

CHAPTER I

HISTORICAL BACKGROUND

1. INTRODUCTORY REMARKS

(Bangladesh which emerged as an independent and sovereign State on the 16th December, 1971, has a long political and legal history. In the ancient times it was ruled by the local Hindu rulers who administered justice according to local customary laws based on religion. At the beginning of the 13th century it was invaded by the Muslims who ruled the country up to the middle of the 18th century. They introduced Islamic administration of justice in which reflection of the legal system of the Hindu period could not be ignored. Though the British came to Indian Sub-continent at the beginning of the 17th century, they were able to establish political sovereignty over Bengal and ultimately over the whole of Indian Sub-continent at the middle of the 18th century. They infiltrated their legal system and replaced the earlier one in course of time. The British left the Sub-continent in 1947 giving independence to colony of India by dividing it into two independent dominions, India and Pakistan. On independence in 1947, Bangladesh which was previously a part of province of Bengal became a province of Pakistan named as East Pakistan and was ruled by the Pakistani neo-colonial rulers up to 1971 when it emerged as a sovereign State.

So, the roots of the development of legal system of Bangladesh go back to the ancient times of Indian Sub-continent. It passed through various stages and has gradually

developed as a continuous historical process. The process of the development can be conveniently divided into the four important periods—Hindu period, the Muslim period, the British period and the Modern period. The Hindu period extended for nearly 1600 years before and after the beginning of the Christian era. Muslim period began with the first major invasion by Muslims in Indian Sub-continent in 1100 A.D. The British period began with the consolidation of their power in 1757 A.D. in India, and lasted for nearly two hundred years. The Modern period has begun with the withdrawal of the British colonial rule from the Indian Sub-continent and the establishment of the independent States of India and Pakistan in 1947.¹

2. HINDU PERIOD

In ancient Bangladesh as well as in India the king was regarded as the fountain-head of justice. His foremost duty was to protect his subjects. He was respected as the lord of religion and was entrusted with the supreme authority of the administration of justice in his kingdom. The King's Court was the highest Court of appeal. It was also the original Court in the cases of vital importance to the kingdom.

Next to the King was the Court of the Chief Justice. Apart from the Chief Justice, the Court consisted of a board of Judges to assist him. In the district headquarters the courts were presided over by the government officers under the authority of the King for the administration of justice. In the villages there existed *panchaets* (councils) consisted of a board of five or more members to dispense justice to the villagers. The village *panchaets* deal with simple civil and criminal cases.

In ancient Bangladesh the law which was administered was customary. Canon law was also recognised. Besides, *dicta*

emanating from religion was regarded as a major source of law. This system remained operative in the country with some modifications here and there until the advent of Islam in Indian Sub-continent.

3. MUSLIM PERIOD

Muslim period marked the beginning of a new era in the legal history of Bangladesh. The Arab Muslim first came to India in the eighth century but it did not create any impression in the minds of the people of this Sub-continent. But during the continuance of the *sultanate*, 1206 A.D.—1526 A.D., the administration of justice was taking formative shape, and during the Mughal period commencing from 1526 A.D. a well-organised legal system took a positive shape.

During the Mughal period the Emperor was considered the fountain of justice. The Emperor created a separate department of justice with a view to regulating and observing the proper administration of justice. A systematic gradation of courts with well-defined powers of the presiding Judges existed all over the empire. They were as follows:

At Delhi, the capital of the Mughal empire, three important courts were established: the Emperor's Court, the Chief Court of the empire and the Chief Revenue Court. The Emperor's Court, presided over by the Emperor, was the highest Court of the empire. The Court had original and appellate jurisdictions to hear civil and criminal cases. The Chief Court of the empire, presided over by the *Qazi-ul-Quzat* (Chief Justice) who was appointed by the Emperor, was the second important Court at Delhi, the seat of the Capital. The Court had the original and appellate jurisdictions to hear civil and criminal cases. It also

supervised the working of the provincial courts. The Chief Revenue Court, presided over by the *Diwan-e-Ala* was the third important Court established at Delhi. It was the highest Court of appeal to decide revenue cases.

In each Province (*Subah*) there were three courts, namely, the Governor's Court and the Bench, the Chief Appellate Court and the Chief Revenue Court. The Governor's own Court (*Adalat-e-Nazim-e-Subah*), presided over by the Governor (*Nazim-e-Subah*), had original jurisdiction to hear cases arising in provincial capital. Sometimes the Governor presided over a Bench to hear original, appellate and revisional cases. The Provincial Chief Appellate Court was presided over by the *Qazi-e-Subah*. The Court had original and criminal jurisdiction.

