights which were incorporated in the Constitution of Pakistan, 1956.

It may be mentioned in this connection that the Constitution of Pakistan, 1956, was the first instrument adopted for the noble cause of democratization of society of Pakistan. In view of importance of fundamental rights which are indispensable for a democratic society, they were incorporated in the Constitution in a manner by which the constitutional courts of the country, another instrument for realization of democracy, would come forward to enforce them if there was any violation of the rights occurred by any person or authority.

Unfortunately, the ruling authorities were temperamentally undemocratic and autocratic and thus made the democratic instrument unworkable by abrogating it in October 1958 the direct impact of which was that the fundamental rights incorporated therein would no longer exist during the continuance of Martial Law. The violation of constitutional provisions, fundamental rights thus started in October, 1958, has not yet been stopped. The dictatorial rules have been continuing in both the parts of Pakistan (now Pakistan and Bangladesh) without paying heed to the democratic sentiments and the fundamental rights of the people. The enjoyment of fundamental rights, the first pre-condition for realization of a democratic society, was given a superior status by the Constitution of Pakistan, 1956, and that constitutional instrument was abrogated with a view to creating a society where there would be no democracy, no rule of law, and no fundamental right. In view of the situations prevailing since 1958, it seems that the chalked out plan has, indeed, become successful.





**DECLARATION AS A REMEDY UNDER SPECIFIC RELIEF  
ACT, 1877**

*by*

Naima Huq

Declaratory relief is one of the most important form of remedy available to an aggrieved party. Its popularity can be understood by the number of suits for declaration that one comes across in the courts and also by the volume of academic writing in this respect. The popularity of the declaratory relief to the litigant is also due to the fact that cost of instituting a suit for mere declaratory relief is very low. This relief is available in public law as well as in private law. But the number of suits involving private rights is overwhelming. In its origin it was an equitable relief but it is now a statutory relief in this country by virtue of its place in the Specific Relief Act, 1877, in section 42. In simple language section 42 provides for the judicial ascertainment of legal character or right to any property by a party to a civil proceedings. The ascertainment of the legal character or right to any property may appear too simplistic but the outcome of the judicial ascertainment may occur as a complete or at least as spring board to further relief but the too simplistic appearance of this relief hides the difficulties which is posed to the lawyers and academicians alike relating to certain fundamental legal concepts enshrined in section 42 of Specific Relief Act, 1877 such as 'legal character' and 'right to any property'. Failure to understand these concepts have led to the institution of suits seeking some egoistic and at time eccentric declaration. The task of the academicians and the lawyers alike have been made difficult by the incorporation of these concepts in section 42 without giving specific meaning of these in the body of the Act itself.

The object of this paper is to seek the meaning of the legal phrase or concepts of 'legal character' and 'right to any property' and see how the courts have interpreted these which will help understanding of the width of the relief granted by section 42 of Specific Relief Act, 1877. A discussion of the other requirement of the section will be done in passing. A mass of case law exist on section 42, Specific Relief Act and it would be impossible to consider all these cases in this paper. Attention will be given to reported decisions of our courts and a selection of Indian and Pakistani case laws.



### Meaning of declaratory relief or decree

A declaratory relief means, a decree where by any right as to any property or the legal character, that is, status of a person, is judicially ascertained.

### History of enactment of 42 of specific relief act 1877

The practice of granting declaratory reliefs, which originated in England in the Equity courts has been codified in the Specific Relief Act, 1877 in Chapter V. In England decrees for declarations pure and simple were innovations introduced by the Court of Chancery and first obtained authoritative sanction by section 50 of the Chancery Procedure Act, 1852.<sup>1</sup> Before the enactment of this section the practice obtaining in English Court was not to make a declaration of right except as introductory to relief which the court proceeded to administer.<sup>2</sup> Section 50 of the Chancery Procedure Act, 1852 was re-enacted in 1854 for the Supreme Court of India in the shape of section 19, Act VI of 1854. Then came the Code of Civil Procedure Act VIII of 1859, section 15 whereof re-enacted provision of section 19 of the said Act VI of 1854. This was in the same terms as section 50 of the Chancery Act, 1852 and ran as follows:-

No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for civil courts to make binding declaration of right without granting consequential relief.

Section 50 of the Chancery Procedure Act 1852 was construed by English courts to give a right of obtaining a declaration of title only in those cases where the court have granted relief, if relief had been prayed for.<sup>3</sup> The same construction as to declaratory relief was put by Indian courts upon section 15 of the Code of Civil Procedure 1859, which interpreted the provisions of the English principles of declaratory relief in this sub-continent. The Code of Civil Procedure 1859 was repealed by the Code of Civil Procedure 1877 and the provision as to declaratory decree was later on inserted in section 42 of Specific Relief Act 1877. The terms of section 42 of Specific Relief Act 1877, however, are not a precise reproduction of the provision of section 15 of the Code of Civil Procedure 1859 and those of the English law.

1. 15 & 16 Vict. c. 86; *Deokali Koer V Kedar Nath* I. L. R. 39 Cal, 704
2. *Fisher v. Secretary of State for India* I. L. R. 22 Mad 270, P.C.
3. *Rooke v. Lord Kensington* (1856) 2 K & J 753



**Section 42 of Specific Relief Act 1877,**

Declaratory relief as formulated in section 42 of Specific Relief Act is as follows :--

**Discretion of court as to declaration of status or right :**

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny - his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

**BAR TO SUCH DECLARATION:** Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

**EXPLANATION:--** A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

**Scope of section 42**

Section 42 of the Specific Relief Act provides a remedy to the plaintiff when he can only show that he has some legal character or some right to property and that his opponent is denying or interested in denying such legal character or title. The object of the section is to perpetuate and strengthen the testimony regarding the title of the plaintiff so that adverse attack upon it may not weaken it.<sup>3a</sup> The policy of the legislature is not only to secure to a wronged party possession of the property taken away from him, but also that he is allowed to enjoy that property peacefully. In other words, if a cloud is cast upon his title or legal character he is entitled to seek the aid of the court to dispel that cloud.<sup>4</sup> Another object is to prevent future litigation by removing existing cause of controversy.<sup>5</sup>

So a declaratory decree, in its very nature does not confer any new rights but only clears up mist which may have gathered round the title to the property

3a. A. I. R. 1915 Mad 348

4. *Naganna v. Sivanappa*, A. I. R. 1915 Mad. 348

5. *Holland v. Challen* 110, U.S. 20



or to status or a legal character. When a court makes a declaration in respect of a disputed status, important rights flow from such declaration.

A judgement under section 42 is a judgement in personam as distinguished from a judgement in rem. Judgment in personam means that the judgment is binding only on parties to the civil proceeding or person claiming through them and it cannot bind strangers, that it does not affect any body or everybody as it happens in the case of judgement in rem. This has been stated in section 43 of the Specific Relief Act.

#### Essentials of section 42

It is essential to the maintainability of a suit under this section that the plaintiff should be entitled to any legal character or to any right as to any property and that his opponent was denying or is interested to deny the same and the declaration sought is that he is entitled to such character or to such right.<sup>6</sup>

#### Meaning of legal character :

A person cannot come to the court for declaratory relief unless he has a legal character or right to any property. The phrase 'legal character' was considered in *K. P. Ramakrishna Patter v. K.P. Narayana Pattar and others*<sup>7</sup> where it was stated that a man's status or legal character is constituted by the attributes which the law attaches to him in his individual and personal capacity (e.g., divorce, marriage, adoption, legitimacy, etc.) the distinctive mark or dress as it were, with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general.

Legal character, according to Holland, the jurist, is referable to such legal conditions as (1) sex, (2) minority, (3) patria potestas and minors (4) coverture, (5) celibacy, (6) mental defect, (7) bodily defect, (8) rank, cast and official position, (9) slavery, (10) profession, (11) civil death, (12) illegitimacy, (13) heresy, (14) foreign nationality and (15) hostile nationality. This list is not meant to be exhaustive. According to *Salmond* the term 'status' is usually confined to personal legal condition, or personal capacities and incapacities or compulsory as opposed to conventional personal conditions. In this sense, the expression will include personal rights and burdens to the exclusion of the proprietary relations, contractual capacities and incapacities or legal conditions imposed upon a person by law without his own consent as

6. *Sheoparsan Singh v. Ramanandan Parsad Narayan Singh* 43 Cal 694 (PC)

7. I.L.R. 39 Mad 80



opposed to condition which he has acquired himself by agreement, such as the position of a slave.<sup>7a</sup>

This legal character as contained in section 42 was intended to mean legal status and this 'legal status' is a legal right when it involves a peculiarity of the personality arising from anything unconnected with the nature of the act itself which the person of inheritance can enforce against the person of incidence.<sup>8</sup> The peculiar characteristics of individuals will constitute the status of each of them. The person may be natural person, i.e. human being or an artificial person, i.e. juristic person, like a company or corporation. An adopted son, for instance, does not quite belong to the same category as a natural born son, as also an adopted son is not quite the same as an illegitimate son and neither an adopted son or illegitimate son can be placed on even footing with a natural born son. The rights of a son again may differ from those of a daughter and the married woman in the eye of law may be a different person from a widow or even a divorcee. The character and position of each may be different.

The character or status must be conferred by law on persons viewed from the stand point of membership of the community and it can not be created by contract. For that reason in most cases one cannot contract out of 'Status' or 'Character' with which the law clothes one. A person is not entitled to a character if at the time he brings the suit he does not have that character; it would be pointless to seek such a premature declaration as it would not serve any purpose.

#### Meaning of legal right

Both *Salmond* and *Holland* propounded that every interest or right which is recognized and protected by the law of the state is a 'legal right' and every such legal right involves corresponding duty or obligation. This statement of law has been cited with approval by the Supreme Court of Pakistan.<sup>9</sup>

A legal right can be either proprietary i. e., in the nature of property or personal and it is only the latter that creates a status.<sup>9a</sup>

Declaratory relief under section 42 of the Specific Relief Act does not extend to all conceivable legal rights, it is concerned with rights which are legally enforceable rights. 'Rights' according to the definition of jurisprudence includes liability, power and duty. If the right includes liability than an action

7a. P.L.D. 1968 Kar 222

8. P.L.D. 1972 Pesh 13 (DB), A.I.R. 1959 Bom 201.

9. 1989 M.L.D. 368, P.L.D. 1978 Lah 113.

9a. A.I.R. 1959 Bom 201



can possibly be entertained not only against private individual or body but also against the government and other public bodies to determine their liability or duty or determine the validity of exercise or non-exercise of executive power. 'Right' also includes immunity, e. g., that a statute is not applicable to the plaintiff. The jurisprudential meaning of right as mentioned above undoubtedly gives the required basis to the judges to extend the scope of section 42 to the greatest advantage of the litigant particularly in respect of public interest litigation.

There appears to be little difference amongst jurists and academicians in respect of the meaning of the phrases 'legal character', 'status' and 'legal right'. The Judges in considering suits for declaratory relief refer to the meaning given to those legal phrases by the jurists and academicians. Consideration of some relevant case law will enable one to see how wide or narrow stand has been taken by the courts in respect of the meaning of the above mentioned legal phrases which are at the heart of the declaratory relief as contained in section 42 of the Specific Relief Act. At least the reported case law would tend to show that the meaning given by the court to 'right' is not as wide as its jurisprudential meaning.

#### Selected case law on legal character

##### a. Declaration as to relationship :

Section 42 of the Specific Relief Act does not provide the grant of declaration of the mere existence of a certain status, but declaration of status - a status having legal incidents likely to affect some legal rights of the parties. A suit merely for a declaration as to the plaintiff being related in a certain manner to the defendant is not contemplated by the section.<sup>10</sup> But where the relationship that confers a status also carries with it certain legal consequences, namely, maintenance, right of inheritance, etc., a suit for a declaration as to the existence of such relationship will lie even though it may not affect any person's right to property,<sup>11</sup> or even though there is no present danger to the plaintiffs's rights.<sup>12</sup>

Suits for declaration establishing a certain relationship may arise in a variety of cases involving adopted son, illegitimate child and even husband and wife. These categories of persons also have peculiar characteristic of personality attached to them and they thus acquire legal status. Cases of this

10. *Md. Akbar v. Farman*, 121 I.C. 417; *Abdul Karim v. Surraya* A. I. R (1945) Lah 266 (F.B.)

11. *Nagi v. Chhaji*, 80 I.C. 606, A. I. R. 1925 O, 210

12. *Mankuar v. Boshi* A. I. R. (1957) M. P. 211



type has been entertained by the Indian and Pakistan Courts, but so far there has been no reported decision as to declaration of relationship of our courts. These cases do not pose much of a conceptual problem and are free of controversy.

**b. Right based on contract :**

Section 42 of the Specific Relief Act recognizes only proprietary rights and it does not provide any remedy to contractual rights.<sup>13</sup>

The claim for declaration based on personal contract subsisting between plaintiff and defendant arose before the Madras High Court in *Ramakrishna v. Narayana*,<sup>14</sup> where it was contended that a declaration about contractual rights could not be claimed or granted under section 42 as such declaration could not be said to relate to any person's, legal character. Such a view has also been taken in cases like *Reshama v. Ram Dawan*<sup>15</sup> relating to rights and liabilities arising out of a hire-purchase agreement ; in *Sripat v. Sankarrao*<sup>16</sup> relating to contract of gurantee and *Madanlal v. State of Madhya Bharat*<sup>17</sup> relating to liability for payment of any amount due on account of the sale.

The above mentioned position was also approved by Murshed C.J. in *Burmah Eastern Ltd. v. B.E. Employers' Union*<sup>18</sup> where declaration was claimed that prejudicial terms and conditions that were imposed upon the service of the members of the plaintiff Union by the defendant were illegal, invalid, void ab-initio and not binding on the members of the plaintiff Union and that they were entitled to their rights and privileges including privilege, leave and other benefit hitherto enjoyed by them. Drawing on cases decided on section 42 by the Indian Courts, Murshed C. J. was of the opinion that the expression 'legal character' or 'status' denoted a character or status conferred by law on individual viewed as a unit of society and not shared by the generality of the community but only by individuals placed in the same category of character. The character itself must be conferred by law on person viewed from the stand-point of membership of the community. It is a status or cahraction conferred by law. The learned Chief Justice further stated that 'legal character' or 'status' was not a creature of contract but of law. For example, a minor cannot contract into majority nor can one who has attained majority

13. A. I. R. 1955 M.B. 11

14. I. L. R. 39 Mad 80

15. A. I. R. 1955 M.B. 11

16. A. I. R. 1930 Bom. 331

17. A. I. R. 1955, Madh B 111

18. 18 D. L. R. (1966) p. 709



under law contract himself into minority. In the facts and circumstances of the case the court held, however, that such a suit was not maintainable under section 42.

Similar view has also been taken in *Azizur Rahman v. Burmah Oil (Pak) Trading Ltd.*,<sup>19</sup> *Chowmuhani College v. Md Ismail Hossain*,<sup>20</sup> and *Manager v. Md. Sazahan Miah*,<sup>21</sup>

In *M/S Eastern Mercantile Bank Ltd v. Mohammad Shamsuddin*<sup>22</sup> where the plaintiff, an employee (on probation) of a private Bank was removed from service it was held that a suit for declaration was not maintainable in the facts and circumstances of the case under section 42, because the service was not regulated by any legal instrument and it did not involve any legal character. In another case where a bank employee was dismissed from service after compliance with the service rules and regulations of the Bank it was held that suits for declaration challenging the order of dismissal from service does not lie.<sup>23</sup>

So we see, that mere personal contractual relationship cannot be enforced by law as they do not involve any legal character or status which is one of the requirement of section 42. But legal relationship conferring rights and duties governed by a statute or the Constitution of Bangladesh are enforceable. This is not created by mere agreement of the parties. Parties to such legal relationship acquire legal status although initially the relationship is one based upon contract. Once a government servant is appointed he acquires a status and his rights and obligations as such are no longer determined by consent of both parties but by Statutes or statutory rules which may be framed and altered unilaterally by the government. The relationship of government and a person in government service is not like an ordinary contract of service between a master and servant. In the case of *M/S Malik & Haq v. Md. Shamsul Islam Chowdhury*<sup>24</sup> it was held that where the dismissed plaintiff owed money from the defendant, he cannot claim a declaration for re-instatement and must sue for money for redress. In the absence of any statutory provision protecting the

19. (1961) 13 D. L. R. 458

20. (1974) 26 D. L. R. 10

21. (1983) 35 D. L. R. 224

22. (1969) 21 D. L. R. (S. C.) 365

23. 1983 B. L. D. 197

24. (1961) 13 D.L.R. (S.C) 228 ; To the Similar effect is the decision taken in *Andhra University v. Lakshmi Monahasam* (1951) 1 M.L.J 518 at pp. 521-523.



servant it is not possible in law to grant a decree against an unwilling master that he is still his master.

In *Province of East Pakistan v. Abdul Lafif Talukdar*<sup>25</sup> the plaintiff, a government servant was held entitled to a declaration that the order of dismissal passed was illegal although the Court knew that it can not order re-instatement of the plaintiff.

Similar view has been taken in *Province of East Bengal v. Zahurul Haq*,<sup>26</sup> and *Z. M. Lal v. Secretary of State*.<sup>27</sup>

On the other hand suit for declaration that the appointment of plaintiff to a lower rank in service regulated by statute is illegal and in-operative with consequential relief, was held maintainable under section 42.<sup>28</sup>

Promotion in a service, however cannot be claimed as a matter of legal right as the right to promotion is not recognised by law as enforceable right and no right of action lies under section 42 of the Specific Relief Act.<sup>29</sup>

### C. Pecuniary right or relationship :

Section 42 of Specific Relief Act does not contemplate declaration which merely touches pecuniary rights or relationship. Thus a declaration that the transaction is sham does not lie at the instance of mere creditor who has not attached the property.<sup>30</sup>

A suit for a declaration that certain sum of money deposited by the plaintiff with the defendant as margin money is accountable by the defendant to the plaintiff<sup>31</sup> or for a declaration that the defendant would be liable to contribute to the plaintiff all money which the plaintiff as the defendant's surety would be liable to pay, do not lie<sup>32</sup>.

In the above cases the declaratory relief was refused because it related merely to pecuniary relationship between the parties as debtor or creditor which does not confer any legal character or right to property according to the meaning of section 42.

25. (1970) 22 D.L.R. 589

26. (1955) 7 D.L.R. 446 (450-451)

27. A.I.R. (1944) Lah 240 at p. 266

28. *Pakistan v. Muhammad Abdul Kuddus* (1968) 20 D. L. R. 333

29. *Province East Pakistan v. Mvi Lutful Haq* (1964) 16 D.L.R. 168 ; Azad J & K Government v. Allatidita P.L.D. (1966) Azad J & K 66

30. A. I. R. (1962) Andh pra. 25 cited at p. 744 ante

31. A. I. R. (1937) Lah 389

32. A. I. R. 1937 Lah 25 ; A.I.R. 1930 Bom 331



Suits which involve something more than pecuniary relationship, one which form a justiciable right like entitlement to funds or shares in money are maintainable under section 42. In *Humayan v. Md. Khan*,<sup>33</sup> the plaintiff instituted a suit against her husband and two bank with whom money had been deposited, for a declaration that the money belonged to herself and not to her husband. The court allowed the relief asked for.