In each district (*Sarkar*) there were four courts, namely, the Chief Civil and Criminal Court of the district, *Faujdari Adalat*, Court of *Kotwali* and *Amalguzari Kachehri*. In each *parganah* there were three courts, *Adalat-e-paragana*, Court of *Kotwali* and *Kachehri*. At the village level the Mughal retained the ancient system of the *panchaets* for the settlement of petty disputes. *Sarpanch*, the village-headman, was the President of the *panchaet*.

This system of law under the Mughals was effective and worked well for some centuries. Its disintegration started when the control of the Mughal Emperors over the provinces became less effective. Another cause of this disintegration was the coming of the English and the infiltration of their legal system into the country. The acquisition of sovereignty over India was slowly made by imperceptible steps and "the sudden application of a foreign law was in the highest degree, improbable".² But ultimately the English established their sovereignty over Indian Sub-continent and made an expansion of the common law in India.

4. BRITISH PERIOD

The English first came to India as trading companies under a series of Charters granted by successive English sovereigns. The earliest was of Eliabeth I in 1600 A.D. It gave the company power to make reasonable bye-laws, ordinances for the good government of the Company and its servants provided they were not contrary to "the laws, statutes or customs of the English realm." Sir James Stephen thought that this first introduced the laws of England into india.³

In 1726 A.D. the Crown granted Letters Patent creating Mayors' Courts in the Presidency Towns of Calcutta, Bombay and Madras.⁴ These were not the Company's Courts but Courts of the King of England. These Courts consisted of the Mayors and certain aldermen and were authorised "to try, hear and determine all civil suits, actions and pleas" and "to give judgment and sentence according to justice and rights". The Charter creating the Mayor's Courts did not expressly state that the law to be applied by these Courts was to be the law of England. But the decision of the Privy Council was that the Charter introduced into the Presidency Towns the law of England - both common law and statute law - as it stood in 1726.⁵ Morley differing from the view expressed by Sir James Stephen also reached the similar conclusion.⁶

In course of time the activities of the companies were not confined to the factories; and their officers gradually assumed the management of affairs in the interior of the country as well. They defeated the *Nawab* of Bengal in 1757 A. D. and established the political supremacy in Bengal, Bihar and Orissa. In 1765 A. D. Clive successfully persuaded Mughal Emperor Shah Alam to grant to the Company *Diwani* for the collection

and administration of revenue of Bengal, Bihar and Orissa. "This involved the establishment, not only of officers to collect the revenue, but also of courts to administer civil and criminal justice." 7 Professor Alan Gledhill regarded it as the "*de jure* recognition" of supreme control of the British. 8

After the acquisition of *Diwani* in 1765 A. D. the Company introduced *adalat* or court system in 1772 A. D. for the administration of justice in *Mufassil* beyond the Presidency Town of Calcutta and set up two types of courts in each revenue district. For civil justices, Provincial Civil Court styled *Mufassil Diwani Adalat* was established in each collectorate and a Chief Civil Court styled *Sadar Diwani Adalat* with appellate power was established in Calcutta. A Supreme Court of Judicature replacing the Mayor's Court was established in Calcutta by a Charter of the 26th March, 1774. A. D. pursuant to the Regulating Act of 1773⁹ A. D. passed by British Parliament. It had jurisdiction of a common law court and also the powers of the court of equity analogous to those exercised at one time by the Court of Chancery in Britain.

In 1862 A. D. the High Court of Calcutta was established pursuant to the provisions of the High Courts Act, 1861¹⁰. This High Court replaced the Supreme Court and Chief Civil Court or *Sadar Diwani Adalat*. All the original and appellate jurisdictions of the Supreme Court, the appellate jurisdiction of *Sadar Dewani Adalat* and *Sadar Nizamati Adalat* became vested in the said High Court. Provision for appeal from the High Court to the Privy Council was made under certain circumstances. The provisions of the High Courts Act, 1861, were modified by the Indian High Courts Act, 1911¹¹. The Government of India Act, 1915,¹² re-enacted all provisions made by the Indian High Courts Acts of 1861 and 1911 in relation to the High Courts. The Government

of India Act, 1935,¹³ retained many provisions regulating the establishment, constitution, jurisdiction and powers of the High Courts.

The Government of India Act, 1935, also provided for the establishment of a Federal Court which was given exclusive original jurisdiction to decide cases between the Centre and the constituent Units. Its advisory jurisdiction was limited only to those cases which were referred to it by the Governor-General for its advice on any legal question of public importance. It also exercised appellate jurisdiction from the decisions of the High Courts but it was a very limited one. The Act made provision for an appeal to the Privy Council from the Federal Court.

This judicial system continued upto 1947 A.D. when two independent dominions, India and Pakistan, were created under the Indian Independence Act, 1947.¹⁴

Before closing the discussion on the legal system under the British period a brief discussion on the codification of law should be made. The legal system prevailing in Indian Sub-continent near about the beginning of the 19th century was full of confusion and chaos. Law in all the Presidency Towns was not uniform. Judicial decisions introduced some differences therein. There was uncertainty whether a particular proposition of law was applicable or not either in the *Mofussil* or in the Presidency Towns till the highest court had given a verdict. The non-Hindu and non-Muslim sections of population were subject to different laws as according as they resided in the *Mofussil* or the Presidency Towns, and this caused them great inconvenience.¹⁵

The condition of law at that period provoked comments and criticisms from many leading people who put emphasis on the codification of law.¹⁶ The creation of an All India Legislative

Council in 1833 under the Charter Act of 1833¹⁷ and creation of Law Commissions of 1835, 1853, 1861, and 1879, were the direct reflections of these comments and criticisms,¹⁸ and the promulgation of the Indian Penal Code, 1860 (Act XLV of 1860), marked "the beginning of the period of codification of substantive law".¹⁹ In 1872 the famous Indian Evidence Act (Act I of 1872) and Indian Contract Act (Act IX of 1872) were passed. All these Acts were based on the common law of England and made remarkably few departures from it.²⁰ Within a few years a number of Acts were passed which provided the laws according to the provisions of which administration of justice was maintained.

In this way "..... the English brought into India not only the mass of legal rules strictly known as the common law but also their traditions, outlooks and techniques in establishing, maintaining and developing the judicial system"²¹ the far reaching impact of which will not be removed in the near future.)

5. MODERN PERIOD

After independence of Indian Sub-continent in 1947 A. D. Bangladesh became a province of Pakistan which was run in accordance with the provisions of the Government of India Act, 1935, read with the Indian Independence Act, 1947. Under the new constitutional arrangement, a new Federal Court of Pakistan was set up at Karachi.²² The Federal Court (Enlargement of Jurisdiction) Act, 1950, provided that civil appeals which previously lay to the Privy Council would lie to the Federal Court and the Privy Council (Abolition of Jurisdiction) Act, 1950,²³ transferred on the 22nd April, 1950, to the Federal Court all the appellate jurisdiction of the Privy Council in respect

of Pakistan. To exercise powers and jurisdictions over the territory comprising the then province of East Bengal a new High Court for East Bengal was set up at Dhaka in 1947.²⁴ This High Court had exercised same power and authority in the administration of justice as the High Court of Calcutta did. After the emergence of Bangladesh the High Court of East Pakistan was replaced by the High Court of Bangladesh²⁵ and later on by the Supreme Court of Bangladesh under the Constitution of Bangladesh, 1972. The Supreme Court of Bangladesh administers justice according to those laws which were in force in Bangladesh on the 25th March, 1971,²⁶ subject to the provisions of the Constitution of Bangladesh and the consequential changes made by the competent authority.

From the above discussion it is revealed that the present legal system of Bangladesh is not an outcome of a revolution but evolution starting from an undated ancient Hindu period. It passed through the Muslim period for some centuries and took a positive shape at the later part of the British period. So, it emanates from a mixed system of Indo-Mughal and English law, both common law and equity,—the English law predominating. After the end of the British rule in 1947, though sovereignty and independence of the people of this region have been established but no change in the basic structure of the legal system as established by the British has yet been made.

NOTES AND REFERENCES

1. See V.D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History* (Lucknow: Eastern Book Company, 1981) at p. 1.
2. *Mayor of Lyons v. East Indian Co.*, (1836) 1 M.I.A. 175, per Lord Brougham at p. 277.