Similarly, a suit lies for declaration that the plaintiff and the defendant are entitled to certain money in the hands of a third party in certain shares.<sup>34</sup>

There is another reason why declaration relating to purely contractual or pecuniary relationship is not maintainable, that is, that law provides alternative remedies in the shape of damages or compensation.

#### d. Public Right

Public law confers legal character or status on voters or ratepayers giving them locus standi to seek declaration when there is a denial or purported denial of the character or status.

A suit by an individual rate payer against Municipal Committee that the act of Municipal Committee was illegal or ultra vires and that the sale of municipal land by the authority was in contravention of Municipal Act, was held maintainable by an Indian court.<sup>35</sup>

The enforceability of public right has been considered by the Supreme Court in this country. In *M. A. Tariq V. East Pakistan Secondary Education Board*, a suit for declaration simpliciter contemplated in a case where an act or an order of a statutory body is in excess of its jurisdiction was held maintainable.<sup>36</sup>

In another case the High Court of Lahore enforced the exercise of power by statutory body under section 42 of the Specific Relief Act. Although the question of maintainability was not in issue, but it appears that the power of the statutory body generated a corresponding right giving necessary locus standi to the plaintiff to maintain the suit.<sup>37</sup>

Section 42 is wide enough to accommodate a declaration as to the effect of a statute, order or notification if the plaintiff's legal character or his right to property is affected by the said statute, order or notification. This, therefore,

33. A. I. R. 1943 P.C. 94

34. A.I.R. 1939 Sind 107

35. A.I.R. (1961) Punj 332

36. (1964) 16 D.L.R. 298

37. P.L.D. 1988, Lah 658



has the potentiality of providing substantial relief against excesses by public authorities. Many statutes and Ordinances which encroach upon legal character or right to property of a citizen also seek to oust the jurisdiction of civil court to question the acts and omission of public officials under the Statute and Ordinances in question. This ouster of jurisdiction of civil courts prevents an aggrieved person to invoke section 42 of the Specific Relief Act in respect of matter which deserves scrutiny by the courts for, example, action under Requisition and Acquisition of Property Ordinance, 1982.

There appears to be no prohibition against invocation of section 42 Specific Relief Act against the Government or Statutory body to enforce a duty or exercise of power. Although in respect of public law rights, the enforcement normally is by way of the prerogative writs under the Constitution, in appropriate cases section 42 of the Specific Relief Act can possibly be invoked at least in cases where the statutes in question do not seek to oust civil court jurisdiction.

#### Meaning of right to property

Right to property' includes rights as to or in relation to a particular property. The expression legal character and right to any property have been used in this section disjunctively and not conjunctively so as to entitle the plaintiff to seek declaration on the exclusive basis of one or the other.<sup>38</sup>

#### Selected case law on right to property :

The expression 'any right to any property' does not include any and every right in the property. In *Pitchayya v. Venkata Krishnayya*,<sup>39</sup> it was held that an agreement to sell property in favour of a person gives him right as to or in relation to property under section 42. Section 42 does not require that the plaintiff should have a right in the property which is the subject matter of the suit.

But Lahore High Court held that suit for declaration of title to property on the basis of mere agreement to sell was not maintainable as it did not create any right, title or interest in the property. The proper mode of redress for the plaintiff would be a suit for a declaration and specific performance of contract.<sup>40</sup>

Also in another case, A agreed to sell certain property to B and subsequently got the property mutated in the name of C on the alleged partition

38. *Bhoop sing v. Tarif Sing* A.I.R. (1952) All 392 at. p. 395

39. A.I.R. 1943 Mad 497

40. P. L. D. 1986 Lah 399.



which was later found to be untrue. On the allegation that A & C were attempting to sell the property to third persons, B filed a suit for a declaration of his right under the contract and for an injunction against A & C seeking to restrain them from alienating the properties in favour of third persons. It was held that in the case of an agreement to sell, the parties to the agreement are not entitled to legal character nor can it be said that a person, who has agreed to purchase has got any right to any property for the simple reason that a mere agreement to sell does not create any interest or any right in the property agreed to be purchased. Under these circumstances, it is not a case in which the plaintiff can obtain any declaratory decree under section 42. It was further held that B would be entitled to the relief of perpetual injunction claimed. A person who has agreed to sell his immovable property is more or less in the position of a trustee for the person to whom he has agreed to sell the property.<sup>41</sup>

The words 'as to right in the property' have been interpreted by the Indian Courts widely to give relief under section 42 to a person interested in private trust, a person seeking attachment of property or even to receive compensation from a public body for the removal of fixture attached to the building.<sup>42</sup> A person claiming possessory right, a bargadar, even a trespasser, is entitled to declaration against any body except the true owner.<sup>43</sup> A landlord who is in possession through his tenants may sue for declaration against one who claims the land.<sup>44</sup>

But right of pre-emption is not enforceable by mere declaratory decree<sup>45</sup> for the very reason that there is an alternative remedy. Also this section has no application where the plaintiff seeks declaration as to a right which has ceased to exist.<sup>46</sup>

The right must be an existing and not a mere *spes successionis*<sup>47</sup> or right that is to come into existence at some future time or right which is dependant on fulfilment of some condition. Where a bid for sale of property was subject to prior approval of the government the highest bid, per se, would not create any contractual right for the sale of the property to such a bidder unless the bid was approved by the government. The mere fact that a person's tender was the highest could vest in him no right to compel its execution. Unless the bid, considering it to be the highest one, was accepted or approved by government,

41. A. I. R. 1976 Gujrat p. 156.

42. I. L. R. 44 Cal 87 (P. C.)

43. (1975) 27 D. L. R. 385.

44. I. L. R. 10 Cal 1076.

45. A. I. R. 1929 Bom 84 at p. 86.

46. 41 I. C. 396

47. A. I. R. 1928 Lah 831.



person bidding had, prima facie, no vested right in the property and no valid contract could be said to come into existence for the enforcement for which a suit would lie.<sup>48</sup>

"Property" includes both moveable and immovable property as well as choses in action. An attempt by the defendant to attach the goods belonging to the plaintiff in execution of a decree obtained by the defendant against another person, gives the plaintiff a cause of action to sue for a declaration under this section.<sup>49</sup> But declaration relating to goods are rarely encountered in reported decisions.

Even if the plaintiff succeeds in satisfying the requirement of 'Legal Character' or 'right to property', his prayer for the desired declaration may fail if the other requirements of section 42 are not satisfied. Many a time a suit for declaration fails for lack of these other requirements and the question whether the plaintiff did have 'legal character' or 'right to property' do not get determined. These other requirements of section 42 are briefly considered below.

#### **'Any person denying or interested to deny'**

A suit under this section is usually brought when any person denies the status or the right in the property of the plaintiff. Even if the plaintiff has a present existing interest no cause of actions accrues to him until there is some infringement or threatened infringement of his right. A plaintiff should not be allowed to rush into court on some imaginary apprehension of future injury when there is no impediment thrown in his quiet and full possession and enjoyment of his right.

A plaintiff is entitled to obtain a declaratory relief in respect of fraudulent *Kabala* obtained by the defendant and in granting the relief the court will see whether there is any impending danger or whether the plaintiff really apprehends that an interested person may deny the plaintiff's title.<sup>50</sup>

#### **Consequential relief : The proviso**

The meaning of the proviso to section 42 of the Act is that a mere declaration should not be granted where the plaintiff is entitled to further relief which he omits to claim. The consequential relief is that which directly flows from the right or title to the property, declaration of which he seeks in the suit.

48. P. L. D. 1987 (S. C.) (A J & K) 99.

49. A. I. R. 1938 Lah 574 at p. 575.

50. 11, D. L. R. 424.



Where the plaintiff, whose right is denied by the defendant is out of possession and the defendant is in possession, the 'further relief' in section 42 would be recovery of possession and a suit for mere declaration of title without prayer for possession is barred under this section.<sup>51</sup> But when the plaintiff is in possession of the suit property, he need not ask for consequential relief.<sup>52</sup> Also the plaintiff being in possession of the suit land need not pray for consequential relief i. e., confirmation of possession,<sup>53</sup> but when the plaintiff fails to prove his title, he cannot claim any consequential relief from a non-existent title.<sup>54</sup>

Also when a declaration is a sufficient remedy for the plaintiff he cannot be compelled to seek a consequential relief.<sup>55</sup>

The plaintiff is not entitled to seek a consequential relief if it occurs subsequent to the institution of the suit.<sup>56</sup>

From the above case study it is seen that the object of the proviso is not to bar any and every suit that does not also pray for consequential relief. A bare declaration can be obtained when no immediate right flows from such declaration. Remote right does not come within consequential relief. This consequential relief has been explained in *Shamsul Huda v. Jalaluddin Ahmed*<sup>57</sup> when the question of bar was raised before the court. The court may determine firstly -- that the plaintiff is able to seek a relief and secondly - that he has not omitted to do so. The proviso does not refer to relief which is not at all necessary. If the plaintiff is entitled to a relief, on a mere question of some technicality his plaint should not be thrown out.

This section does not empower the court to dismiss a suit in which the plaintiff being able to seek for further relief omits to do so.<sup>58</sup> When the proviso is attracted, the court should, instead of dismissing the suit, give the plaintiff an opportunity to amend the plaint so as to add a prayer for consequential relief.<sup>59</sup>

51. (1958) 7 D. L. R. 6

52. 12 D. L. R. 488.

53. (1961) 13 D. L. R. 538.

54. (1962) 14 D. L. R. 44

55. 9 D. L. R. 44.

56. (1969) 31 D. L. R. 5.

57. (1979) 31 D. L. R. 5

58. A. I. R. 1925 Cal 233.

59. A. I. R. 1942 Cal 394.



### Conclusion

The terms "right to property" or "legal Character" are wide and it would seem that the position has not been reached where one can draw an exhaustive list or claims that may be incorporated within either of these terms. This is helping to maintain the flexibility which is desirable in respect of this great relief which seems to have the capacity to adapt to changing need and time. Although to a certain point the jurisprudential and judicial meaning of either of these terms converge but the jurisprudential meaning seems to be wider and there seems to be no reason why the same wide view can not be adopted by the courts. But the courts appear to have developed some technical rules which tend to limit the ambit of the relief and this has resulted in some amount of uncertainty for the lawyer and litigants in respect of the prospect of a particular declaration being acceptable to the courts. The great potentiality of declaratory relief in the field of public rights has not yet been tested in the reported cases and difficulty remains in relation to the type of public right that comes within the scope of declaratory relief under section 42 of Specific Relief Act, 1877.

It may not be out of place to note that proposals for widening the scope of declaratory relief came from the Law Commission of India prior to the enactment of Specific Relief Act of 1963 in India. The Indian Law Commission expressed the opinion that:

Under the existing law (i. e., Section 42, Specific Relief Act, 1877), a declaratory decree can be obtained apart from cases involving a legal character, only in respect of proprietary right. But there is no reason, except in apprehension as to multiplicity of declaratory suits why this beneficial remedy should not extend to all legal rights".<sup>60</sup>

The beneficial aspect of the declaratory relief is not far to seek. The Indian Law Commission was of the opinion that the apprehension of multiplicity of suits in the wake of liberalisation of the provision in question is exaggerated. There has been prolonged controversy as to whether section 42 is exhaustive or whether declaratory action lie in cases not covered by it and whether any particular right is a right as to property or not. The Indian Law Commission was of the opinion that if the relief was extended to legal right of all kinds it might, instead of multiplying litigation, lead to its reduction. Certainty and security in respect of ordinary legal rights are as important as in the case of proprietary rights. The discretion exercised by the Courts in relation to the

60. As Quoted in Annand & Iyers' : *The Law of Specific Relief*, Vol. II 8th Edition (1982), at p. 907.



grant of relief acts as a controlling mechanism to dispel the apprehension of those who do not like to see the widening of the scope of section 42 of the Specific Relief Act. The author of this article is in support of the widening of the scope of this beneficial relief in this country either by way of liberal construction by the courts of section 42 or by legislation.



## CONFLICTING NORMS IN PRIVATE INTERNATIONAL LAW : AN APPRAISAL

by

Mizanur Rahman

The world today is divided into more than 170 sovereign independent political entities called states. Almost all of them have their own system of municipal law, each of which is different from the other. These systems include the 'conflicting law' as an attribute of the legal system.<sup>1</sup> In federal states we observe the presence of more than one legal system, which are mostly micro in nature. Each of these systems differs from the other, because of the divergent nature, outlook and different principles followed by them in regulating legal regulations. On the other hand, the personal laws or the religious laws of an individual, specially in the countries of the East transcend national territorial boundary. This is so, because they are based on the same religion in which particular group of legal relations are regulated by these religious norms (generally in matters of marriage, divorce, succession etc.). Personal law depends on the religion or on the tribe to which a person belongs, and concerns him or the persons of the same tribe or religious beliefs only. In this paper an attempt is made to analyse the basic criteria of 'conflicting norms' in order to determine their place and the role played by them in the body of rules known as Private International law.

II. Although the existing legal systems of the West are mostly based either on Roman or Common Laws, even then, they differ from each other for each of them serves the purpose and demands of their respective society.<sup>2</sup> These differences gave birth to the objective necessity of having certain group of principles and norms for the cases involving a 'foreign element'.

Private international law is characterised by some specific means and methods of regulation of rights and obligations of the participants in legal relations of international nature. What is meant by this is that, in private international law (PIL) two methods play decisive role in legal regulation of various problems : conflicting method and method of material law regulation. PIL, which in many countries is still named as 'Conflict of Laws' is indebted for its emergence to the conflicting method. Whereas in other branches of law

1. Graveson R. H., *Conflict of Laws*. 7th edition. London, 1974.

2. *Op. cit.* p. 5



conflict of laws carry only secondary importance, this notion is of paramount importance to PIL. Since in PIL relations i. e. relations with a foreign element, the court, at the very outset, has to decide which of the conflicting laws needs to be applied in the given case -- law of that territory in which the court deciding the case is located or foreign law i. e. law of that state to which the foreign element involved in the case belongs? Such conflicts are generally resolved in PIL by the application of the so called 'conflicting norms' which decides the question as to the choice of law i. e. which system of law, municipal or foreign, must govern the case.<sup>3</sup> In other words, conflicting norms determine what system of internal law shall constitute the *Lex causae*.<sup>4</sup>

III. The oftly used term 'foreign element' needs some explanation. The notion of foreign element includes either any one, more than one or all of the following four factors :

- a) when the subject of the civil law relations is a foreign physical or legal person, for example a citizen of Bangladesh marries a citizen of the USSR in the USSR. Here the citizen of Bangladesh will be treated as a foreign element by the Soviet legal system;
- b) property i. e. the object in connection with which the legal relation has grown or developed is located in the territory of a foreign country, e. g. a Bangladeshi national owning a house in Czechoslovakia expires there leaving behind his nominees in Bangladesh. Here the house of the deceased is a foreign element before the Bangladeshi court;
- c) legal incident in connection with which legal relations arise, change or evade, occurs in a foreign territory, e. g. a tourist bus of Bangladesh Parjatan Corporation with some foreign tourists falls into an accident causing serious injuries to some of them and the question of payment of compensation and insurance arise. Here the very incident occurred in the territory of Bangladesh although the claims of compensation and insurance might be made in the courts of the respective countries of the affected tourists, for which the incident is a foreign element in the sense of its occurrence in a foreign territory;

3. More elaborately see : Boguslavsky M. M., *Private International Law*. (in russian). Moscow, 1982, pp. 81-82.

4. North P. M. Chesire's *Private International Law*. Ninth edition. London, 1974, p. 58



- d) Legal consequences of an act appear in a foreign country. The following example should suffice to explain: 'A' of the USSR after his father's death sells his father's house. 'A's sister married to a Pole living in Poznan (Poland) files a suit in the Polish court questioning the validity of the selling. Here, the legal consequence of the afore-mentioned deed appears or is felt in a foreign country, and this too is considered as a 'foreign element'.

The following example reveals the complexity of the situations involving foreign elements: A Bangladeshi marries a citizen of Peru in the territory of the USSR and after two years the Bangladeshi decides to divorce his Peruvian wife who has a son born in the USA. Now the Bangladeshi court is asked by the petitioner (wife) to decide on divorce, legitimacy of the child, alimony etc. Naturally, the court is faced with the question as to which law should be applied to resolve the issue - law of Bangladesh according to *lex fori* or the laws of the parties involved i.e. Bangladeshi or Peruvian law according to *lex patriae* or the Soviet law according to *lex loci actus* or the law of the USA according to place of birth of the child or the law of any one of the countries involved in the matter so that the child's interests can be best preserved? This is where the conflicting norms come into operation.

IV. From the ancient time the development of trade, commerce and other relations including matrimonial between the citizens and organisations of different states created constant problems of their legal regulation. The demand for effective regulation of trade necessitated some legal means which would guarantee *inter alia* the civil rights and obligations acquired in another state. This necessity has become acute, specially in the last century as a result of intense development of science and technology forcing a tremendous development of inter-state relations. This has been quite nicely expressed by the Indian lawyer R. C. Khare: "The development over the course of centuries of social and commercial intercourse among men of different nations has presented a continuous problem of legal organisation. The establishment of effective international commerce demanded legal means of assuring the recognition in one country of acts performed in another. Just as much of Municipal law arises from the pressure of social needs, so in the sphere of international private relations, principles and rules were and are still being involved to deal with private law problems of international intercourse. Herein



lies the need for establishment of a body of rules of conflict of laws in each municipal legal system."<sup>5</sup>

International division of labour and international specialisation in production has made the countries of the world interdependent and now a days no nation can remain isolated. Moreover, in this century this dependency has deepened due to the emergence of transnational corporations in the economy of different countries. No doubt, these corporations play a vital role in the economic development of a country but their negative effects might surpass the positive ones if the countries concerned do not enact proper legal means to regulate the activities of these corporations. In this context, the developing countries should remain more vigilant since the problem of sovereignty is directly connected with economic penetration of transnational corporations.

The advancement of communication is making the world still smaller. Mutual relations among people of different countries, may it be in the sphere of economy, family or other spheres, made it imperative to regulate these multiple and diverse relations. Regulation of all these relations is impossible without having a definite group of norms in every legal system which we call 'conflicting law' of the country.<sup>6</sup>

V. The jurisdiction of municipal law is restricted within the boundaries of a particular state. This obvious fact alone leads to collision between different legal systems, each having its own territorial jurisdiction. Quite often, the court of a country while judging a case considers foreign law and whenever necessary applies them. But we know that state sovereignty demands exclusive supremacy over its own territory, i.e. jurisdiction of a state spreads over all within its territorial boundary. In other words, court of a country *stricto sensu* can refrain from consideration or application of foreign laws. However, present day international cooperation objectively demands consideration, respect and even in some cases application of foreign laws. This consensus has led to the present state of things when in the municipal law of a country there are special norms showing the possibility and boundaries of application of foreign law, which the court is bound to apply rationally. Thus we find that in the contemporary world there is no possibility of any country being the strict follower of the dogmatic notion of sovereignty and not to apply foreign laws. Moreover, the very application of foreign law under no circumstances means the denial of sovereignty, rather it is one of the forms of its realisation. The state concerned has only the right to allow or not to allow

5. Khare R. C. *Lectures on Private International Law*. Allahbad, 1982, p. 10.

6. Krilov S. B., *Private International Law*. (in russian) Moscow, 1930, p. 43.



the possibility of the application of foreign law in its territory in definite legal relations with the consideration of foreign material law. The state generally draws the boundary line and the forms of application of foreign law. This is done in Private international law by means of the so called 'connecting factors' indicating the proper foreign law to be applied in any particular case.

Every factual situation contains elements which, in given system of conflict of laws, indicate which legal system or systems shall or may govern those facts. Once the relevant legal elements in a case have been defined and the whole issue allocated to its correct legal category within the legal system of the forum, it becomes possible by the application of connecting factors to decide whether the question before the court shall be determined by local or foreign system of law.<sup>7</sup>

Law of a state prevails not only over its citizens but also over each and every physical and legal persons including aliens residing within her territory. As has already been noted, the state may allow the application of foreign law by her own will. On the other hand, national laws are always addressed to its nationals irrespective of their location. A state, of course, cannot directly influence the civil status of its citizens located in a foreign land or of their deeds in a foreign country. But as has been quite aptly put by the Soviet Professor Krilov that "a state can show its relation only by denying the legal defence of such actions abroad on return."<sup>8</sup>

Therefore, in order to lead a normal international life a state is somewhat compelled to demarcate the territorial jurisdiction of her municipal law and spell out the scope of application of foreign law. The application of foreign law is solely dependant on municipal law. Hence Private international law is treated by legal experts both in the socialist and capitalist countries as a branch of municipal law. It however needs mentioning that according to the generally accepted notion, PIL although taught in most of the universities as an independent branch of municipal law, in fact, constitutes an integral part of the national civil law.

VI. Arguing the necessity of conflicting laws Graveson writes : "The main motivating force of law is the necessity of regulating social life whether in national or international sense; so that it can develop and exist. What concerns the English law (may concern other systems too - M. R.) is the

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7. Khare R. C. *ibid.* p. 27

8. Krilov S. B., *ibid.* p-43



désire to do justice in cases complicated with foreign element. This is the practical and theoretical justification for this branch of English law".<sup>9</sup>

No court can do proper justice if it absolutely ignores the existence of foreign law or any right acquired abroad or refuses recognition to foreign court judgements. For example, if two Britons sign a contract in Dhaka regarding selling of goods in London and the payment is made in Dhaka, the English court would surely be not in a position to do proper justice if it fails to apply the Bangladesh law regarding the validity of the contract. Any other course would result in flagrant injustice. According to Lord Morris "to find a justifiable decision of the case is one of the major factors influencing and developing the law".<sup>10</sup>

Without *under estimating* the importance of justice in law, it should be noted however, that it would rather sound idealistic to consider justice or the desire to do justice as the *leit-motif* for the emergence and existence of conflicting norms. It can hardly be argued that existence of conflicting norms depend primarily on a number of objective factors although subjective factors too play a definite role.

Many western lawyers while talking about Private international law in general and conflicting norms in particular, try to connect the problem of recognition and application of foreign law with the principle of 'reciprocity' explaining that denial by a court to apply foreign law may result in the subsequent denial of the application of its law by another country. To say the least, this would have very adversely affected interantional trade and commerce.

Many of the British writers on this topic, in explaining the basis of conflicting laws, quite often exaggerate the importance of 'comity'.<sup>11</sup> Graveson, for example, holds the opinion that "in our time, although very rarely, English courts would apply foreign law if required by international comity".<sup>12</sup>

The doctrine of comity provides an inadequate and unsatisfactory basis for the modern conflict of laws, because the primary duty of a court is to do justice according to law. It is in pursuance of this duty i. e. the duty of the

9. Graveson R. H. *ibid*, p. 7

10. Lord Morris. *The Spirit of Justice*. Haldance Memorial Lecture. London, 1974, p. 5

11. North P. M. *ibid*, p. 5

12. Graveson R. H. *ibid*, p. 7



court to do justice according to law, that reference is made to systems of foreign law. In the opinion of Dr. Cheshire "the fact is, of course, that the application of foreign law implies no act of comity, no sacrifice of sovereignty. It merely derives from a desire to do justice."<sup>13</sup>

VII. In the legal doctrine quite often one might find authors who share the view that on principle conflict may arise in any branch of law albeit mostly in civil law. In fact, we come across many cases which lie in between different branches of law and it is very difficult to draw any clear-cut line between them. Therefore, in view of these authors, any involvement of foreign element is treated as a 'conflict'. It is rather difficult to agree with such a concept. Professor L. A. Lunts quite justifiably warned about wrong interpretation of a few occurrences in financial law in the light of 'conflict'. In some cases the Court recognised the application of foreign law regarding nullity of contracts short of going through proper process. Prof. Mann illustrates a case when a German court applied English law regarding the nullity of contract because the parties did not pay requisite fees. Mann in this case deals with the application of foreign fiscal law. "But, the norms, according to which payment of requisite fees for the deed makes the contract itself void is a civil law norm, because in this norm it is said about the civil law consequences of the formalities to be maintained and hence this example does not at all illustrate the application of foreign fiscal law."<sup>14</sup>

Arguments of those authors who consider *inter alia* that conflict may arise in the sphere of criminal and administrative laws, are more difficult to accept due to the fact that these branches of law have strict territorial jurisdiction and are intimately related to state sovereignty. On the contrary, PIL relations have special type of structure wherein the subjects enjoy free choice of law (autonomy of will or *lex voluntatis*). This criterion i. e. free choice of law or equality of the subjects of civil law relations differentiate it from other legal relations involving foreign element in other branches of municipal law.<sup>15</sup> From the aforesaid it can be concluded that conflict of laws arises only in the civil law.

VIII. If the territorial jurisdiction of the conflicting norms are taken into consideration then conflicts can be classified into three major groups : conflict

13 . North P. M. *ibid.* p. 8

14 . Lunts L. A. About the essence of conflicting norms. (in russian) - *Journal of the Soviet Institute of Legal Science*, Moscow, 1969, p. 107.

15 . Sokolov V. A. *The question of differentiating Inter-state and Private International Legal Relations.* (in russian) - *Voprocitecii prava i gosodarsvinnoe stroitelstvo*, Tomsk, 1979, No. 2, p. 96.



of laws at the inter state level; inter regional conflict and interpersonal conflict. A few words on each of them will make them clear :

- a) conflict of laws at the inter-state level i. e. when conflict arises between the legal systems of two different states. These are conflict of civil law norms of different states. The term 'inter-state conflict' has different meaning in different branch of science. Terminologically speaking, it would have been better to avoid this term in the legal science. However, for easy writing this term is used to denote exclusively the conflict of civil law norms of different countries and not the conflict in its political, economic or military connotation. The following example is likely to give a better understanding of the issue. Different states have different attitude towards full 'legal capacity' of its nationals. For example, we are to decide on the capacity of a Belgian national habitually residing in the UK. According to Belgian law (*lex patriae*) he attains full legal capacity at the age of 21, while according to English law (*lex domicilli*) it starts at 18.
- b) Interregional conflict of laws : These are generally conflicts in federal states i. e. where a state comprises a number of territorial political units (state ; province; republic etc.) each having its own legal system (eg. USA, USSR, Canada, India, Nigeria etc.). Conflict might arise between these different legal systems which we have earlier identified as micro legal systems, and the aim of conflicting norms is to regulate these complex relations. For an example we may refer to section 15 of the Family and Marriage Code of the RSFSR (Russian Federation), where the minimum age limit for marriage is fixed at 18, whereas section 16 of the Family and Marriage Code of the Ukraine SSR fixes the age at 18 for men and 17 for women. Now, marriage of a 17 year old Russian girl registered in the territory of Ukraine on principle can be put to question i. e. question might arise as the validity of the marriage on her return to the Russian Federation.
- c) Interpersonal conflicts : These conflicts spring up when within a state there function different religious or tribal legal systems, or the subjects of law belong to different religion or tribe, each regulating the same relations in question (generally those of marriage, divorce, succession etc.) in its own specific way. Religious norms regulate the behaviour of the followers and bind them by providing a definite system of relation with followers of other religions. Tribal norms



also perform the same function for members of the tribe. These norms often transcend territorial boundaries. Let us imagine a situation when a muslim marries a christian girl and at a later period marries another muslim girl (polygamy is not prohibited in Islam). Now the second marriage is questioned by the christian wife on considerations of her own personal law binding her to follow monogamy and she considers the second marriage as *ipso facto* establishing divorce from the part of the husband. She might also question the validity of the second marriage according to her personal law.

In countries where Islam commands strong influence, the degree, mode and volume of regulation by Islamic law are different due to the fact that different states have different outlook toward religion.<sup>16</sup> We can broadly divide Islamic states into two groups : those where Islam enjoys the status of state religion and has stupendous influence on legal relations (North Yemen, Saudi Arabia, Iran, Kuwait, Libya etc.), and secondly, those where Islamic law mostly limits its supremacy in the civil law matters connected with marriage, divorce, succession etc. (Bangladesh, Malayasia, Sudan etc.).<sup>17</sup> Whatever may be the case, inter religious matrimonial relations can generally lead to such above mentioned conflicting cases.

Religion and usage play a vital role not only in the private and personal life of a person but also regulate a large number of civil law relations in the traditional societies of Asia, Africa and Latin America. If conflict arises between religious norms and the state legislature, generally the legislative norms prevail, but in case of conflict between religious norms and norms of usage, priority is given to the latter.<sup>18</sup>

In many developing countries interpersonal conflicts constitute the majority of cases awaiting resolution by the courts. The picture could hardly have been different if we consider that only in Kenya, Sudan, Tanzania and Uganda there function more than 200 systems of tribal laws.<sup>19</sup>

16 . Anderson J. N. D. *Changing law in Developing Countries*. London, 1963, pp. 241-245.

17 . Minakov A. I. *Interpersonal Conflicts in some of the countries of Asia, Africa and Latin America*. (in russian) -- *Vestnik*, series Law, Moscow State University, 1978, No. 4, p.33

18 . Krashimikova N. K. *Hindu Law : Historical evolution and extent of application*. (in russian). - *Vestnik*, series. Law Moscow State University, 1978, No. 3 p. 5.

19 . Sinitsina I. E. *Tadition and Traditional Law in Modern Africa*. (in russian) Moscow, 1978, p. 44



The main criterion of interpersonal conflict is the absence of direct relation of these norms with any particular territory. The underlying principle is that wherever a person goes he carries with him his personal law. This accounts for the unusual complex nature of interpersonal conflicts.<sup>20</sup> However, to cope with the situation, developing countries are enacting new laws to replace or supplement the norms of religion and usage. The main trend in the legal policy of the developing countries is the search for new legal forms, in view of the existing complex situation, to effectively regulate various social relations. The necessity of such transformation is enormous in building a new legal system which in the words of the late African leader Nkruma, should "neither be foreign nor non-understandable to the bulk of the population".<sup>21</sup>

IX. Whether the conflicting norm, or more accurately the connecting factor, relates to marriage, succession, contract, tort, land or any other institution known to law, its nature, characteristics and essence are defined by the local court whenever such definition becomes the duty of that court before which the question is brought. Such unilateral and somewhat arbitrary interpretation of conflicting norms by the court gives rise to a number of problems, both legal and ideological. Not only that different legal terminologies might bear different connotation in legal systems of opposing socio-economic formations; but even within the legal systems of the same socio-economic formations identical legal terms might have completely different meaning and application. In western legal systems such differences generally occur owing to different basis of division between material law and procedural law.

Moreover, some legal concepts are used to denote completely different relations in the legal systems of different countries. For example, in England and Japan contract is said to be concluded in the place form where acceptance is delivered; whereas in the vast majority of other countries contract is said to be concluded in the place where acceptance is received. This indicates the 'national character' of conflicting norms.

Conflicting norms are 'national' not only in the sense that every country possesses her own system of conflicting norms, but also in the sense that every country accords her conflicting norms specific meaning in accordance

20. For an analytical study of interpersonal conflicts see : Szacry I. *Conflict of Laws in the Western, Socialist and Developing Countries*. Budapest, 1967, p. 296.

21. Nkruma K. *The Future of African Law*. -- Tribune, Colombo, 14 July, 1962.



with her civil law, Civil codes etc.<sup>22</sup> This goes to signify that the 'form' of the conflicting norms may be identical, though their 'essence' quite different. This results in the so called problem of 'conflict of qualification'. According to the dominant western doctrine such 'conflicts of qualification' are generally resolved by applying the law of the court - *lex fori*, and not according to the law of the country to which the connecting factor indicates i. e. *lex causae*. This doctrine leaves sufficient room for the judges to 'qualify' the law in such a way which practically restricts to the minimum any possibility of application of foreign law.

However, natural justice demands that law should be applied uniformly in identical relations. This primarily reflects the aspirations of the developing countries. One of the ways to achieve this is to enact on an accelerated rate material norms which will directly regulate legal relations with foreign elements. Another effective way to attain this is to unify the rules of Private international law, so as to ensure that a case containing a foreign element shall result in the same decision irrespective of the country of its trial. This should be the common ground of the developing countries wherefrom the struggle for the establishment of a New International Legal Order can be launched. Material laws still occupy a very small portion in the sum total of norms known as Private international law. But recent developments in PIL testify that this trend is gaining momentum, and may be that the time is approaching nearer with each day passing when the expression 'conflict of laws' used to denote PIL would sound ridiculous and remain as a specimen of the historical past.



22. Lunts L. A. et al., *Private International Law*. (in russian) Moscow, 1984, p. 64.



## THE SOCIALIST APPROACH TOWARDS HUMAN RIGHTS

by

M. M. Ahsan Khan

### Introduction:

In every stage of human civilization the "human rights" has its own contents and connotations. Almost in a similar way every ideology and socio-political system views human rights in its own way and pursue its own ways and means to translate the theoretical concepts to real material life. In this modern highly technological world, where different conflicting ideologies are in fierce struggle to establish their legitimacy and credibility, a proper assessment about the degrees of success and failure of any particular doctrine or ideology with its close relationship with the conceptual aspects of human rights and their practical implementation in the socio-economic life of concerned state is not only needed for researchers and intellectuals, but it has a great deal of theoretical and practical importance for every conscious citizen of each and every modern state.

Socialism though passing through an unprecedented difficult time of its history, it is very rich in its theoretical contribution towards a particular type of human rights. No less important is its practical experiences in implementing those cherished human rights.

In the present context of socialist reality and realization of human rights in the socialist countries, some pertinent issues are to be researched objectively in close connection with the concepts of "Socialist Human Rights" and the practical experiences of socialist efforts in their realization. Very relevant questions are: How socialism views human rights? Are Socialist Human Rights fundamentally different from the capitalist conceptions of human rights? How far Soviet Socialism is successful in maintaining the human rights? Is Gorbachev phenomenon has any substantial effects on the human rights in real material life? Are differences between the capitalist and socialist stances on human rights have been diminishing? What would be the future of human rights in a newly emerging market-economy in the socialist countries? This paper is an attempt to answer some of these questions.



### Socialist Humanism: A Challenge to Capitalist Liberalism

Christianity with its conception of original sin and expulsion from Paradise turned man into a condemned, abject and reprehensible being. The Renaissance, mainly a revolt against medieval Christianity tried to uphold human dignity and a noble being of immense capabilities. While the conception of man as conceived by medieval Christianity made Europe stagnant and dull for about thousand years, but on the other hand, renaissance unleashed a force of creativity, scientific discovery and blossoming of human qualities. This unleashing of human capacity reached its apogee in modern capitalism. Again a revolt set in motion against capitalism, which in the name of human freedom reduced man to a slave through ruthless exploitation of human endeavours. Socialism in European horizon appeared to raise human dignity through a regulation of human life.<sup>1</sup>

Herbert Spencer's principle, "survival of the fittest", appeared to be inhumane to the Marxist doctrine of humanism. Capitalist competitive economy had been criticised for its oppressive policies and ruthless outcome making the majority of human community impoverished. The socialist doctrine accused capitalism for the conversion of human "labour into a curse, and the worker himself into a slave in conditions of private ownership of the means of production".<sup>2</sup> As a remedy Marxism prescribed the doctrine of classless society through the establishment of a set of new socio-economic conditions and values. To achieve a socialist classless society, absolute abolition of private property and establishment of a state or collective ownership under a totalitarian centralised state machinery is of paramount importance.<sup>3</sup> Against the backdrop of this conceptual and practical world-view one has to examine the seriousness of the challenge of socialist humanism to the capitalist one.

Socialism as an ideology and a socio-political theory describes the capitalist constitutional system as a "democracy for an insignificant minority, democracy for the rich—that is the democracy of capitalist society"<sup>4</sup> To a socialist mind capitalist democracy is a sophisticated institutionalised system of slavery, replacing the previous explicit oppressive methods. Marx explaining

1. See for details : Ali Shariati, *Marxism and Other Western Fallacies*, (Trans. by R. Campbell) Mizan Press, Berkeley, 1980, pp. 49-96.
2. F. V. Khostantinov (ed) *The Fundamentals of Marxist Leninist Philosophy* (Trans. by Robert Baglish), Progress Publishers, Moscow 1982, p. 227.
3. See for details : V. I. Lenin, *Izbrannye proizvegenia : v 3-Kh Tomakh*, Vol. 3 *Politizgat, Moscow*, 1980, pp. 6-9 220-228.
4. Marx, Engels, Lenin, *On Communist Society*, progress publishers, 1981, p. 80.



the essence of capitalist democracy said that the vast majority oppressed are allowed once every few years to decide which particular representative of the oppressing class shall represent and repress them in parliament and other governmental organs.<sup>5</sup>

Thus to a socialist, even the best capitalist form of democratic system is also a means of exploitation. To the socialist doctrine, all sorts of political liberty are meaningless in a capitalist society, where the economy is dominated by the capitalist class, while the working majority live in deep poverty. Liberty of housing is meaningless for a large section of people who does not find proper housing facilities. Similarly what is the meaning of the liberty of education for those who are unable to afford the expenses of capitalist education.<sup>6</sup>

To the socialist doctrine, the state machinery is to be blamed for all sorts of violation of human rights. Socialism advocates a system, which can not be realised in a typical governmental system. But in reality socialism can not avoid the state power and its machinery. Engles explaining the importance of state in different stages of development towards Communism writes that "the proletariat needs the state, not in the interests of freedom but in order to hold down its adversaries, and as soon as it becomes possible to speak of freedom the state as such ceases to exist."<sup>7</sup> But capitalism takes it an imperative to maintain state and its machinery within the wider purview of Western liberalism.