3. See Justice Vivian Bose. "the Migration of the Common Law" *The Law Quarterly Review*, Vol. 76 (1960) p. 59.
4. Letters Patent of 24th September, 1726, the 13th year of the reign of George I.
5. See *Advocate-General of Bengal v. Ranee Surnomoye Dossee*, (1863) 9 M.I.A. 424.
6. See Justice Vivian Bose, *op. cit.*, at p. 60.
7. *Ibid.*
8. Alan Gledhill, *Pakistan: the Development of Its Laws and Constitution* (London: Stevens and Sons, 1967) at p. 17.
9. 13 Geo. III, C. 63.
10. 24 & 25 Vict. C. 104.
11. 1 & 2 Geo. V. C. 18.
12. 5 & 6 Geo. V. C. 61.
13. 26 Geo. V. C. 2.
14. 10 & 11 Geo. VI. C. 30.
15. *Hansard's Debates, Third Series*, Vol. XVIII, 729 (1833).
See also *Musleah v. Musleah*, Ind. Dec. (OS) III, 147.
16. See M.P. Jain, *Outlines of Indian Legal History* (Bombay: N.M. Tripathi Private Ltd., 1972) at pp. 500-505.
17. 3 & 4 Will. IV C. 85.
18. M.P. Jain, *op. cit.*, at pp. 511-551.
19. *Ibid.*, at p. 551.
20. Justice Vivian Bose, *op. cit.*, at p.60.
21. M.C. Setalvad, (London: Stevens and Sons Limited, 1960) at p. 3.
22. The Federal Court Order, 1947 (G.G.O. 3 of 1947). See *Constitutional Documents (Pakistan)* Vol. IV-B, (Karachi: Government of Pakistan Press, 1964) p.919.

23. See *Constitutional Documents (Pakistan) Vol. III*, p. 73.
24. The High Court (Bengal) Order, 1947 (Order 4 of 1947). For the text see *Constitutional Documents(Pakistan), Vol. IV-B*, p.915.
25. See *High Court of Bangladesh Order, 1972* (P.O. 5 of 1972). For the text see *Bangladesh Gazette Extra.*, January 17, 1972.
26. See Proclamation of Independence, 1971, read with Laws Continuance Enforcement Order, 1971. For the texts see 24 D.L.R. (1972) Bangladesh Statutes (1971-1972) pp. 1-3.

CHAPTER II

BASIS CONSTITUTIONAL LAW

1. EXECUTIVE

On the emergence of Bangladesh constitutional arrangement was contained in the Proclamation of Independence¹ which came into force on the 26th March, 1971. This arrangement continued till the 10th January, 1972. On the 11th January, 1972, the President promulgated the Provisional Constitution of Bangladesh Order, 1972,² which became the interim constitution of the country. However, The Government of Bangladesh had in its mind to frame a constitution. The Constitution Drafting Committee prepared a draft constitution³ which was finally adopted and enacted by the Constituent Assembly. The Constitution of the People's Republic of Bangladesh⁴ came into force on the 16th December, 1972.

The Constitution of Bangladesh under Article 7 guaranteed the supremacy of the Constitution over all the laws of the country and introduced westminster model of parliamentary democracy. The Constitution since 1972 was amended for ten times and was suspended for two times due to declarations of Martial Law one in 1975 and the other in 1982. The Fourth Amendment of the Constitution⁵ has made a radical change in the basic structure of the Constitution and introduce the presidential system of democracy which is now prevailing in Bangladesh. In the following pages the discussion is made on the basis of the Fourth Amendment of the Constitution subject to changes made later on by any other amendments.

Part IV of the Constitution deals with "the Executive." Chapter 1 of this Part ensures that the executive authority of the Republic shall vest in the President and shall be exercised by him, either directly or through officers subordinate to him⁶.

The President shall be elected by direct election⁷ and hold office for a term of five years from the date on which he enters upon his office.⁸ The President shall make rules for the allocation and transaction of the business of the Government.⁹ He shall have power to grant pardons, reprieves and respites, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.¹⁰ The supreme command of the defence services of Bangladesh shall vest in the President.¹¹

Under the Constitution provision has been made to have a Vice-President to be elected by direct election.¹² The term of the Vice-President is for five years but he can "continue to hold office until his successor enters upon his office"¹³ The Vice-President is to exercise such powers as are assigned to him by the President.¹⁴ He can function as Acting President if any vacancy occurs in the office of the President or the President is unable to discharge the function of his office on account of absence or illness or any other cause.¹⁵

Chapter II of Part IV of the Constitution deals with "the Council of Ministers". For the original arrangement of a cabinet system with the Prime Minister at its head, a Council of Ministers has been substituted to "aid and advise the President in the exercise of his function."¹⁶ Under the new arrangement the Ministers, including the Prime Minister, are to be appointed by the President and shall hold office during his pleasure.¹⁷

The original Constitution of 1972 made the President titular Head of the State; but the Fourth Amendment has made him head of the State as well as head of the Government. The Vice-

President, the Prime Minister and all other Ministers are subordinate to him who hold office during the pleasure of the President. In short, the Fourth Amendment has made the President constitutional dictator.