Individualism and liberalism can be treated as the ideological basis of a modern capitalist state. A capitalist state is meant for the preservation of the principles and values of Western liberalism. Western liberalism does not see any reason why a modern state should curtail the liberty and freedom of a civilized human being. The state authorities are to guarantee the liberty and freedom for all.<sup>8</sup>

Liberty of a tiny section of a capitalist society costs highly to the rest of the majority. But in various ways and means a developed capitalist state provides

5. Ibid, also see, G. N. Volkov, *The Basics of Marxist Leninist Theory*, progress publishers, 1982, pp. 62-75.

6. "The freedom is just as utterly false, serving to mask capitalist deception, coercion and exploitation, as are the other "freedoms" proclaimed and implemented by the bourgeoisie such as the "freedom to work" (actually to starve) and so on." In : Marx, Engels, Lenin, op. cit. p. 133.

7. Ibid. p. 81.

8. See for details : Andrew Levine, 'Human Rights and Freedom In' : Alan S. Rasenbaum (ed) *The Philosophy of Human Rights : International perspective*, Greenwood press, Westport, 1980 137-147.



some material assistances to the poorer or jobless sections of its population. In Socialist view, such measures are not only insufficient for their minimum material well-being, but such an approach is a disgrace to the very dignity of the human being. Frederick Engels characterising the entire human civilization writes: "From its first day to this, sheer greed was the driving spirit of civilization; wealth and again wealth and once more wealth. Wealth not of society but of the single scurvy individual – here was its one and final aim."<sup>9</sup>

Freedom and equality have their own connotations in socialist perspective. Socialism not only recognises the formal constitutional equality of every citizen, but guarantees all members the equal rights to satisfy basic needs. In return it demands from each and every adult citizen compulsory contribution to the state and collective efforts of production.<sup>10</sup> Does it mean that spectrum of the conception of human rights in socialist perspective is wider than the capitalist notion of human rights?

Formally declared democratic norms and human rights fall shorts to the socialists because of the absence of socialist production relationship. According to the socialist perspective: "Little is altered by the fact that the bourgeois state officially proclaims the principles of "equality" and "freedom", even the most democratic bourgeois state is, in fact, the dictatorship of the bourgeoisie."<sup>11</sup> Thus the dictatorship of the prolateriates appears to alter the dynamics of bourgeois human relationship. The socialist went for a qualitatively different kind of relationship between the labour forces and the remuneration of their work. In socialist view there should be no direct relationship between the productive efforts of individual labourer and his payment for that. This is the notion which created the communist principle: "From each according to his ability, to each according to his needs".

Lenin elaborating this principle wrote that the Communist labour "is labour performed gratis for the benefit of society, labour performed not as a definite duty, not for the purpose of obtaining a right to certain products, not according to previously established and legally fixed quotas, but voluntary labour, irrespective of quotas; it is labour performed without expectation of

9. Cited in : Claude M. Lightfoot, *Human Rights U. S. Style, From Colonial Times through the New Deal*, International publishers, New York, 1977, p. 46.

10. See for details : L. S. Jawitsch, *The General Theory of Law*, progress publishers, Moscow, 1981, p. 188-204. This socialist principle commonly known : "He who does not work shall not eat" See : Marx, Engels, Lenin, p. 85.

11. G. N. Volkov, op. cit. p. 225-226.



reward, without reward as a condition, labour performed because it has become a habit to work for the common good, and because of a conscious realisation (that has become a habit) of the necessity of working for the common good—labour as the requirement of the healthy organism."<sup>12</sup> According to this thesis, it would not be right to accuse Marxism of regarding human being merely as a "living productive factor" and attaching no human value to it as an individual.<sup>13</sup>

As a principle, communist regime of work sounds very good and much more humane than the capitalist principle of work and pay. But it appeared too ideolistic even to the socialists after the liquidation of the "dictatorship of the bourgeoisie". The thesis that the abolition of private property and the establishment of the dictatorship of proletariat would make people automatically interested and enthusiastic in their works proved to be illusory. Honesty and sincerity of the working class were assumed to be unquestionable due to the socialist character of the state machinery and of its absolute control on the means of production and production relations. But after the establishment of the socialist states function and role of the state power which was what to be unnecessary in optimum Communism, in practice the state power was made absolute and all pervading to make Communism workable. The main fallacy of the socialist ideology regarding the human being is that it failed to appreciate the direct relationship between individual and his economic interests.<sup>14</sup>

Soon after capturing power, the socialist regimes faced the challenge of the dichotomy of idealism and reality. Guaranteed employment and economic solvency not necessarily makes an individual more sincere and honest, and committed to the causes of humanism. Strict organisation of labour forces and appropriate economic impetus at work proved to be an imperative to make a society more productive and affluent. It appears that one of the main inherent attributes of human being is to see his every effort remunerated in terms of concrete material benefits.

12. Marx, Engels, Lenin, op. cit. p. 130.

13. "The challenge of Marxism - Leninism is that man as a productive force should be a free worker, a highly developed, creative personality. This is real and not illusory humanism." In: F. V. Konstantinov (ed), op. cit. p. 227.

14. "Man's alienation from the universe, and his conflict with it often results from his conceiving it from the view-point of materialism. . . If man is shown to be either good or evil, moral or immoral, or if he is seen from a nonabsurdist vantage he is not considered to be real" In: Ali Shariati, *Man and Islam*, University of Mashhad press, Mashhad, 1982, pp. 26, 32.



That is why "from each according to his ability, to each according to his work" was accepted as a workable principle in every socialist state. Merely in literary sense this principle may be found every close to the capitalist regime of work. But in a socialist regime of work with a fully nationalized and command economy, this principle is fundamentally different from the capitalist one and the implementation of this principle together with the socialist system of equal social services put the whole spectrum of human rights on different footings. From this view-point some socialist countries including the Soviet Union abstained from voting to the adoption of the Universal Declaration of Human Rights regarding it merely a matter of propaganda having no material support for its realization and, moreover, they considered the document insufficient for a modern man.

### **Success and failure of Socialist Human Rights**

In a sharp contrast with the capitalism, Socialism as a whole successfully provided job to every abled adult member of the society. Guaranteed job opportunity for all was not merely a formal constitutional principle, but a realization of the socialist principle of work. Together with this guaranteed employment and at least minimum state-established pay, socialism provided almost equal rights to health protection, housing, education, rest and leisure, maintenance in old age, in sickness, and in the event of complete or partial disability or loss of the breadwinner. Such rights were not only formally recognised by the fundamental law of every socialist legislation, all socialist economies without exception tried hard to realize all these right irrespective of their level of socio-political and overall economic development. Success of European Socialist countries was remarkable in this regard. Other socialist countries also had been trying to implement these rights in their own context.

Despite the apparent wider conceptual perspective of socialist understanding of human rights, totalitarian socio-political system and complete centralized command - economy in reality had been creating some serious problems for the realization of some human rights related to religious and cultural rights, rights to freedom of speech and expression of opinions and formation of associations other than socialist. Article No. 2 of the Universal Declaration of Human Rights stipulates that everyone is entitled to all the rights and freedom irrespective of his religious, cultural and political conviction and affiliation; possession of wealth or membership of any political party or group also should not be a barrier in the way of realization of any basic human rights. But socialism declaring its war against capitalism and religions up to the total abolishment of religious feelings and all sorts of private properties, in fact, ignored an important wide spectrum of human rights. Thus



rights. Thus guaranteed job opportunity together with a minimum state salary costs some human rights heavily. It is on record that under the socialist regime in various countries suppressive and oppressive policies were carried out on different religious groups and groups fighting for freedom of press, publication and other forms of expression of opinions and views. The Soviet legacy might be the richest case study of success and failure of socialist human rights in practical material life of a society.

### Socialist Regimentation and Liberalisation: The Soviet Legacy

#### a. Regime of Work and human rights

The Soviet Union is not only the first socialist state playing the leading role in the international arena on behalf of other socialist countries; its socialist pattern also served as a strong model for orientation to the rest of the socialist bloc. It is very rich in its experiences in the process of regimentation and liberalisation of entire state system as well as particular socialist principle. The Soviet experience is very useful for an objective scrutiny of socialist attempts in realization of various human rights. This is why here we can take the Soviet experience as an object of study revealing the real essence of socialist human rights.

After the Bolshevik Revolution in 1917 and a successful take over of state power the Soviet socialists went for a full-scale nationalized and command economy. But with their utter disappointment they found that the outputs both in industrial and agricultural sectors had been decreasing in an alarming rate. Initially it was thought that sabotage of the bourgeoisie class is solely responsible for that.<sup>15</sup> But after a large scale physical elimination of the capitalists or their imprisonment and migration to other countries overall situation did not turn to any positive directions. Repressive policies of the Bolshevik regime during the years of 1917-1921 directly violated the right to protection one's life and property.<sup>16</sup> Such a policy failed to raise production or to bring any material benefits to a larger section of the Soviet state. Failing in

15. "The building of the foundations of socialism came up against the desperate resistance of the Kulaks - Wealthy peasants. . . Anti Soviet revolts were instigated by them. . . the Kulaks hid grain and engaged in profiteering, calculating to strangle Soviet rule by hunger". In : B. N. Ponomarev (ed), *A short history of the Communist Party of the Soviet Union*, progress publishers, Moscow, 1977, p. 163.

16. "The soviet authorities did not confess any large-scale repression. "The dictatorship of the proletariat suppresses only the deposed exploiters, only those who attempt to restore the power of the exploiters and regain a stranglehold on the people. Soviet power used force only when it was compelled to do so by counter-revolutionaries. The working class displayed the maximum of humanity even towards its class enemies. . ." Ibid, p. 166.



this economic front and simultaneous onset of famine and food shortage throughout the country made V. I. Lenin to curtail his previously adopted socialist programmes and replace them by a New Economic Policy (NEP), which is somehow similar to a modern conception of mixed-economy.<sup>17</sup>

With the introduction of NEP violation of human rights on the grounds of possession of properties in terms of land, capital and small shop or factory substantially decreased. Along with this change suppression on religious ground also was relaxed. Religious institutions were allowed to function and to use their properties previously confiscated.<sup>18</sup> Overall NEP succeeded to some extent to rehabilitate the crumbled and famine stricken economy. Material benefits coming as it did out of such rearrangement encouraged the entrepreneurs and workers to exert more to some extent. But such a situation did not long last, as Stalin and his government did not want to live with NEP assuming it dangerous for the survival of the socialist regime. In 1930s Stalin regime ruthlessly killed hundreds of thousand people on simple grounds that they did not want to give up their rights on properties allowed by NEP or did not want to stop to show their adherence to any particular religious group or rituals.<sup>19</sup> Loyalty to any political party or group other than socialist was completely out of question in Soviet Stalinist reality. After the full-scale suppression of all types of anti-socialist groups, in 1936 the Soviet Union adopted a constitution declaring the establishment of full socialism. That

17. After the adoption of NEP many Communists lost their faith in Soviet socialist ideals, and Lenin was accused for the reversion of Soviet economy to capitalism. "Lenin did not close his eyes to the threat of a revival of capitalism and drew the party's attention to the fact that in the period of transition from capitalism to socialism the class struggle between the bourgeoisie and the proletariat did not disappear but, on the contrary, acquired new forms" Ibid. p. 210.

18. "In 1918, for example, the jurisdiction of the Islamic Shariat was abolished and lands belonging to religious organisations were nationalized. This policy, however, merely succeeded in strengthening Muslim resistance. So in 1922, the lands were restored to their former owners (mosques, madrasas etc.) in three provinces (Fergana, Samarkand, and Sir-Darya). Baymirza Hayit, 'Islam in Turkestan: perspectives on an Enduring problem' In: *Journal, Institute of Muslim Minority Affairs*, vol. 9 No. 2 July, 1988, London p. 340.

19. "After 1928 the most influential personages among the Muslims were arrested. Over one million five hundred thousand members of Dervish orders were imprisoned and takyas were closed. . . Up to the age of 18 no one was allowed to belong to any religious community. This law also prohibited the organising of any charities, founding libraries, running education classes, publishing religious literature or celebrating Islamic ceremonies in official and privately own buildings." In: Ibid. p. 341.



constitution guaranteed many human rights. But both written and unwritten socialist human rights had to live with the Stalinist reality.

Until the outbreak of the world war II Stalinist repressive policies knew no turn to the better. In the face of Hitler's aggression, Stalin was bound to change some of his policies having influence on the realization of some religious, cultural, ethnic and spiritual rights. Religious and national festivals were allowed to be celebrated openly. Religious institutions were allowed to operate with a limited scale of activities. Such a liberalized policy during the World War II was viewed to achieve two main direct aims. Firstly, to defuse the antagonism against Kremlin and tensions among the different Soviet nationalities.<sup>20</sup> Secondly, through a liberalized policy Stalin tended to achieve wholehearted support of a larger section of Soviet people in his war efforts irrespective of their national, religious, ethnic and cultural heritage or loyalties. After the war was over, Stalin reverted to his traditional policy of "Blood and Iron". Now Stalin regime did not feel any responsibility to project its human face to the outside world and no force within the country could pose any real threat to his socialist regime.<sup>21</sup>

Now the problem was to feed the people and engage them in reconstruction programmes of the country. Stalin's extremely authoritarian and totalitarian system appeared to be very helpful in the restoration process of war devastated economy. During the 1920s and 1930s Stalin regime could easily be blamed for wide spread famine in many regions of the country. But after the World War II up to the death of Stalin in 1953, his regime could easily be credited for raising industrial and agricultural outputs and their distribution to the majority of the soviet people.

Until the end of 1950s Soviet leadership in the socialist world was unquestionable and Kremlin had been successfully leading the countries,

20. In the territories of the Soviet Union inhabit more than 100 nationalities and ethnic groups. The Soviet system in theory wanted to bring legal, economic and cultural equality to all these nationalities, regardless of their socio-political development. But reality shows that the Soviet governments and the communist party utterly failed to unite these nationalities or to establish equality among them. See for details: Donald D. Barry, Carol Darner Barry, *Contemporary Soviet Politics: An Introduction*, prentice Hall International, London, 1978 pp. 101-109.

21. "It was essential to rehabilitate the economy in the liberated areas as quickly as possible. The enemy was still strong and it still resisted ferociously." This was the main argument in defence of all stalinist methods. See: S. Alexeyev, V. Kartsov, A. Troitsky, *A Short History of the USSR*, progress publishers, 1981, Moscow, p. 140.



parties and groups upholding the ideals of Socialism. But after the death of Stalin, there started a soul searching as to the wisdom of continuing Stalinist iron-fist policy, which might adversely affect the spread of the ideals of socialism. Thus Soviet state and communist party organs had to review the Stalinism and socialist concepts of human rights. Such dissidence was unthinkable before the 1960s. Now Stalinism was openly criticised for its ruthless suppression and oppression and wide-scale violation of human rights. The Communist party and Kremlin were now convinced that they must jettison Stalinism as it had earned a discredited image abroad and might adversely affect the spread of socialism. In Khrushchev era despite its better projection of socialist human rights to the outside world, in reality within the country very little had changed. In fact, Stalinism and socialism remained almost synonymous upto the mid of 1960s.

Brezhnev era promised a qualitatively better treatment to human rights.<sup>22</sup> By the mid of 1960s Soviet economy reached to a level of development, which could not be sustained only by a Stalinist regimentation. Workers both in industrial and agricultural sectors were not satisfied with the strictly regulated salaries having almost no relationship with their better efforts or real contribution to the productive process. In a bid to give a substantial boost to the Soviet economy, a new system of *Khozraschot* was introduced throughout the country. According to this newly introduced system of establishing a direct relationship between labour and salary, since 1965 every worker was supposed to be benefited from his more sincere and hard labour. But this new system of distribution of wealth faced several difficulties. Firstly, this new system failed to embrace the entire Soviet economy. Only a tiny industrial sector was selected for the operation of the *Khozraschot* system. Secondly, in the absence of private sector and competitiveness, privileged Communist leaders and bureaucrats remained almost lukewarm to introduce a system bringing financial benefits to the ordinary workers. Thirdly, in a socialist economy scope of using extra salary was also very limited. Fourthly, corruption and irregularities in determining the price of real contribution of individual workers mostly remained undetermined.

In 1970s main task of Communism-building was identified as the creation of a new communist generation, more selflessly dedicated to the cause of Communism. It is true that Brezhnev era liberated the socialist regimentation to some extent and paved the way for the better treatment of human rights. But

22. Brezhnev probably being conscious to the damage done to the human rights in the Soviet Union tried to materialise the principle of equality at state and party levels.



human rights. But Brezhnev liberalized policies created paradoxical situation. The Soviet peoples habituated with the socialist regimentation of work used the newly liberated policies to avoid their responsibilities and they remained unpunished for many crimes. Formal criticism of the activities of various state and party organs was very ineffective to face the challenge. Guaranteed job opportunity and almost free housing, education and medicare facilities kept the majority of the population unmoved to the setbacks in their professional live. Moreover, in a newly liberated situation workers could successfully fight to resist their suspension or to avoid degradation of working position.

Brezhnev era was really serious in realising some of the human rights keeping them within a wider purview of the socialist economy. Peoples were allowed to have wider scope in choosing their nature of education, work and place of inhabitation. But attention was given so that no one could cross the boundaries fixed by the State Socialism. To avoid misuse or unnecessary wastage of wealth and energy, special measures had been taken throughout the country, as indifferent attitude of the people towards state or collective properties was identified as the most dangerous social disease. In the socialist arrangement of production, indifferent attitude of the employees and workers can very badly affect the ultimate production and its quality. Quality of work and products was main concern of Kremlin in the late years of 1970s and early 1980s. But no measure could put the Soviet economy in right track. Karl Marx and Frederick Engels were quite aware about this problem of socialist mode of production and mentioned the argument against Communism, as saying: "It has been objected that upon the abolition of private property all work will cease and universal laziness will over take up."<sup>23</sup> From Lenin to Brezhnev every Soviet government tried hard to prove such assumption as mere a capitalist assumption or propaganda.

Since 1917 upto the mid of 1980s Kremlin remained stick to the socialist form of production and distribution through which the Soviets tried to realize their own concepts of human rights. Almost all sorts of human rights were taken into consideration to be implemented under a developed socialist democratic rule. As a practical socialist model, Brezhnev era, can be regarded as the zenith of the socialist democracy, the Soviets called it Razbitoi Socialism.<sup>24</sup> Lenin himself stated that "as soon as equality is achieved for all

23 . K. Marx, F. Engels, *Manifesto of the Communist Party*, progress publishers, Moscow, 1977, p. 54.

24 . See for details: *Materiali XXV Sazda KPSS*, Politizdat, Moscow, 1978, pp. 62-88 also G. N. Volkov op. cit. pp. 178-184.



members of society in relation to ownership of the means of production, that is, equality of labour and wages, humanity will inevitably be confronted with the question of advancing farther, from formal equality to actual equality.<sup>25</sup> Main test for Brezhnev era was how far it could establish actual equality, if not for the whole of the Soviet population, at least for the majority of the population. The majority of the Soviet people were almost equal, if not in all spheres of public and private life, at least in realizing those human rights which were essential to meet the basic needs for the physical survival of a human being.