2. LEGISLATURE

Part V of the Constitution deals with "the Legislature". Chapter I of this Part of the Constitution provides that the legislative powers of the Republic shall be vested in Parliament to be known as "the House of the Nations."¹⁸ Parliament consists of 330 members of whom 300 members will be elected in accordance with law from single territorial constituencies by direct elections.¹⁹ There shall be reserved 30 seats exclusively for women members who shall be elected according to law by the members aforesaid.²⁰ The seat of Parliament shall be in the Capital.²¹

Parliament shall be summoned, prorogued and dissolved by the President.²² There shall be at least two sessions of Parliament in every year.²³ The normal term of Parliament is for five years.²⁴

Parliament shall at the first sitting after any general election elect from among its members a Speaker and a Deputy Speaker, and if either office becomes vacant shall within seven days or, if Parliament is not then sitting, at its first meeting thereafter, elect one of its members to fill the vacancy.²⁵

Chapter II of Part V of the Constitution deals with legislative and financial procedures. Every proposal in Parliament for making a law shall be made in the form of a Bill.²⁶ When a Bill is passed by Parliament it shall be presented to the President for assent.²⁷ When the President has assented or is deemed to have

assented to a Bill passed by Parliament it shall become law and shall be called an Act of Parliament.²⁸ No tax shall be levied or collected except by or under the authority of an Act of Parliament.²⁹

Chapter III of Part V of the Constitution deals with the Ordinance making power of the President. The Constitution provides that at any time when Parliament is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make or promulgate such Ordinances as the circumstances appear to him to require.³⁰ Any Ordinances to made shall have the like force of law as an Act of Parliament.³¹ But such an Ordinance shall not make any provision - which could not lawfully be made under the Constitution by Act of Parliament; for altering or repealing any provision of this Constitution; or continuing in force any provision of an Ordinance previously made.³²

From this short discussion it is evident that the established ingredients of the westminster model of parliamentary system are absent in the Constitution as amended by the Fourth Amendment. The executive is no longer responsible to the legislature; thus, the check and balance maintained in the original Constitution has been destroyed. On this point Moudud Ahmed observes: "with these amendments the importance of the Parliament was entirely gone and it was turned into a secondary rubber-stamp body in the new political system."³³ Latter political crises prove this statement to be correct one.

3. JUDICIARY

part VI of the Constitution deals with "the Judiciary". Chapter 1 of this Part provides that there shall be a Supreme Court of Bangladesh which is the highest Court of Bangladesh

comprising two Divisions: the Appellate Division and the High Court Division.³⁴ The Supreme Court shall consist of the Chief Justice and such number of other Judges as the President may deem it necessary to appoint to each Division.³⁵ The Chief Justice and other Judges, who hold office until they attain the age of sixty-five years unless removed earlier by the order of the President on the ground of misbehaviour or incapacity, shall be appointed by the President.³⁶

The High Court Division of the Supreme Court shall have such original, appellate and other jurisdictions and powers as are conferred on it by this Constitution or any other law.³⁷ The said Division, on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any fundamental rights conferred by Part III of this Constitution.³⁸ In other words this Division is empowered to issue writs of *habeas corpus*, *mandamus*, *Quo warranto*, *certiorari* and prohibition. This Division shall have superintendence and control over all courts subordinate to it, and the law declared by that Division shall be binding on all courts subordinate to it.³⁹

The Appellate Division of the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division.⁴⁰ The said Division has the power to review any judgment pronounced or order made by it.⁴¹ If at any time it appears to the President that question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the Division may, after such hearing as it thinks fit, report its

opinion thereon to the President.⁴² The law declared by the Appellate Division shall be binding on the High Court Division and all other courts subordinate to it.⁴³

Chapter II of Part VI of the Constitution deals with "Subordinate Courts." The Constitution provides that in addition to the Supreme Court there shall be such courts subordinate to it as may be established by law.⁴⁴

Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf.⁴⁵ The control including that power of posting, promotion and grant of leave and discipline of persons shall vest in the President.⁴⁶

Chapter III of Part VI of the Constitution provides that Parliament may by law establish one or more "Administrative Tribunals." The Constitution provides that Parliament may by law establish one or more administrative tribunals to exercise jurisdictions in respect of matters relating to or arising out of --- the terms and conditions of persons in the service of the Republic; the acquisition, administration, management and disposal of any property vested in or managed by the Government by or under any law, including the operation and management of, and service in, any nationalised enterprise or statutory public authority etc.⁴⁷ Where any administrative tribunal is established under Article 117 of the Constitution, no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal. Provision was made that Parliament may, by law, provide for appeals from, or the review of, decisions of any tribunal.⁴⁸

In this way, the structure of the Judiciary has been framed by the Constitution of Bangladesh.

4. INDEPENDENCE OF JUDICIARY

Before making an observation on the independence of judiciary provided by the Constitution as amended by the Fourth Amendment, a short diacussion on its background should be made with view to giving the proper perspective of the study.

The original Constitution of Bangladesh ensured the independence of judiciary. The Supreme Court of Bangladesh in deciding a number of cases ⁴⁹ took a valiant stand and tried to establish the rule of law as contemplated within the structure of the Constitution. "This sort of rulings was a great shock on the part of the executive authority of Bangladesh"⁵⁰ and the Government of Bangladesh had determined to curtail the powers and jurisdictions of the Supreme Court in particular and judiciary in general as guaranteed by the Constitution of Bangladesh, 1972. And the curtailment of the independence of judiciary as made by the Fourth Amendment was the direct consequence of this sort of determination taken by the existing Government.

Thus, it has been laid down in the Constitution that "subject to the provisions of this Constitution the Chief Justice and other Judges of the Supreme Court of Bangladesh shall be independent in the exercise of their judicial functions."⁵¹ It has also been laid down that "subject to the provisions of the Constitution, all persons employed in the judicial service and magistrates shall be independent in the exercise of their judicial functions."⁵² This means that the persons who are employed in the judiciary are independent in the exercise of their judicial functions. In other words, independence of judiciary is ensured. But if the matter is looked into deeply it will be clear that the independence of judiciary has been curtailed by the provisions of the Constitution as amended by the Fourth Amendment.

First, on the question of removal of judges the provision for impeachment was deleted and the same power has been assumed by the President who can remove a Judge including the Chief Justice simply by an order on the ground of misbehaviour or incapacity. secondly, with regard to the appointment of additional judges of the Supreme Court, the President may make the appointment without any consultation with the Chief Justice. Thirdly, in matters of appointment to the subordinate courts the authority of the Supreme Court has been withdrawn. Fourthly, the Supreme Court has no authority for the control and discipline of the subordinate courts. Fifthly, the power of superintendence and control of the High Court Division over all tribunals subordinate to it has been withdrawn. in these ways, the independence of judiciary within the framework of the Constitution of Bangladesh as amended by the Fourth Amendment has been curtailed.

Moreover, since 1972 Martial Law had been declared two times, one in 1975 which continued upto 1979 and another in 1982 which continued upto 1986 — the direct consequence of which was that the powers and jurisdictions of the Supreme Court as provided by the Constitution were curtailed so that the said Court could not call in question the Proclamations of Martial Law, Martial Law Regulations, Martial law Orders, or any other order made by the Chief Martial Law Administrator or any person authorised by him. Thus, during the continuance of the Martial law the Judiciary was made the subordinate organ of the executive authority i.e., the Martial Law authority, and accordingly, the residue of the independence of judiciary has been abolished.

5. FUNDAMENTAL RIGHTS

Part III of the Constitution deals with "Fundamental Rights." The Constitution guarantees that all existing laws inconsistent with fundamental rights and any law so made shall, to the extent of such inconsistency, become void on the commencement of the Constitution.⁵³ It also guarantees that the State shall not make any law inconsistent with fundamental rights and any law so made shall, to the extent of such inconsistency, be void.⁵⁴

Articles 27 to 43 of the Constitution guarantee some fundamental rights which may be classified under the following heads: (A) equality of persons; (B) protection of life, liberty and property; and (C) political and religious freedoms.