#### **b. Technology and Human Rights**

Main problem of the soviet socialism during the reign of Brezhnev was how to compete the capitalist bloc in the world market and to achieve higher technological development. No less important were the problems facing the successful creation of the "new Soviet people" making the Communism a reality. For this purpose Lenin visualized the entire Soviet society and its whole population in a homogenous organic relationship. Lenin wrote that "the whole of society will have become a single office and a single factory, with equality of labour and pay."<sup>26</sup> Establishment of a system providing an equality of labour and pay appeared to be a stigma for many quarters of the Soviet people and proved to be very harmful for a speedy technological development and introduction of newly invented technology in real life.

On the other hand, capitalist technological development had been treated as inhumane because of its antagonism with the human labour. It was argued that the capitalists have been trying to divorce man from the normal productive process with the help of technology. "In the conditions of capitalism where modern technical progress gives rise to increasingly acute social antagonism, we find various kinds of "technical mythology", which absolutise the role of technology and regard it as a force hostile to man".<sup>27</sup> Socialism was supposed to create special kind of social and production relationship, where technological development would not only serve to make human productive efforts easier and comfortable for the majority of the workers, but also ensure job opportunities for all irrespective of their level of skill and physical fitness. In reality, in the absence of material impetus and dynamic technological development, socialism also failed to achieve this objective. Hence the Soviet Union being the avantgarde of the socialist bloc lagged far behind in all the parametres of development in modern life.

25 . Marx, Engels, Lenin, op. cit. 90

26 . Ibid, 92.

27 . F. V. Konstantinov, op. cit. p. 227.



### Crisis in Socialist Humanism

Almost sudden collapse of Soviet and all East European socialist systems and regimes is a serious challenge to the socialist humanism. Not a single European socialist state or government could face this challenge. The most important phenomenon is that the socialist regimes succumbed to their own internal pressure and crisis. It would be very difficult to blame any external force or pressure for the total break-down of socialist systems.

The Communists now poignantly become aware that they can not materialize their much publicised Marxist dictum that one day they would be able to provide "each according to his ability, and each according to his needs." In fact, the Marxists misunderstood human nature and his essence; physically a man may be limited but his capabilities as well as needs are ever expanding. The Marxist premises are based on the reasoning that man is merely a material and natural being; he differs with other animal on the point that he possesses a superior understanding and grasping power. Thus they ignored human's spiritual, emotional and psychological complexities. An ideology which fails to conceive human nature comprehensively can not render enduring service to the cause of human rights. The Marxists loop-sided view of humanity resulted in unleashing of wide spread terror and oppression to bring conformity to their envisioned socio-political order. Not only they failed to understand man, they also failed in the economic front. It may be that they succeeded to provide basic needs of the people to some extent, but they failed to cope with burgeoning demand of their people for consumer goods. Compared to capitalism, they promised better material benefits with an efficient and humane production relationship, all these proved to be illusory to their people. Now the whole socialist world is groping in a labyrinth to come out present predicament.<sup>28</sup>

With the emergence of Gorbachevism all East European socialist countries abandoned the single-party dictatorship and its constitutional supremacy over all state organs and absolute socialist ownership of means of production. They argued that by jettisoning these features, they would make socialism more efficient and humane. But these are fundamental tenets of Marxism; pruning of these elements cut at the very root of socialism itself. The socialist legacy and experiences of about three quarters of a century proved that these were the doctrines which were instrumental in making socialist world as an inferno.

28. See for details : M. R. Khan, *Changing Faces of Socialism*, BIIS papers No. 9., Bangladesh Institute of International and Strategic Studies, Dhaka, 1989 pp. 3-11, 58-89.



In socialist analysis, it is the private property which is pivotal in undermining human dignity.<sup>29</sup> Advocates of present-day socialism are now making an exactly U-turn and resorting to private ownership to salvage their vulnerability.<sup>30</sup> How far the privatization process would bring the desired result begs question. One can observe the strong resistance against the whole-scale privatization in every socialist state. Economically it is illusory to a larger sections of the socialist societies. Privatization process in any socialist economy bound to yield many disadvantages to the privileged groups both in bureaucracy and economic sectors.<sup>31</sup> Rewards of privatization might not reach to the common masses within a short span of time. The socialist regimes have to invite foreign investors or to create their own capitalist class to sustain the programmes of privatization and allow them to make sizable profits out of their business transactions and services. Thus socialist humanism now is in cross fire of its own extremism and extremism of capitalism. How successfully socialist humanism would come out from its present crisis is still a matter of prediction.

The socialist ownership turning the wealths and potentialities of the state and society into the "properties of none" frustrated the entire socialist system of the majority of the socialist states. On the other hand, rule of the capitalist minority was replaced by the absolute domination of a tiny group of communists and military leaders. "In fact, the long years of communist rule have bred cynicism, lethargy and unscrupulousness among the broad masses. . . the state monopoly of the socialist countries over their wealth, rewards and punishments enabled the *nomenklatura* – the list of party-approved candidates to fill important party / government positions – to reward itself with a very comfortable life, unimaginable by the masses. In fact the *nomenklatura*, otherwise called the *apparatchiks*, overtime acquired the characteristics of a hereditary caste and held the whole country virtually into their ownership".<sup>32</sup>

29. "The theory of the Communists may be summed up in the single sentence : Abolition of private property". In : K. Marx, F. Engels, *Manifesto of the Communist party*, op. cit. p. 50.

30. See for details : P. H. Elicker, *Some Political Aspects of Privatisation*, Centre for privatization, Washington D. C. 1988, pp. 1-3.

31. "the Communist system is so designed that the *status-quo* serves the vested interests better, rather than from its change." In : M. R. Khan op. cit. p.64; "privatization inevitably has its opponents . . . These opponents represent distinct interest groups. . . The first is the bureaucracy itself . . . the military." In : M. Rahman, "Socialism and privatization : The ESOP Combination" In : *BISS journal*, Vol. 11 No. 3, 1990, pp. 324-325.

32. M. R. Khan, "Changes in the Soviet Union and Eastern Europe : Sourcees and nature" paper presented at the Seminar on Changes in Eastern Europe : Regional and Global Impact, Organised by the BISS, Dhaka, March 11, 1990 oo. 6,7.



Despite the differences in historical, political and cultural legacies and political arrangement of power structure and the level of socio-political development among the socialist states, this common phenomenon was very prominent in every socialist state.

Socialist humanism has been changing its face under the pressure of the socialist peoples. That is why many quarters still devoted to the ideals of socialism do not want to blame socialism, they rather tend to blame a modern man for his selfishness and inhumane attitude towards fellow citizens.<sup>33</sup> Inherent qualities and attributes of a human being almost always remain the same throughout the history. Credit of a particular doctrine or civilization is to use the good qualities of a man and refrain him from using the bad qualities. After gaining so much experiences by the socialist states regarding the materialization of human rights, it is probably high time to come to a conclusion how far human civilization was rewarded or punished for the adoption of socialist humanism.

### Conclusion

History of socialist humanism goes back to the Greek political thought. Plato advocated a rudimentary socialist humanism in the nature of more even distribution of wealth. According to him a just economic system can not allow private ownership to the "Guardians", the ruling class.<sup>34</sup> Present-day socialism surfaced against the backdrop of extreme failure of capitalist humanism in the forms of individualism and liberalism, and it advocate complete abolition of private property.<sup>35</sup> The socialist conceptions of human rights emphasized all pervading regulation of human activities. The socialist regimes in the Soviet Union and East European countries succeeded to some extent in distribution of economic benefits.<sup>36</sup> Such a success caught the

33. "Unfortunately, human being is still miles away from that ideal state when he would be free from all lusts for private property and ownership. . . The human civilization is yet to reach that high level of awareness and maturity which was the dream of Karl Marx." In : M. Rahman op. cit. p. 336-337.

34. "The remedy lay in communizing family relationships. Wives, husbands, and children must be held in common and shared by all . . . Plato proposed therefore that the guardians be prohibited from owning property of any sort. They were to live in barracks and eat common meals" In : Lawrence C. Wainlass, *Gettell's History of Political thought*, George Allen & Unwin Ltd., London, 1962, p. 57.

35. See K. Marx, F. Engels, *Manifesto of the Communist party* op. cit. p. 50.

36. "It is this communist society, which has just emerged into the light of day out of the womb of capitalism and which in every respect stamped with the birthmark of the old society, that Marx terms the "first", or "lower", phase of communist society." In : V. I Lenin, *Gosudarstvo i Revolyutsia* In : *Izbrannye proizvedeniya v Trekh Tomakh*, Vol. 2, politizdat, Moscow, 1980, p. 300.



imagination of tens of thousand downtrodden people to the ideology of socialism. But many human rights were to be sacrificed at the feet of the "Socialist juggernaut". Even the success story proved to be ephemeral. At present the socialist states are seeking succour from capitalism to rescue them from deep bewilderment.

A basic problem with Marxism is that it took a wrong view of human being. It considers man as a mere material entity ignoring his spiritual dimensions. On the other hand, Marxism calls for sacrifice to be above self for the establishment of Communist Society. Thus Marxism contains in its womb a contradiction<sup>37</sup> and the socialist regimes failed to bail out of this whirlpool. Compared to many countries, the socialist countries ensured a minimum standard of life, even that proved to be unsatisfactory because of the extreme material impulse in human nature they nurtured. The lure of Western conspicuous consumption hunted the socialist people and the socialist regimes could not marshal any armour against it.

In the final analysis, success of the socialist humanism like capitalist one has been measured solely by the material achievements of the state and society in general. In the near future, humanity might not trace a different kind of socialist humanism contrasting sharply the capitalist one. Experiences of socialist humanism and its recent deep crisis prove that without strong spiritual and moral dimensions no doctrine of humanism can survive for a longer period.



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37. "Marxism has emerged as a major source of opposition to Marxism" In : Ali Shariati, *Marxism* op. cit. p. 74.



## SUPREMACY OF THE CONSTITUTION

by

Taslima Mansoor

In the preamble of our constitution we, the people of Bangladesh clearly affirm and state that it is our sacred duty to safeguard protect and defend the constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh.

A constitution embodies the supreme law of the land. How is the supremacy of the constitution maintained? According to some it is maintained by the courts in the sense that they interpret and apply the supreme law of the land and in the event of any law made by the Parliament coming in conflict with the constitution it is the former that is declared by them to be null and void. To others the supremacy of the constitution is conserved and maintained by the political process. The constitution of Bangladesh article 7(2) states: -

"This constitution is, as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void."

Thus the supremacy of the constitution is not to be doubted. Similar is the case with the constitution of the USA, for instance Art. vi para 2, provides:

"This constitution, and the laws of the United States which shall be made in pursuance and all treaties made, under the authority of the United States, shall be supreme law of the land; and the judges in every state shall be bound thereby anything in the constitution or law of any state to the contrary notwithstanding."

Similar is the case with the Australian constitution also: Covering clause 5 provides that all and all laws made by the Parliament under the constitution shall be binding on the courts, Judges, & People of every state and of every part of the Commonwealth, notwithstanding anything in the laws of any state.

Justice Geroqe Whythe in the court of Appeals of the State of Virgina (1782) said:



"Nay more, if the whole legislature on event to be depreciated, should attempt to overleap the bounds prescribed to them by the people, I in administering the public Justice of the court, will meet the united powers at my seat in this Tribunal, and pointing to the CONSTITUTION will say to them, there is the limit of your authority; & hither shall you go, but no further."<sup>1</sup>

Thus the origin of the idea or concept of the supremacy of the Constitution goes back to 1700 A. D. The American constitution was the first to designate its constitution as the "Supreme law of land."

For the first time in *Marbury v. Madison*<sup>2</sup> established the practice of Judicial review, an act of congress was held invalid. A major state law was first held void by the court as a violation of a provision of the Constitution. Justice Marshall said in *Marbury v. Madison*<sup>3</sup>

"That the people had an original right to establish for their future Government such principles, as in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion, nor can nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent."<sup>3A</sup>

Although *Marbury v. Madison* established the practice of Judicial review, no statute of congress was held invalid again until the *Dred Scott* case in 1857. They hold that the judgment of Congress as to the scope of one of its own legislative powers, this time a power in no way concerning the court, is wrong and that the act so passed is unconstitutional. The court, in other words takes in the task of determining whether congress has exercised powers which the constitution has not delegated to it.<sup>4</sup>

E.C S. Wade & G. Godfrey Phillips in *Constitutional and Administrative Law* observed that -

In a constitutional system which accepts judicial review of legislation, legislation may be held invalid on variety of grounds : for example, because it

1. Cited in Cahn, *Supreme Court and Supreme Law* (1954) page 18.

2. *Marbury v. Madison*, 1 cranch 137, 2 Lawyers. Edition 60(1803).

3. *Ibid.*

3.A *Marbury v. Madison*, 1 cranch 137, 2 Lawyers Edition 60(1803).

4. Robert E. Cushman - *The Role of the Supreme Court in a Democratic Nation* (Urbema : Univ. of Illinois Press, 1938.)



conflicts with the separation of power where this is a feature of the constitution (case : *Liyange v. R.* (1967) A. C. 259) or infringe human rights guaranteed by the constitution (case : *E. G. Aptheke v. Secretary of State* 378 U. S. 500 (1964) or has not been passed in accordance with the procedure laid down in the constitution (Case : *Harris v. Minister of interior* 1952(2) S. A. 428).

#### Parliamentary Sovereignty :

In contrast, in England, writes De Tocqueville : The Parliament has an acknowledged right to modify the constitution, as therefore, the constitution may under go perpetual changes, it does not in reality exist ; the Parliament is at once a legislative and a constituent assembly.<sup>5</sup>

The results of his expression may be brought under three heads :

1. No law Parliament can not change.
2. No distinction between constitutional and ordinary laws.
3. No person is entitled to pronounce Act of Parliament void.

Bryce denominated these Traits as Flexibility of British constitution. Every part of it can be expanded, curtailed, amended, or abolished with equal ease. It is the most flexible polity in existence & is therefore bitterly different in character from the rigid constitution the whole or some part of which can be changed only by some extraordinary method of legislation.<sup>6</sup>

Thus the role of the "Parliament" and its absolute power i. e., the sovereignty, have occupied a special place in the constitutional history of Britain in the very morning of its birth, that is in Anglo Saxon age, it was known as WITAN, and thereafter as MAGNUM CONCILIUM. But in course of time this Magnum Concilium has been turned into "Parliament". Gradually this Parliament began taking away the supreme power of the king and thus finally declared to be the sovereign authority. Now, this sovereignty of parliament becomes the dominant characteristic of the British constitution.

#### Interpretation of the term :

Under the British constitution Parliament means such a sovereign parliament which is composed of the Queen, the House of Lords and the House of Commons - collectively known as the Queen-in-Parliament. This parliament is the highest institution and as such its will is the final will, therefore sovereignty of parliament means the Parliament's legal, final and

5. de Tocqueville, *Voli* (Democratic en Amerique), pp. 166-167.

6. Bryce - *Studies in History and Jurisprudence* (1901) vol i Essay ii Flexible and Rigid Constitution page 120.



irresistible power, the parliament becomes sovereign only when the above mentioned institutions appear to be amalgamated. By dint of this power the parliament becomes competent enough to change, amend make and unmake any law. Besides, no question can be raised about the legal validity of an Act passed by the parliament. Prof. Dicey has rightly remarked "The legislative omnipotence of parliament is the most outstanding characteristic of the English constitution."<sup>7</sup> He further said "There is no power which under the English Constitution, can come into rivalry with the legislature sovereignty of Parliament."

By parliamentary sovereignty Prof. Dicey's proposition :

1. That there is no law which parliament can not make.
2. That there is no law which parliament can not unmake.
3. That there is under the British constitution no marked or clear distinction between laws which are fundamental or constitutional and laws which are not.
4. That there is no authority recognised by the law of Britain which can set aside and make void such legislation.
5. That parliamentary sovereignty extends to every part of the King's dominions.

**Two aspects of parliamentary sovereignty :**

1. Positive aspect ;
2. Negative aspect.

**Positive aspect :** from the point of positive side, parliamentary sovereignty means that the Queen in parliament can legislate on any subject which is fit , reasonable and useful in nature and that any Act passed by Parliament will be enforced by the courts.

**Negative aspect:** From the point of negative side, parliamentary sovereignty means that under the British constitution there exists no power or authority who can compete with the legislative supremacy of Parliament. Thus :

1. Resolutions of either House of Parliament does not have the force of law and consequently they can not act as rivals of the authority of parliament.
2. The authority of parliament is not affected by the will of the votes.
3. The English Judges do not claim or exercise any power to repeal a statute. In other words no act of parliament can be declared void by the courts.

7. A. V. Dicey, *An Introduction to the Study of the law of the Constitution* page 70.



We therefore, see that the British Parliament is paramount and sovereign. It is complete both on its positive and negative sides. Parliament can legally legislate on any topic which is a fit subject for legislation. There is no rival of the British Parliament in the field of legislation. De Lolme, a French journalist has rightly said that the British Parliament can do everything but make a woman a man and a man a woman.

**Limitations on the Sovereignty :**

1. Public opinion : The public opinion is an important check on the sovereignty of parliament. No parliament can dare to pass any law which is opposed by the public opinion. In the long run parliament has to bow before the verdict of the people.
2. Party Manifesto : The party manifesto puts a limitation on the parliamentary sovereignty. A party generally wants to enact laws having regard to party manifesto.
3. International Law : International law also has wrinkled the sovereignty of the parliament to some extent. Though the British Parliament can legislate any law yet does not in practice pass a law violating the provisions of international law. Reference may be made in this regard to a famous case *West Rand Central Gold Mining Co. v. The King*.<sup>8</sup>
4. The Press : In the case of limitation of parliament, the influence of press is worthy of mention. The newspapers apply themselves to criticism as the parliament takes the initiative to make such a law which is injurious to public interest. So, the English parliament can not make any law at its will in fear of criticism of the press.
5. Judicial interpretation : Parliament makes law, but these laws are explained and interpreted by the judiciary. Although the judiciary does not make any law or can not challenge the validity of a law passed by parliament, yet, prior to the enactment of a law, parliament remembers or considers the fact how and in which manner the judiciary will interpret and explain it. And as such, the interpretation by the courts acts as a limitation on parliamentary sovereignty.
6. Convention : Conventions and usages also put a limitation on the sovereignty of parliament. Though the conventions themselves are not laws, yet they are regarded as such. So, the British Parliament does not in practice pass a law contrary to custom and convention of the land.

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8. 1 (1905) 2 K.B. 391.



7. Leagues and Associations : Leagues and Associations for political and economic purpose put a limit on the sovereignty of parliament. They have to be consulted before passing a measure affecting them. It is impossible to ignore these associations.
8. Statute of Westminster : The sovereignty of parliament is limited by the Statute of Westminster 1931, it is provided in that Act that British Parliament can not forcibly impose the laws passed by it upon the dominions.
9. Rule of Law : Another limitation is the rule of law. Parliamentary supremacy is tolerable because the rule of law is recognised. If parliament passes a law which is opposed to the rule of law it imperils its own supremacy. The view of Earnest Barker is that the sovereignty of parliament and rule of law are not only parallel, they are also interconnected and mutually interdependent.
10. EEC: Britain has joined the European Economic Community of the Common Market under Treaty of Rome (1958). When the United Kingdom became a member of the E E C certain changes in the law were necessitated. These were effected by European Communities Act, 1972 by which the intention of Parliament was to give precedence to Community law.<sup>9</sup> Britain would be bound by the legislation imposed by the E E C and that would be a limitation on the sovereignty of parliament. In other words, parliament does not make any law violating the provisions of the Community Law.