(A) Equality of persons :- the Constitution ensures that all citizens are equal before law and are entitled to equal protection of law.⁵⁵ To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen.⁵⁶ The Constitution provides that there shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.⁵⁷

(B) protection of life, liberty and property:- The Constitution guarantees that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.⁵⁸ It also guarantees that no person shall be deprived of life or personal liberty save in accordance with law.⁵⁹ The Constitution further provides protection against retrospective offence or punishment.⁶⁰

The Constitution ensures to every citizen certain safeguards against arbitrary arrest and detention.⁶¹ No person shall be subjected to torture or to cruel, inhuman or degrading

punishment or treatment.⁶² All forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.⁶³ The Constitution provides that every citizen shall have the right, subject to any reasonable restrictions imposed by law, to be secured in his home against entry, search and seizure, to the privacy of his correspondence and other means of communication.⁶⁴

Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law.⁶⁵

(C) Political and religious freedoms:- The Constitution guarantees freedoms of --- movement, assembly, association, thought, conscience, speech, profession or occupation or religion.⁶⁶ But the enjoyment of any right was subject to reasonable restriction imposed by law in the interest of security of the State or public order or public health or morality or decency. There is no hard and fast rule to determine the standard of reasonableness of restriction enjoyed by the Constitution. It should be an objective standard which in a given circumstances and average prudent man would employ.⁶⁷

Enforcement and suspension of fundamental rights :- The right to move the Supreme Court in accordance with Article 102(1) of the Constitution for the enforcement of fundamental rights has been guaranteed.⁶⁸ As pointed out earlier under Article 102(1) the High Court Division of the Supreme Court is empowered to issue writ of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari* and prohibition for the enforcement of fundamental rights whenever there is any infringement of them.⁶⁹

The fundamental rights can be suspended according to specific constitutional provisions. They can be suspended by an order of the President if an emergency is declared under Article 141A of the Constitution and 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 remained suspended.⁷⁰

Thus, the Constitution of Bangladesh has guaranteed an ideal bill of rights which has been prepared following the general principles enunciated by the International Bill of Rights, i.e., the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966, and the Optional Protocol to the International Covenant on Civil and Political Rights, 1966. The influence of American Bill of Rights, 1791, and the Fundamental Rights guaranteed by the Constitution of India, 1950, cannot be ignored, and whenever the Supreme Court of Bangladesh interprets the provisions relating to fundamental rights it makes references to the relevant decisions of the Supreme Courts of United States of America and India.

NOTES AND REFERENCES

1. For the text of the Proclamation of Independence, 1971, see *the Bangladesh Gazette, Extraordinary*, 23rd May, 1972.
2. For the text of the Provisional Constitution of Bangladesh Order, 1972, see *the Bangladesh Gazette, Extraordinary*, 11th January, 1972.
3. For the text of the Report of the Constitution Drafting Committee, 1972, see *the Bangladesh Gazette, Extraordinary*, 12th October, 1972.

4. For the text of the *Constitution of the People's Republic of Bangladesh 1972* see Ministry of Law, Parliamentary Affairs and Justice, Government of the People's Republic of Bangladesh (Dhaka : Government Printing Press, 1972).
5. For the text of the Constitution (Fourth Amendment) Act, 1975, see *the Bangladeshs Gazette, Extraordinary*, 25th January, 1975.
6. Article 56(i) of the Constitution of Bangladesh, 1972.
7. Article 48(1). *ibid.*
8. Article 51(1). *ibid.*
9. Article 5(5). *ibid.*
10. Article 57. *ibid.*
11. Article 61. *ibid.*
12. Article 51(2). *ibid.*
13. Article 51 A/(1). *ibid.*
14. Article 56(2). *ibid.*
15. Article 55(1). *ibid.*
16. Article 58(1). *ibid.*
17. Article 58(3). *ibid.*
18. Article 65(1). *ibid.*
19. Article 65(2). *ibid.*
20. Article 65(3). *ibid.*
21. Article 65(4). *ibid.*
22. Article 72(1). *ibid.*
23. *Ibid.*
24. Article 72. *ibid.*
25. Article 74(1). *ibid.*

26. Article 80(1), *ibid.*
27. Article 80(2), *ibid.*
28. Article 80(5), *ibid.*
29. Article 83, *ibid.*
30. Article 93(1), *ibid.*
31. *Ibid.*
32. *Ibid.*
33. Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman* (Dhaka : University Press Limited, 1984) p. 237.
34. Article 94(1) of *the Constitution of Bangladesh*.
35. Article 94(2), *ibid.*
36. Article 95(1) read with Article 96(1) and 96(2), *ibid.*
37. Article 101, *ibid.*
38. Article 102(1), *ibid.*
39. Article 111, *ibid.*
40. Article 103(1), *ibid.*
41. Article 105, *ibid.*
42. Article 106, *ibid.*
43. Article 111, *ibid.*
44. Article 114, *ibid.*
45. Article 115, *ibid.*
46. Article 116, *ibid.*
47. Article 117, *ibid.*
48. Article 117(2), *ibid.*
49. An for Instances see *Habibur Rahman v. Govt. of Bangladesh*, 26 D.L.R. (1974) 201; *Tafur Uddin v. State*, 27 D.L.R. (1975) 18; *A.T. Mridha V. The State*, 25 D.L.R.