We therefore see that there is a number of limitations on the sovereignty of parliament. But it must be said here that the aforesaid limitations are merely practical limitations, they are not legal limitations.

#### Legal Limitations :

The Bill of Rights in 1689 laid it down that the raising of money for the use of the crown by pretence of prerogative was unlawful. It further declared that the pretended power of suspending of laws by prerogative was unlawful. In James I's time there was a dicta to the effect that acts of parliament contrary to common rights & reasons, or making a man a Judge in his own cause, were void.

S.A. de Smith said "In order to express its sovereign will parliament must be constituted as parliament and function as Parliament within the

<sup>9</sup> *Constitutional and Administrative Law* Stevens, page 40



meaning of existing common law and statute law. Unless these antecedent conditions for law making have been fulfilled, the product should not be regarded as an authentic Act of Parliament."<sup>10</sup>

Moreover, if a Bill to prolong the duration of a parliament beyond five year which is contrary to the Parliament Act procedure (Vide section 2, 1911) and if such a bill were to be passed by the House of Commons alone; certified by the speaker and assented by the Queen with words of enactment stating that it has been passed in accordance with the parliament act, as court should surely treat that "Act" as nullity because it was bad on its face ; the body purporting to enact it would not be parliament within the meaning of existing law. The purported Act would be no more efficacious then a resolution of the house of Commons; which has not legal effect outside the walls of parliament Case: *Stockdale v. Hansard*.<sup>11</sup>

Thus it is limited, so to speak, both from within and from without ; from within, because the legislature is the product of a certain social condition, and determined by whatever determines the society and from without, because the power on imposing laws is dependent upon the instinct of subordination which is itself limited. If a legislature decided that blue eyed babies should be murdered, the preservation of blue eyed babies would be illegal : but legislature must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.<sup>12</sup>

But the origin of the Doctrine of Judicial Review has been traced back to the dictum of Sir Edward Coke who contended that Magna Carta had embodied certain fundamental principles of right and justice and that the common law contained a further expression of the same principle. "Magna Carta" and the "common laws" he argued, were therefore, supreme law having such force that they controlled both the king and the acts of Parliament . In a famous case known as *Dr. Benhams* case <sup>13</sup> decided in 1610, Sir Edward Coke then Chief Justice of England, in an appeal, preferred by Dr. Benham charged for having violated the statute, adjudged the appellant to be not guilty upon the ground that the law in question was void, his reasons being :

"And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void ; for when an act of parliament is against common right and reason , or repugnant,

10. *Constitutional Law and Administrative Law* by S.A.de Smith p. 82

11. 1839 9 Ad. & El page 86

12. Leslie Stephen in "*Science of Ethics*" (1982) page 102.

13. The English Reports Vol LXXVII page 638



or impossible to be performed, the common law will control it and adjudge such act to be void."<sup>14</sup>

*Amendment of the Constitution and the Doctrine of basic Structure*

"Amendment" comes from the latin word "EMENDERE" i. e. correct. Amendment is a change for the purpose of bringing in improvement in the statute to make it more effective and meaningful but it does not mean its abrogation or destruction or a change resulting in the laws of its original identity and character. In the case of amendment of a constitutional provision, "Amendment" should be that which accords with the intention of the makers of constitution."<sup>15</sup>

Constitution stands on certain fundamental principles which are its structural pillars if those pillars are demolished or damaged the whole constitutional edifice will fall down.

The doctrine of basic structure is one growing point in the constitutional jurisprudence. It has developed in a climate where the executive, commanding on overwhelming majority in the legislature gets snap amendments of the constitution passed without a green paper or white paper, without eliciting any public opinion without sending the bill to any select committee and without giving sufficient time to the members of the parliament for the deliberation on the bill for amendment. Examples may be found both at home and abroad.<sup>16</sup>

In India the 39th amendment with regard to Art. 329 A (4) of the Indian Constitution was ratified in 3 days during a period of emergency when freedom of speech was suspended and there was hardly any time for the debate on the constitutional implications of that amendment.<sup>17</sup>

In *Smt Indira Gandhi's case*<sup>18</sup> it was found that Smt Indira Gandhi's election was declared invalid by the election tribunal on the ground that she had adopted corrupt practices in the election. During the pendency of her appeal the parliament by 39th amendments inserted Art 329 A (4 & 5) in the constitution. It was provided by that amendment that henceforth the parliament would decide any dispute as to the elections of the Prime Minister and the Speaker, that the existing laws in the regard would not apply to the

<sup>14</sup> The English Reports vol LXXVII page 638

<sup>15</sup> S. Ahmed Judgement (para 334 -336) on the Celebrated Case of 8th Amendment C.A. 42 of 1988.

<sup>16</sup> *Anwar Hossain v. Bangladesh* B.L.D. 1989 page 169

<sup>17</sup> H.M. Seervai, *Constitutional Law of India* Vol. II page 2659-2666

<sup>18</sup> A.I.R. 1975, S.C. 2299



election of the Prime Minister and the Speaker, and that the disputed election of Smt Indira Gandhi was valid and the election petition against her abated. The Supreme Court declared the amendment as invalid as it violated the principle of free and fair election, a basic structure of the constitution, offended the rule of law and right of equality under article 14 of Indian Constitution.<sup>19</sup>

In *Kesavinanda v. State of Kerala*<sup>20</sup> Art 31-c (which was brought in by the 25th Amendment Act and which falls under Part III of the Constitution i.e. Arts 12-36 relates to Fundamental rights) was challenged on the grounds that it empowered the legislature to take away fundamental rights under the pretext of making laws to give effect to any Directive Principles of State Policy, and that it took away the Court's power of Judicial review of unjust legislation and thereby altered the basic structure of the Constitution. The matter was heard by a Bench of 13 Judges including the Chief Justice, Sikri, and by majority of 7-6 the Court held the Second part of Art 31-c to be ultra vires the Constitution and declared it invalid. The same question as to Parliament's power to amend the Constitution abridging or taking away any fundamental rights was raised in *Golaknath v. State of Punjab*.<sup>21</sup> The Court by a majority of 6-5 upheld the contention that law within the meaning of Art- 13(2) includes an amendment of the Constitution and as such it is void if it conflicts with any provision guaranteeing fundamental rights.

In *Minerva Mills Ltd. v. Union of India*<sup>22</sup> Art 368(4) and 368(5) (Which was added by 42nd Amendment) was challenged on the contentions that these provisions took away Court's power of Judicial review and destroyed the basic structure of the Constitution. The Supreme Court upheld the contentions and held the amendment invalid.

The doctrine of basic structure in the subcontinent had its origin in a decision of the High Court of East Pakistan in 1963 in the case of *Md. Abdul Hoque v. Fazlul Quader Chowdhury*<sup>23</sup> upheld by the supreme Court in *Fazlul Quader Chowdhury v. Abdul Hoque*<sup>24</sup> referred to in the case of *Sajjan Singh v. State of Rajasthan*<sup>25</sup> in support of the proposition that amending power could not be exercised to destroy the basic structure of the Constitution.

19. D.L.R. 1989 page 120

20. A.I.R. 1973 S.C. 1461

21. A I R 1967 SC 1643

22. A I R 1981 SC 1789

23. P L D 1963 Dacca 669

24. P L D 1963 SC 486

25. A I R 1965 SC 845



"If upon a literal interpretation of this provision an amendment even of the basic feature of the Constitution would be possible it will be a question of consideration as to how to harmonise the duty of alleging to the Constitution with the Power to make an amendment to it. Could the two be harmonised by excluding from the procedure for amendment, alteration of a basic feature of the Constitution? It would be of interest to mention that the Supreme Court of Pakistan has in *Fazlul Quader Chowdhury v. Mohd. Abdul Haque*,<sup>26</sup> held that franchise and form of Government are fundamental features of a Constitution and the power conferred upon the President by the Constitution of Pakistan to remove difficulties does not extend to making an alteration of the Constitution.<sup>27</sup>

Further reference may be made at *C.P. & Berar Motor Spirit Sales Act*,<sup>28</sup> *Bidie v. General Accident Insurance*<sup>29</sup> (1948), *Bourne v. Novwiltch Crematorium*<sup>30</sup> (1967), *Vacher & Sons v. L.S.C.*<sup>31</sup> (1911-1913), *Towne v. Eisner*<sup>32</sup> *James v. Commonwealth of Australia*<sup>33</sup> and *Bangladesh v. Haji Abdul Gani*.<sup>34</sup>

The Constitution of India is a controlled constitution as referred in the case of *McCowley v. The King*<sup>35</sup> while Pakistan Constitution of 1956 contained a power of "repeal" of the Constitution (Art 216) and the Constitution of Sri Lanka of 1977 provides for "repeal and replacement" of the Constitution. But the amending power of Art 142 of Bangladesh Constitution does not contain any express power to repeal or replace the Constitution. There can be no objection to the exercise of amending power to fulfil the needs of the time. But if more power is sought to alter the basic structure of the Constitution it will turn the Constitution or the Scripture of hope of a living Society to a Scripture of doom. This power is given to the Parliament under the Constitution and is not a power beyond or above the Constitution.

26. P.L.D. 1963 SC 486

27. A I R 1965 SC p 867

28. A I R 1939 F. C. I. at pp 4-5

29. 2 ALL E.R. 995 at p. 998 (1948)

30. 2 ALL E.R. at p. 578 (1967)

31. All E.R. Rep 214 at p. 246 Per Lord McNaughten & at p. 248 Per Lord Atkinson.

32. 62 L. Ed 372

33. A.C. 538 at p. 613

34. 1981 BLD at pp. 16-17

35. A I R 1920 PC 92 at p. 96



Professor K.C. Wheare<sup>36</sup> quoted Alexander Hamilton in the *Federalist* when he said "there is no position which depends on clearer principle than that every act of a delegated authority, contrary to the Tenor of the Commission under which it is exercised, is void. No legislative Act therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master, that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only, what their powers do not authorize, but what they forbid." And he concludes that "the Constitution ought to be preferred to the Statute, the intention of the people to the intention of their agents."

He further says: "A Constitution can not be disobeyed with the same degree of light heartedness as a dog act. It lies at the bases of political order; if it is brought into contempt, disorder and chaos may soon follow."<sup>37</sup>

#### **The Legislative Powers of the Parliament and the Constitution:**

Parliament is the Supreme legislative authority subject to the constitutional limitations. One of the attributes of legislative supremacy is its power to pass any law on any subject, not prohibited by constitution. Parliament has the power to validate a law declared by a court illegal by removing the cause of illegality or infirmity. But the basic condition of validation is that Parliament must possess the power to legislate on the subject.

#### **The validity of a law is to be judged by three tests :**

The first, is to see whether parliament is clothed with the legislative power on the subject. The second test is whether by validation Parliament has removed the defect which the court had found in the earlier law. And the third test is whether the validating law is inconsistent with the provisions of the constitution when all the three tests have been fulfilled, the validation law may operate.<sup>38</sup> It is however, to be observed that endeavour of the court will be to protect the legislative competency and the attempt of Parliament to validate past actions, so far as canon of judicial interpretation of legislative power under the constitution permits.

<sup>36</sup> . *Modern Constitution* at page 89-90

<sup>37</sup> . *Ibid.* page 91

<sup>38</sup> . *Evaluation of the Supreme Court of Bangladesh*, Kamini Kumar Dutta Memorial Lecture by Justice Badrul Haider Chowdhury Part II page 89



In Bangladesh, it was in the case of *Mofizur Rahman Khan v. Government of Bangladesh*,<sup>39</sup> the court examined the supreme legislative authority of the Parliament and its constitutional limitations and held,

"It is first to be observed that Bangladesh Parliament by virtue of Article 65 has plenary or supreme legislative power conferred upon it, and this power is exercisable subject to the Constitution."<sup>40</sup>

It was in the case of *Kazi Mukhleshur Rahman v. Bangladesh*<sup>41</sup> where it was held that the head of the executive, namely, the Prime Minister cannot unilaterally determine the boundaries of Bangladesh which has to be done by a law of Parliament under Article 143(2) of Bangladesh Constitution. It can't but be more so when cession of territory is involved. This limitation on the part of the head of the Executive of Bangladesh is on the face of it such a "manifest and notorious" restriction on his treaty making power that any such treaty entered into by a foreign state with Bangladesh without the sanction of the Parliament of Bangladesh will be ultra vires and cannot pass title.

Further reference may be made to *Columbia v. Venezuela*,<sup>42</sup> *Belgium v. Netherlands* (1959)<sup>43</sup> *Cambodia v. Thailand* (1962).<sup>44</sup>

In the case of *Dr. Nurul Islam v. Bangladesh*,<sup>45</sup> the question of constitutionality of a piece of legislation came up, when the appellant challenged the government order retiring him from service in exercise of powers conferred by section 9(2), of Public Servant (Retirement) Act 1974. It was contended that section 9(2) of the Act was itself ultra vires as it violated Articles 27 and 29 of the Constitution which provide for the fundamental rights of equality before law and equality of opportunity in Public employment, section 9(2) of the Act was declared unconstitutional.

### Conclusion

It was accurately said by Robert H. Jackson: "The Constitution in making the balance between different parts of our Government a legal rather than a political question, casts the court as the most philosophical of our political departments. It keeps the most fundamental equilibrium of our

39. 34 DLR (AD) 321

40. Ibid

41. 26 DLR (S.C) P- 46

42. U. N. Rep. Vol. 1 Page 223

43. I.C.J. 209

44. I.C.J. 6

45. 1981 BLD (AD) 240



society, such as that between centralisation and localism, between liberty and authority and between stability and progress."<sup>46</sup>

Critics differ on whether the absence of explicit language in the Constitution implied that the Judicial review was an inherent power of Judges, or whether it was to be construed as a rejection of that power.<sup>47</sup>

Debates on the ratification of the constitution seemed to assume the former. Judicial power to enforce the Constitution was asserted in *Federalist Paper* No. 17. Most influential was Hamilton's argument in *Federalist Paper* No. 78. That the power of the judicial review was necessary to the workings of a written Constitution. In the Virginia Ratifying Convention, a Youthful John Marshall asked, rhetorically And prophetically "To what quarter will you look for protection from an infringement on the Constitution if you will not give the Power to the Judiciary"? But in New York, Robert Yates expressed the fears of many; "The power in the Judicial branch will enable them to mould the government into any shape they please ..... Men placed in this position will generally soon feel themselves independant of heaven itself." It was in response to such fears that Hamilton contended, in No 78 of the *Federalist Papers*, that Judicial review did not imply Judicial Superiority over legislature "It only supposes that the power of the people is Superior to both."<sup>48</sup>

The Constitution is the Supreme law and all law are to be tested in the touch stone of Constitution (Art 7 of Bangladesh Constitution) . It is the Supreme Law because it exists ; it exists because the will of the people is reflected in it. History of Mankind is replete with instances when a constitution ceased to exist because the will of the people was either not reflected in it or the support was withdrawn ultimately. It is rather too late in the day to suggest that pre-constitutional pieces of legislation will displace one of the three structural pillars on which the Mechanism of the Constitution rests. Having declared that parliamentary democracy is the mainfest aspiration of the people of Bangladesh , the Constitutional instrument has been drafted keeping in full view that the power of three organs of the Government, namely, Executive Legislative and Judiciary are well defined.<sup>49</sup>

<sup>46</sup> . *The Struggle for Judicial Supremacy* by Robert H. Jackson p. 312

<sup>47</sup> . Leonard W. Levy "Judicial Review, History and Democracy : An Introduction" In Levy (ed). *Judicial review & The Supreme Court: Selected Essays* (New York) : Harper & Row, 1967 , pp. 1-42

<sup>48</sup> . *Constitutional law & Judicial Policy Making* (Second edition) Edited & Written by Joel B. Crossman & Richard S. Wells page 240.

<sup>49</sup> . A.T. Mridha's case 25 D.L.R. p.344



## DEATH PENALTY - THE CONTINUING CONTROVERSY

by

Shahnaz Huda

'The hour of departure has arrived ..... I to die , you , to live ..... which is better only God knows' thus spoke Socrates in the year 399 B.C. having been condemned to death for the ambiguous crimes of impiety, heresy and corrupting the morals of the young. The method of his execution, strangely humane for that age was by drinking a cup of the poison hemlock. As far as man can recall, there has always been the practice of condemning persons convicted of certain crimes to death. Capital punishment or the death penalty is a form of punishment and punishment is the infliction of some pain, death, suffering , loss or social disability, as a direct consequence of some action or omission on the part of the person punished. 'Punishment involves pain or suffering produced by design and justified by some value that the suffering is assumed to have'.<sup>1</sup> Punishment is a means of social control and a way of seeking redress for any wrong, injury or violation of law and custom.<sup>2</sup> Punishment is thus an ill suffered for an ill done and as such the death penalty has been almost universally practiced', although through the ages the concept of crime and its corresponding consequences have undergone various changes and so also the recognition of death as an acceptable form of punishment.

Used in early times to "please and placate the Gods" and afterwards as a consequence of displeasing the Kings', the death penalty has been imposed later, based on various other theories. The RETRIBUTIVIST APPROACH i.e. the idea of "an eye for an eye" was one of the earliest justifications behind the imposition of the death penalty. A common element noted amongst the three oldest of known legal codes i. e. the CODE OF HAMMURABI, the sixth King of Babylon (dated around 2000 BC) , the SUMERIAN CODES and the MOSAIC CODE (Old Testament) is the general attitude of revenge or

1. E.H. Sutherland ; Indiana University and D.R. Cressey, University of Calif. L.A ; *Principles of Criminology* ; (6th Edition 1968) P. 256.
2. Walter C. Reckless ; *The Crime Problem* 4th Edition, (1967) Chap. 23, 'the Nature of Punishment.' P. 487



retaliation, the LEX TALIONIS. To quote from the Mosaic Code in the Book of Exodus "and if any mischief follow, thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe".<sup>3</sup>

The notion was that an offender must suffer in proportion to his wickedness - thus murder and other heinous crimes must be matched with death. A person endangering the life and property of another, loses his right to be secure in the enjoyment of his life and property. IMMANUEL KANT was of the opinion that if a person has committed murder he must die. In this case he held, there is no substitute that will satisfy the requirements of legal justice. There is no sameness of kind between death and remaining alive even under the most miserable condition and consequently there is also no equality between the crime and the retribution unless the criminal is judicially condemned and put to death.<sup>4</sup>

Anyone who is a murderer must, says Kant, suffer death 'this is what (legal) justice as the Idea of the judicial authority wills in accordance with universal laws that are grounded a priori'.<sup>5</sup>

The PROTECTION of society by 'elimination' of those found unsuitable to exist in society, those who construed a threat to society, was another justification behind the death penalty. "The complete blocking out of the culprit was a practical demonstration of group disapproval of the particular type of anti-social conduct involved in the case"<sup>6</sup>.

The modern theory of DETERRENCE also aims at the protection of society and social control. Some regard punishment, before all things, as a deterrent. According to Salmond, offences are committed by reason of a conflict between the interests, real or apparent, of the wrongdoer and those of society at large. Punishment prevents offences by destroying this conflict of interests to which they owe their origin - by making all deeds which are injurious to others, injurious also to the doers of them - by making them in

3. Exodus, 21, 23-25 (King James version of the Holy Bible cited in *Theoretical Criminology* By G. B. Vold 1979, P. 396.
4. Immanuel Kant; cited in E. A. Kent's (Editor) *Law and Philosophy*, Readings in Legal Philosophy (1970), P. 288.
5. E. A. Kent (Edition), *Law & Philosophy*, Readings in Legal Philosophy (1970); p. P. 289.
6. Harry E. Barnes and Negley K. Teeters; *New Horizons in Criminology* 2nd Edition. P. 355.



Locke's words 'an ill bargain to the offender'.<sup>7</sup> Thus where the aim of punishment is to 'deter' or 'prevent' potential criminals the best way is to disable the criminal and the most effective method of disablement is the death penalty. Life is generally regarded as mans most valued and precious possession and the fear of losing ones life is the worst possible of all fears - and so the thought of such a consequence would deter a potential offender from committing a crime. For the above reasons penal systems from very early times have advocated publicly inflicted death penalties, as well as harsh and brutal punishments. With the progress of civilization human nature has undergone changes and the brutal instincts that led to the imposition of such hedious punishments have been somewhat curbed. Again, the definition of crime and what constitutes crimes punishable by death, have also altered. Along with such changes came the questions which led to the beginning of the movement for the abolition of the death penalty, or limiting its exercise. Questions also arose as to whether it is justified to take life in the name of law, whether it produces the desired results, whether it actually prevents crime.

History shows that the death penalty has taken various forms in various ages and countries. It was left to the caprices of Kings' and tyrants to choose the most ingenious and the cruelest of methods of imposing death. Burning, beheading, boiling in oil, breaking at the wheel, the iron coffin, drowning, stoning, lynching, crushing beneath wheels or the feet of elephant's strangulation, suffocation -- the history of the middle ages is darkened by the most barbarious punishments inflicted upon persons for mere crimes of holding a religious faith or opinion contrary to those in power. Apparently the crucifixion of Jesus Christ was only a routine punishment for his time. Witches and heretics were burned at the stake. Europe in the middle ages had different modes of execution for persons of low status and those of quality - the former being hanged and the latter decapitated. Beheading was looked upon as an honourable way of meeting death while hanging carried with it a definite stigma.<sup>8</sup>

The varied modes do justice to mans ingenuity though not to his humanity. The reasons for imposing the death penalty was as varied as the ways. In England, for example, during the early part of the 19th century death penalty was frequently imposed for religious offences and for other unimaginably trivial offences such as stealing vegetables; associating with

7. SALMOND on *Jurisprudence*, 12th Edition (1966) by P. J. Fitzgerald, MA; P. 94.

8. Barnes & Teeters. *New Horizons in Criminology*. 2nd Edition P. 349.



gypsies etc. In 1814 three boys - aged eight, nine and eleven were sentenced to death for stealing a pair of shoes.<sup>9</sup> Primitive societies gave death sentences for treason, incest or sacril offences; homicide was left to private redress. The Babylonians and the Israelites imposed death for wilful homicide and certain religious offences. The Greeks of the Homeric period regarded homicide as a private offence to be redressed by vengeance on the part of the victims family. In Athens, however, as early as the period of Draconian laws, homicide came to be regarded as a grave offence against both society and the Gods and was made punishable by death or banishment. In early Rome in the law of the XII tables, death penalty was reserved for treason and other crimes. In Europe, during the middle ages states cooperated with the church in imposing such penalty for 'witches' and 'heretics'.<sup>10</sup> Much later, renowned thinkers and philosophers like Kant and Hegel in his 'philosophy of Rights' voices Aristotles thoughts on the subject and says that 'retribution is the turning back of crime against itself, the criminals own deed judges itself'. He argues that since crime is 'an act of violence on the social order, and hence an act of unreason it can only be negated by,<sup>11</sup> another act of violence and unreason. . . thus the necessity or justification of the death penalty was social control. Death alone was not considered a proper punishment unless accompanied by terror or torture. The idea was the more barbaric the method of execution, the better effect of such punishment.

For the same reason public executions were encouraged. "The more public the punishments are, the greater the effect they will produce upon the reformation of others", declared Seneca in ancient Rome. Hanging days were public holidays and in 1807 a crowd of 40,000 became so frenzied at an execution that nearly a 100 were trampled to death.<sup>12</sup>

Not until a few hundred years ago had the states right to kill been seriously questioned. The modern crusade against capital punishment started in the year 1764 when Cesare Beccaria wrote his Essay on Crimes and Punishments. Beccaria maintained that since man was not his own creator, he did not have the right to destroy human life either individually or collectively. During the 18th century a reform movement had taken hold of Europe. In 1789, the French Declaration of Rights declared in the spirit of Beccaria that

9. Sutherland & Cressey - *Principles of Criminology* 6th Edition. 1968 P. 262.

10. Arthur E. Wood & John B. Waite; *Crime and its Treatment (Social and Legal Aspects of Criminology)*. 1941 P. 468-469.

11. Prosanto Kumar Sen, *Penology - Old and New*, Tagore Law Lectures. P. 29. (1924).

12. Time, the Weekly Magazine; Vol. 121 No. 4, Jan 24, 1983.



'the right to punish was limited by the law of necessity'<sup>13</sup> The traditional utilitarian view of punishment holds that punishment itself being an evil, should only be resorted to when it is necessary to prevent a greater evil and therefore William Paley tells us that punishment should be proportionate to prevention and not to guilt.<sup>14</sup>

Beccaria's ideas were introduced in England through Jeremy Bentham and Sir Samuel Romilly and death penalties were abrogated in various cases.<sup>15</sup> The law was authorised only to punish overt acts and not intangible things as the opinions or thoughts of man, for it was accepted that "the thoughts of man shall not be tried for the devil himself knoweth not the thoughts of man". Only tangible, provable acts causing harm to society could be punished.<sup>16</sup>

Various states abolished the death penalty completely while others used it sparingly.

The debate over death penalty has continued and seems destined to continue for a long time. As mentioned earlier the modern justification behind the death penalty is its deterrent effect. It teaches others the consequences of a serious crime and so deters them from perpetrating that crime. The idea behind the death penalty is to instil the threat in a person's mind that there is a possibility of losing his life if he commits certain acts.

Barnes and Teeters argue strongly against the feasibility of the deterrent theory. They contend that most murders are committed either as a result of deep seated sub-conscious criminal compulsions which finds an outlet in the act of murder, or he murders in moments of intense anger or rage which he is not capable of controlling.<sup>17</sup>

Murderers according to Barnes & Teeters may be divided into (1) Excitable murderers who murder due to 'psychopathic compulsions' or fits of rage (2) Insane or abnormal persons with 'defective personality. and (3) Professional murderers.<sup>18</sup> Few murderers murder with cool determination. Insane murderers driven as they are, 'by psychopathic compulsions or fits of

13. Elizabeth Orman Tuttle. *The Crusade Against Capital Punishment in Great Britain*; published in 1961; P. 2.

14. A. E. Wood & Waite; *Crime and its Treatment* P. 462.

15. Elizabeth O. Tuttle; *The Crusade Against Capital Punishment in Great Britain*. 1961 P. 1-7.

16. Prosanto K. Sen, *Penology, Old & New*; Tagore Law Lectures, 1929 P. 25.

17. Harry Elmer Barnes and Negley K. Teeters, *New Horizons in Criminology*, 2nd Edition; P. 356.

18. *Ibid* p. 357.



rage' are immune to the idea of the death penalty as a deterrence. Nothing short of physical restraint can control these types. If they were capable of comprehending the deterrent effect of the death penalty, they could not be categorised as abnormal. The same logic holds for excitable murderers. They find it impossible to control their rage and any deterrent effect of the death penalty would be outweighed at that moment of intense rage. Professional killers, killing with cool deliberation, e. g. gunmen, hired assassins, mercenaries know their chances of being apprehended are so slim and remote that the deterrent effect of the death penalty is insignificant. They also contend that persons who murder because of deep seated grudges would fail to be deterred because any fear would be outweighed by strong pressure to commit murder and the idea of escaping apprehension of his crime.<sup>19</sup> It is obvious that a large number of murderers, rapists etc. go scot-free because of the failure to apprehend them or to prove their guilt beyond reasonable doubt'.

Defective police, detective and court systems are blamed for the above failures. For obvious reasons many abolitionists argue that it would be much better if there was certainty of punishment, though a mild one, than the uncertainty of a harsh punishment. Then again there is the frightening argument which cannot be dismissed lightly - that is, the possibility of mistakenly putting an innocent person to death and such mistakes are cruelly irrevocable. In 1927, CERO GANGI was convicted of murder in a Massachusetts Court and within four weeks of his execution when a new trial was secured another man was found guilty of Gangi's Crime.<sup>20</sup> In the 1950's there is a good chance that an innocent man was hanged in England, (the case of Timothy John Evans 1949). Financial compensation is hardly adequate for the loss of a life. Those who argue in favour of the death penalty say that the system of law and trials in the civilized world with its lengthy system of appeals, review and revisions is so exhaustive that it leaves little scope for mistakes. If there is non-compliance of these lengthy processes required by law or a mistake is made, is not that the fault of the administrators of law rather than the theory of capital punishment? Can mistakes in solitary cases justify the abolition of this system? Abolitionists argue that life is too precious to make mistakes about. Death penalty is against, they contend, the spirit of humanity. It brutalises human nature and intellect and God alone has the right to take human life.<sup>21</sup>

19. Harry Elmer Barnes and Negley K. Teeters; *New Horizons in Criminology* 2nd Edition, P. 357.

20. 'Innocent men can be executed' - pamphlet by American League to Abolish capital punishment cited in Wood & Waite op cit. P. 475.

21. Harry E. Barnes and Negley K. Teeters; *New Horizons in Criminology*; 2nd Edition. P. 359.



Retentionists argue strongly in favour of the continuation of the system of capital punishment for certain crimes. According to them, some criminals are so hopelessly 'degenerate' and 'irreformable' that only their removal can protect society.<sup>22</sup> The idea of life imprisonment instead of death penalty according to the retentionists is a 'hoax' because parole and pardon powers are so abused that the criminal ends up serving only a minimum number of years behind bars which is unjust and not in keeping with the heinousness of the crimes they have committed. They argue that capital punishment really has a deterrent influence and a large number of crimes are prevented because of this particular mode of punishment. Abolitionists also put forward the argument that the mental torture suffered while waiting final judgement as well as the 'poignant' suffering of friends and family of the person to be executed ought well to be considered.<sup>23</sup> According to Kant on the other hand, punishment is inflicted only because it is merited and whether it will reform or deter is irrelevant in justifying the infliction of punishment. It is often said that too little attention is paid to the victims of murder, that the consideration is for the offender who did not consider his victims.<sup>24</sup> Lord Denning opined that the punishment for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for such crimes. It is a mistake, he thought, to consider the object of punishment as being deterrent, or reformatory, or preventive or anything else. The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime, and from this point of view there are some murders which in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.<sup>25</sup>

There seems to be no satisfactory conclusion to the argument pro and anti death penalty. One seems to sway to and fro. All that is humane speaks out against putting someone to death and some call it 'a second murder', 'the more reprehensible because it is officially sanctioned and done with great ceremony in the name of us all.'<sup>26</sup> Capital punishment we say, brutalises

22. Arthur Evans Wood and John Barker Waite; *Crime and its Treatment (Social aspects of Criminology)* (Pub in 1941; p. 472-473).

23. Harry E. Barnes and Negley K. Teeters, *New Horizons in Criminology*, 2nd Edition, p352.

24. Cited in Edmond L. Pincoff, *The Rationale of Legal Punishment* 1966 P. 18.

25. Lord Denning to the *Royal Commission on Capital Punishment* cited in H. L. A. Hart; *Punishment and Responsibility, Essays in the Philosophy of Law* P. 170.

26. *Time*, the Weekly News Magazine; Vol. 121. No. 4, Ja 24, 1983; P. 9



human nature but the next morning we are confronted with the news that someone we knew very closely has been murdered or a young housewife has been brutally killed by her husband in cohorts with her in-laws for not paying her dowry. 'A heinous reprehensible murder occurs and the public responding to deep seated feelings, is in full cry demanding the execution of the killer.' We begin to have second thoughts as to whether a person who has cold bloodedly murdered four in a family has the right to continue to exist in society; whether he will not put into risk someone else's life. And this time, it may be someone you know. Can it be said safely that a person who has murdered once will not murder again? Also will it not act as an encouragement to others to commit similar crimes if he is not punished with the utmost severity. Is it not better to eliminate the murderers, rapists and traitors from society for ensuring the protection of society?

Abolitionists do not give up of course. Death penalty gives the judges and in some countries the jury an all encompassing discretion to impose death. In *Furman vs Georgia* (1972) the Supreme Court of the USA declared that 'they (the judges and jury)' had intolerably wide discretion to impose death or not'. This made the death sentence "freakishly imposed" on "a capriciously selected random handful".<sup>27</sup> In *Furman vs. Georgia* 1972 the Supreme Court of the United States ruled that the death penalty 'constitutes cruel and unusual punishment in violation of the 8th and 14th amendments.' The Court was so badly split that the nine judges wrote separate opinions. The decision did not eliminate capital punishment in the United States of America completely but limited the discretionary manner in which it is imposed.<sup>28</sup>

Statistics show that status, race and other prejudices play a large part in determining who is to die and who is to live. In the United States executions vary regionally as well as racially. Statistics for 1930 to 1975 showed that the majority of those executed 2,066 were blacks compared to 1,751 whites. For rape, in particular, far more of those executed were blacks.<sup>29</sup> The poor again, are more likely to be condemned to death than the rich. One of reasons for this may be the quality of legal help they can afford, i. e. whether or not a person has adequate legal representation. Here again statistics show that murderers with court-appointed legal help are more likely to be condemned to death than those with private advocates. In underdeveloped and developing countries such

27. Justice Potter Stewart quoted in *Time*, the Weekly News Magazine; Vol. 121. No. 4 Jan 24, 1983; P. 19.

28. Richard Quinney; *Criminology*; 2nd Edition 1979, P. 378.

29. *Ibid.* p. 374.



as our own with their uncertain future and backward economic and social conditions, the wide disparity between the rich and poor, it must be conceded that status does have a large part to play in determining who is to be put to death and who is to survive for the same type of crime. Retentionists argue that all these facts may be attributed to faulty administration of justice and not directly to the theory of the death penalty as a necessary punishment. The question naturally arises whether it is proper to ignore human traits and faults as well as the prospect that those in authority have the power to use their discretion as they please. Would it not be simpler and much less soul searching to give sentences for life? Would that provide long term solutions, retentionists question. Also, inhuman though it sounds, a penalty of death is cheaper for the state than keeping a convict in prison for years.

Both sides seem to have logical arguments. It is a difficult decision for a country to take - whether to ban capital punishments totally, whether to retain it and use it selectively and sparingly only in special cases.

Countries that have abolished the Death Penalty include Australia, Britain, Brazil, Canada, France, Germany, Mexico, Spain, the Netherlands, Italy, etc. Among those that retain the right to put to death are such Middle Eastern countries like Iran, Iraq, Saudi Arabia, Yemen, Libya, Bahrain, Israel, and Syria. Some of these countries while retaining the right to put to death rarely use such right, e. g. in Israel the only person put to death in that country's history was ADOLF EICHMANN in 1962 for the crime of being in charge of extermination of Jews under the German Nazi regime.<sup>30</sup> Other countries which continue to maintain the death penalty as a form of punishment are the USSR, Cuba, Asian countries like Bangladesh, India, Pakistan, China, Japan etc. In Taiwan, in 1990 some 80 people were executed for major crimes.<sup>31</sup>

In the United States of America capital punishment is legal in 36 states.<sup>32</sup> The common method of execution used in the USA is the electric chair - apart from which several states use the unique method of execution by lethal anesthesia injections. In Bangladesh, during the five year period of 1986-1990 twenty nine civilians were hanged in different jails of the country.<sup>33</sup>

Amnesty International, a London based human rights organisation has launched a world wide crusade against Death Penalty. This organisation is

30. See news item entitled 'When the State Kills' published in *The New Nation* on the 27th of April, 1989.

31. See *The Morning Sun* of April 26, 1991.

32. See *Time - The Weekly News Magazine*. Vol No. 139 No. 9, March 4, 1991.

33. See news item entitled '29 hanged in 5 years' quoting the Prime Minister of Bangladesh, published in the *Morning Sun* of 25th April, 1991.



firmly committed to the abolition of capital punishment and with this end in view tries to motivate various states against retention of the Death Penalty. A 1989 report published by the Amnesty International entitled 'When the State Kills' states that the Death Penalty is still widely used in various countries. The report specifically mentions in this context countries such as Iran, Iraq, China etc. Seven Middle Eastern countries namely Iran, Iraq, Saudi Arabia, Yemen, Libya, Syria, UAE have staged public executions which were also televised. The common method of execution in such countries is by hanging or the firing squad although in Saudi Arabia and North Yemen beheading by sword is practiced. In the Asia Pacific region, according to Amnesty's report, Australia, Philippines, Fiji have abolished the Death Penalty although most other countries of that region still retain such punishment. The report further states that in countries of that region namely, Bangladesh, India, Indonesia, Pakistan, Thailand and Vietnam prisoners have been executed after being sentenced to death by special tribunals - military, 'revolutionary' or anti-terrorist courts.<sup>34</sup>

The question confronting individuals and eventually states is whether to completely abandon the notion that the death penalty can result in any sort of advantage or whether alternately that because there are advantages it ought never be completely abolished. Various states have abolished the death penalty while others use it sparingly. In other countries, the total number of formal executions are also declining or appear to be. There remains, however, the frightening fact that a large number of persons are being quietly gotten rid of without the necessity of formal trials.

Various international institutions have come forward to provide guidelines for states to follow. The Universal Declaration of Human Rights, adopted and proclaimed in 1948 after the devastating world wars, reiterated that 'disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind'. In 1950, the Council of Europe, in order to enforce collectively the rights declared in the Universal Declaration, signed the Convention for the Protection of Human Rights and Fundamental Freedoms. Protocol No. 6 to the above convention 'concerning the abolition of the death penalty'<sup>35</sup> considered the 'evolution that has occurred in several

34. See news on Amnesty International's report entitled 'When the State Kills', published in the *The New Nation* 27th April, 1989.

35. PROTOCOL NO. 6 to Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty; Council of Europe; European Treaty Series No. 114; Strasbourg 28. IV. 1983.



member states of the Council of Europe' which expressed 'a general tendency in favour of abolition of the death penalty'. Article 1 of the Protocol stated: 'The death penalty shall be abolished, no one shall be condemned to such penalty or executed'.<sup>36</sup>

In 1969 in San Jose, the OAS (Organisation of American States) in the American Convention on Human Rights reiterating the ideals of the Universal Declaration in Article 4 stated<sup>37</sup> 'In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgement rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply' Art. 4(2). Art. 4(3) also states that 'the death penalty shall not be re-established in states that have abolished it'. Although such international and regional conventions furnish some sort of necessary guideline based upon which states can decide what course to take regarding capital punishment, they are not sufficient and the controversy regarding death penalty continues. As Albert Camus very aptly said, "we cannot argue eternally over the advantages and ravages of the death penalty. . . .". Neither can we solely base our arguments and reach a decision of such momentous proportion on theories alone. Each country must minutely consider its social, political and economic conditions and then decide once and for all whether the death penalty ought to be retained or abolished. It would be impracticable to suggest the worldwide and general abolition of Capital Punishment without regard to the special characteristics, peculiarities and problems of each particular country. If that happened the probable result would be that there could never be a long term solution to the debate and with every change, with every unforeseen crisis, the debate over capital punishment would be reopened.

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36. *Ibid.*

37. American Convention on Human Rights; Signed November 22, 1969, entered into force July 18, 1978. O. A. S. *Treaty Series* No. 36.



## HUMAN RIGHTS & WOMEN IN THE INDIAN SUB-CONTINENT

by

Sumaiya Khair

### 1. Introduction :

The movement for women's rights has come of age – 20 - 25 years by some calculations. Women began to redefine their traditional roles as wives and mothers in the 1960s and 1970s, to seek more education, to apply for jobs in occupations once held mainly by men, and to vie for leadership through public office and non-governmental organizations. In addition, through organized political movements, women secured the sanction of laws guaranteeing them social justice from nation to nation. In the twentieth century discrimination against women has begun to fade and women's issues are coming into focus through consistent efforts of the different agencies of the United Nations in curtailing crimes against women.

### 2. Sanctions of the U. N. :

A Commission on the Status of Women was established by the Economic and Social Council in June 1946, to "prepare recommendations and reports to the Council on promoting women's rights in political, economic, civil, social and educational fields." The Commission further called upon to "make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights, and to develop proposals to give effect to such recommendations."<sup>1</sup>

On the recommendation of the Commission the Economic and Social Council submitted a draft convention on the elimination of discrimination against women to the General Assembly. In December 1979, the Assembly adopted and opened for signature, ratification and accession to the Convention on the Elimination of All Forms of Discrimination Against Women. State

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1. "Commission on the Status of Women," *United Nations Action in the Field of Human Rights* (U. N., New York, 1988), p. 19.



parties to the Convention recall that discrimination against women violates the principles of equality of rights and respect for dignity as it serves as an obstacle to the participation of women on equal terms with men, in the political, social, economic and cultural life of their countries. Such a discrimination hinders the full development of the potentialities of women in the service of their countries and of humanity. Under this Convention state parties undertake to ensure measures to eliminate all forms of discrimination against women, to ensure their equality with men in all spheres of life and to do away with prejudices and practices based on stereotyped roles for men and women.<sup>2</sup>

The Convention ensures the rights of women to (a) vote in all elections (b) participate in the formulation of Government policy (c) hold public offices and (d) represent their Governments at the international level.<sup>3</sup> State parties also undertake to eliminate discriminations against women in order to ensure them equal rights with men in the fields of education (Art. 10), employment (Art. 11), health care (Art. 12), and other areas of economic and social life (Art. 13).<sup>4</sup> The Convention ensures equality for women before the law (Art. 15) and elimination of discrimination against women in all matters relating to marriage and family relations (Arts. 16).<sup>5</sup>

The Decade for Women which began with the International Women's Year Conference in Mexico City in 1975 marked an era of increasing consciousness among both men and women. More and more politicians and activists have taken up advocacy of women's rights. Governments have taken up women's issues, enacted laws outlawing discrimination, endowing women with rights and status on equal terms with men.

### 3. Status of Women in the Indian Sub-Continent : Legal, Social, Economic

Unfortunately, the impact of women's rights movements have left the Indian Sub-Continent with very little improvements in the lot of the female population. Disparity still exists where women are under constant subjugation in every aspect of human life. Attitude towards women have undergone negligible change in recent years, where men profess to encourage the emancipation of women superficially but deep down still nurture the primitive

2. "Convention on the Elimination of All Forms of Discrimination Against Women," p. 43, *ibid.*

3. Part II, *ibid.*

4. Part III, *ibid.*

5. Part IV, *ibid.*



macho outlook in their treatment of women. As developing and least developed countries the third world nations face various constraints in promoting the development of women. Obviously, the status of females is not an enviable one as they are subjected to various forms of discrimination arising out of legal, social, economic and cultural contexts.

a. Legal :

Article 28(2) of the Constitution of Bangladesh guarantees equal rights for women on the same level as men in all spheres of the state and of public life. The constitutional provisions are backed by various legislations -- Family Courts Ordinance (1985), The Cruelty to Women (Deterrent Punishment) Ordinance, 1983, Dowry Prohibition Act, 1980, Provisions of Penal Code of Bangladesh, Muslim Family Laws Ordinance (1961) etc.

All citizens are equal before law<sup>6</sup> in Bangladesh and there can be no discrimination, disability, restriction or condition on grounds of religion, race, caste, sex, etc.<sup>7</sup> Similarly, the Indian Constitution, in order to attain equality of status and opportunity, ensures "equality before the law"<sup>8</sup> and prohibits "any discrimination"<sup>9</sup>. Hence, the Indian women are the beneficiaries of fundamental rights in the same manner as Indian men, with regard to employment, education, health, etc. The legislative measures taken in India to meet the constitutional commitments were many -- The Hindu Marriage Act, 1955, The Hindu Succession Act, 1956, The Suppression of Immoral Traffic Act, 1956, The Hindu Minority and Guardian Act, 1956, The Prohibition of Dowry Act, 1956 etc. These various legislations were major steps towards the liberation of women from their traditional bonds.

Three noteworthy legal rights conferred by *Sharia* are enjoyed by the muslim women i.e their rights regarding marriage, divorce and inheritance. A muslim marriage is a contract requiring consent of both parties before witnesses. There has to be a provision for *Mahr*, i. e. dower to be partly paid to the bride after the wedding ceremony and the rest of it to be delivered in case of a divorce. The *dower* is distinct from *dowry* in the sense that the former is paid as a *symbol* of respect to the bride whereas the latter is a precondition to marriage the lack of which sometimes results in sad losses of life.

6. Article 28 (1), *Constitution of the People's Republic of Bangladesh*.

7. Article 28 (3), *ibid*.

8. Article 14, *Constitution of India*.

9. Article 15, *ibid*.



Islam permits women to divorce their husbands either by obtaining a judicial decree or by exercising the right of *Talak - e- Tawfeez* or Delegated Divorce where the authority to divorce is bestowed on the wife by her husband in the marriage contract. A muslim women has a much publicized right of inheritance by virtue of which she stands to inherit one - eighth of her husband's property upon his demise and if he dies childless she receives one- fourth. In case of a daughter, she is entitled to inherit half of the brother's share because Muslim *Sharia* Law gives the male a share double than that of his female counterpart. As a mother a muslim woman enjoys one - sixth of her son's property upon his demise and if he dies without leaving any issue then she stands to receive one - third of his estate. Under Muslim Law, a mother can never be a natural guardian of her children being entitled only to the custody of a minor child.

The Hindu marriage, however, being a sacrament, generally denies the right of divorce by either party though the Hindu Marriage Act, 1955, permits divorce provided certain grounds for such dissolution are met. This provision is applicable in India and not in Bangladesh. Widows may, contrary to previous practice where the widow had to follow the dead husband to the funeral pyre, remarry under Hindu Women's Remarriage Act, 1956. In the ancient days, a Hindu woman could only own her '*stridhan*' or bridal ornaments which were given to her during marriage. The Hindu Succession Act 1956 conferred on the widow (after amendment in 1973) and the mother the right to inherit the coparcenary property of the deceased with the privilege of selling, mortgaging or disposing of the property as she wished.

However, the laws that have been intended to bring the legal status of women in equality with men have remained a myth. Divorce in most cases still seems to be the prerogative of the man. Dowers remain unpaid and there is a distinct gap between a women's inheritance rights and actual practice. Child marriage continues and the horrible system of *suttee* is observed, though rarely, even now in remote villages of India. Girls are expected to remain mute and suffer innumerable agonies at the hands of their husbands and in- laws if they fail to provide handsome dowries. Stories of women burnt alive by their husbands and in - laws for failing to procure the required dowry are not new to our ears. Women continue to fall prey to regular harassment and disrespect.

Many laws are thrust aside by orthodox priests in the name of tradition and custom. In order to remove social inequality in the field of legal provision



it is necessary that laws are implemented adequately and people are educated to follow them.<sup>10</sup>

**b. Social :**

There are a number of social and cultural factors which make the position of women in third world countries somewhat different from their counterparts in the West. Although the goals of equality, justice and peace in human development may be the same for all, the fundamental problems and solutions are bound to be different in different societies. Well known factors which leave considerable impression on the position of women in developing and least developed countries include religion, family structure, social values, etc.<sup>11</sup> The South Asian region hosts a number of religions, myths, ideologies, rituals and beliefs which obviously vary the status of women accordingly. Such status is invariably connected with social and patriarchal norms where women are considered inferior to men. It is undeniable that a girl is unwelcome and discriminated upon since her birth. Her male counterpart is almost always the centre of all attention as he is considered to be an asset and not a liability like his sister. The discriminatory practices begin at home where the parents themselves are unaware of their partial behaviour towards the male child. Ironically, it is the women who perpetuate the preference for a male child because in South Asia the status of a woman is enhanced with the birth of a male child. This may have serious implications not only on the status but even the survivals of females.<sup>12</sup>

An important factor which influences women's self perception, despite social changes, is religion. The participation of women in the religious sphere is a peculiar blend of the old and the new. Some religious traditions may provide women with greater scope of self-expression while others restrict the participation of women to religious practices in the privacy of their homes. In Bangladesh, women generally do not participate in congregational prayers e.g. the *Jumaa*, or Friday prayer, or *Idd* Prayer or even the *Janaza*. Prayers are practiced in private by reason of sexual segregation. Recently though

10. Sachchidananda, Ramesh P. Sinha, "Women and Law: The Legal Status", *Women's Rights: Myth and Reality*, Printwell Publishers, 1984, P. 42

11. Andrea Menefee Singh, "The Study of Women in South Asia: Some Current Methodological & Research Issues", Alfred de Souza (ed.), *Women in Contemporary India & South Asia*, Manohar Publishers, India, 1980, p. 69.

12. Alfred de Souza, "Women in India and South Asia: an Introduction", *Women in Contemporary India & South Asia*, Manohar Publishers, India, 1980 p. 23.



women in Bangladesh have begun to take part in congregational prayers but the instances are few. Although in some of the countries of the Middle East women are not subject to such segregation it shall be an error to state that discrimination does not exist there.

c. Economic:

Social aversion to women may have deep rooted economic reason. Sons are considered to be economically productive as he may be the future breadwinner of the family. Also it is important to have a male heir to continue the family lineage. Contrarily, girls cannot be relied upon to provide for her parents; instead the parents have to pay substantial dowries in most cases to their sons-in-law.<sup>13</sup> Hence, the financial aspect plays an important role in encouraging discrimination against women in general.

An overwhelming majority of working women live in the rural areas. According to a 1971 census, only 13 percent of Indian women are engaged in some form of economic activity. About 80 percent of these working women are engaged in agriculture.<sup>14</sup> In contrast to South East Asian countries, i. e. Burma, Thailand, etc. very few Bangladeshi women go for business though recent years witness a general trend of women taking up traditionally male occupations. Despite constitutional measures conferring the right of equal pay for equal work, it still remains a dream. Women in rural areas are worst effected as they cannot stand up for their rights due to their lack of knowledge of it. Women need to be educated about their rights so that they may not be taken advantage of, so that they can protect and enforce their fundamental equality in all spheres. It is a common feature that girls are more disadvantaged as they begin work at a very early age, and they work for longer hours and more than often their labour goes unpaid. Young children are employed as household help who are mostly girls. Lately, there has been a great exodus of teenage girls into garment factories where they work for low wages and long hours. These girls are deprived of their otherwise essential schooling because need for survival surpasses all other priorities. It shall not be an understatement to speak of women as perhaps major earners of their families. In a study in Delhi, 81 percent of women stated that they worked to provide basic support to their families. The study of rural women in

13. A.F.M. Iqbal Kabir and Quazi Ghiasuddin, "The Girl Child in Bangladesh Perspective" *In Touch*, (Voluntary Health Services Society) Health Newsletters, September, 1990, p. 13.

14. Joseph Minattur, "Women and the Law : Constitutional Rights and Continuing Inequalities," Alfred de Souza (ed.) *Women in Contemporary India & South Asia*, p. 175.



Bangladesh who were participating in the food-for-work programme reveals that 50 percent of these women were the chief income earners in their families and some of them even supported their whole families for several years at a stretch. Divorced and separated women though face lack of institutional help, often head households and are solely responsible for the maintenance of their families.<sup>15</sup>

It is quite evident that paucity of data on important social and economic indicators related to women has caused the distortion of the picture of participation of women in the economy and labour force of the country. The census data which are available conceal actual facts related to women, their rights and their contribution to the social and economic fields of the country because of the biases introduced by sex based stereotypes.

#### 4. Women and VIOLENCE :

Violence against women has been on the rise for quite some time now and their harassment range from kidnapping and trafficking to rape and murder. In the absence of data based research on violence affecting women, one has to rely mostly on newspaper reportings and news casting media for an accurate account of the incidents. The life and liberty of women are sharply curtailed with the increase of violence in the family. Incidents where young housewives are doused in petrol and burnt alive have become commonplace. Dowry deaths are many in number where wives are brutally killed for failing to procure the required dowry from their fathers. Even when demands are fulfilled, women are plagued with fresh demands. More than 50 percent of murders are due to family disagreements over unfulfilled demands both in the rural and urban areas. Dowry deaths absorb 22 percent in the villages as compared to 10 percent in the cities.<sup>16</sup> Although death figures are lower in the cities, the dowry remains an enigma which reflects the inferior status of women in this region.

Physical torture in the form of habitual beatings by the husband is a normal phenomenon. Merciless beatings often result in death and the cause is almost always cited as suicide. The most ruthless and horrifying method of torture is the practice of throwing acid on women out of vengeance in violation

15. Alfred de Souza, see introduction of *Women in Contemporary India & South Asia*, pp. 3-4.

16. Latifa Akanda and Ishrat Shamim, "4 Comparative Study of Rural and Urban Violence Against Women in Bangladesh", *Women and Violence : A Comparative Study of Rural & Urban Violence Against Women in Bangladesh*, *Women's Issue* 1, p. 9



of existing deterrent legislations. Women victimized thus hardly receive any justice and equality before law as given in the constitutional provisions of the country.

#### 5. Women and Saarc :

Discrimination against girl children, in other words, women, is a common feature in almost all countries of the South Asian region. During its 1987 summit, SAARC declared that 1990 should be designated as the Year of the Girl Child in its member countries, thus taking cognizance of gender disparity in the countries concerned. With the exception of Sri Lanka and Maldives, the low status of the girl child is evident in gender disparities in low nutritional status, high mortality rate, low enrolment in schools, high dropout rates, etc. Disparities exist between girls and boys in the availability and access to actual opportunities, services and resources.<sup>17</sup> This is very common in every corner of the society but particularly prevalent in poverty stricken and illiterate house-holds in both rural and urban areas. Women in Bangladesh have traditionally and historically lagged behind men in literacy and celebration of decades and years of women in development has not bridged this gap. The situation is more acute in the rural areas where over 80 percent of the rural women were illiterate as late as 1987.<sup>18</sup>

Sons are given preference particularly among the illiterate parents. World Fertility Survey, 1983, studied forty developing countries and found that the countries with the strongest son preference were Bangladesh, Jordan, Korea, Nepal, Pakistan, and Syria.<sup>19</sup> This social psychology reflects the discriminatory attitude accorded to women and characterizes the behaviour of the society towards girls in general. Women are thus denied their opportunities and rights consciously or sub-consciously.

#### 6. Difficulties in the Enforcement of Social Legislation :

Despite concerted efforts the legal position of women in the Indian Sub-Continent is far from satisfactory. Women continue to suffer socially inexorable harassment and inhibitions. They fail to exercise their rights owing mainly to ignorance and even if they were familiar with their privileges the social values particularly in the rural areas do not permit women to use them.

17. Jowshan A. Rahman, "SAARC Year of the Child," *InTouch*, VHSS Newsletter, September, 1990 p. 4-5.

18. Report by Mahmuda Islam, *The Girl Child in Bangladesh A Situation Analysis*, UNICEF 1990, Dialogue Publications Ltd. p. 19.

19. p. 9, *ibid*.



Sources through which women could acquaint themselves with their rights and privileges are few and ineffective. Insufficient publicity and inadequate machinery for implementation has an adverse effect on the education of women of their constitutional rights. As a result, they are unable to achieve equality with men. Analysis shows women, with the exception of an urban few, in complete darkness where their rights are concerned.

The attitude of men have undergone little change and rural men still consider women to be subservient to them. Strangely enough, this opinion is echoed by a large number of women whose social values clashed heavily with legislative enactments thus hampering the smooth enforcement of their provisions. The mental horizon of both men and women need to be widened enough to accept changes in the society with good grace.

The equality clause in the Constitution has hardly made any impact on the social and economic life of women in this region. Dowry Prohibition Act fails when dowries are construed as "gifts". Provisions of divorce are futile as society frowns upon the institution making it alien to the social pattern. Child marriages are still favoured and cruelty to women continues to terrorize them. When will all this sordidness end?

#### 7. Conclusion :

The difficulties faced by women demand the attention of all quarters of a given society in formulating appropriate policies and programmes. A general awareness of their rights and privileges has to be created among the female population. Social attitudes cannot be changed overnight but voluntary organizations may assist in mobilising public opinion and strengthening the need to overcome all social evils. In order to attain this objective, prevailing discriminatory attitudes should be shed and women be freed from their bonds. Not only that, legislation should be made simpler and less contradictory if women are to be extricated from subjugation. Ignorance must be eradicated and this is possible only through proper education because educated women are more aware of their legal rights irrespective of regional variation.

The change is not a static outcome but a dynamic process involving re-examination of ideas and their implementation. We have a long course to follow if we are to initiate any sort of emancipation of women in every field. As it is, we are lagging far behind our Western counterparts. Superstitions and other traditional taboos should be erased from the social and cultural contexts in order to create a healthier and richer concept of womanhood and



thus pave the way for the next generation to enjoy the fruits of an indiscriminate society.

Women's rights should no longer be cushioned between the pages of the Constitution -- they should be savoured in the manner intended -- with courage and dignity.





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ঢাকা বিশ্ববিদ্যালয় গ্রন্থ সংস্থা