- (1973)335; *Maimunnessa v. State*, 26 D. L.R. (1974)241; *Superintendent and Rememberancer, Legal Affairs v Jobed Ali*, 26 D.L.R. (1974)1; *S. Mohasin Sharif v. Government of Bangladesh*, 27 D.L.R.(1975)186.
50. A.B.M. Mafizul Islam patwari, *Changes in the Structure of Government under the Fourth Amendment of the Constitution of Bangladesh*, 1972. (Dhaka: University Grants Commission, 1987) at p. 22.
53. Article 26(1), *ibid.*
54. Article 26(2), *ibid.*
55. Article 27, *ibid.*
56. Article 31, *ibid.*
57. Article 29.(1), *ibid.*
58. Article 31, *ibid.*
59. Article 32, *ibid.*
60. Article 35(1) *ibid.*
61. Article 33, *ibid.*
62. Article 35, *ibid.*
63. Article 34(1), *ibid.*
64. Article 43, *Ibid*
65. Article 42(1), *ibid.*
66. Aritcles 36-41, *ibid.*
67. *Oali Ahad V. Govt. of Bangladesh*, 26 D.L.R. (1974) 376.
68. Article 44 of the *Constitution of Bangladesh*, 1972.
69. *Government of Bangladesh v. Ahmed Nazir*, 27 D.L.R. (A.D.)(1975) 41.
70. Articles 141B and 141C of the *Constitution of Bangladesh*.

CHAPTER III

LAWS RELATING TO CIVIL COURTS AND CIVIL PROCEDURE

1. CIVIL COURTS AND THEIR JURISDICTIONS

The Code of Civil Procedure, 1908 (Act V of 1908), forms one of the most important part of the adjective law of Bangladesh because it contains the law in accordance with which courts of civil judicature proceed in the trial of suits and other proceedings before them. Subject to the appellate jurisdiction of the Appellate Division of the Supreme Court, the High Court Division is the highest court of civil judicature in Bangladesh which has superintendence and control over (a) District Court, (b) Civil Court of a grade inferior to that of a District Court, and (c) Court of Small Causes.¹ A short discussion on these courts has been made as follows:

(a) **District Court:-** The District Court is called District Judge's Court headed by a District Judge who is empowered to transfer, withdraw, try and dispose of any suit, appeal or other proceeding.² The said Court has original jurisdiction relating to probate and letter of administration and guardians and wards. In some districts there are Courts of Additional District Judges who try and dispose of cases which have been transferred by the District Judge.

(b) **Inferior Courts:-** Next to the District Court there is existence of Subordinate Judge's Court which has original jurisdiction as well as appellate jurisdiction. At the *Upazilla* headquarters there is an Assistant Judge's Court which has only original jurisdiction to try cases. The said Court also acts as a Family Court under the Family Courts Ordinance, 1985 (Ordinance VIII of 1985).

(c) **Court of Small Causes:-** In fact, there is no existence of Court of Small Causes. The government may empower any experienced Assistant Judge or Subordinate Judge to try cases as mentioned in the Small Cause Courts Act, 1887 (Act IX of 1887). Section 7 of the Code of the Civil Procedure, 1908, specifically mentions that the some provisions of the Code will not be applicable in the cases of the Court of Small Cause.

Jurisdiction of Civil Courts: the Code of Civil Procedure, 1908, provides three kinds of jurisdictions: (a) jurisdiction over Subject-matter; (b) pecuniary jurisdiction; and (d) territorial jurisdiction.

(a) **Jurisdiction over subject-matter:-** The Code gives jurisdiction to the Civil courts over "all suits of civil nature," including rights to property or office, notwithstanding that question of religious rites or ceremonies are involved.³ A civil court has no Jurisdiction to try suits which are not of a civil nature and of which its cognizance is either expressly or impliedly barred.

(a) **Pecuniary jurisdiction:-** Section 6 of the Code of Civil Procedure, 1908, provides that "... nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction." Thus, the

pecuniary jurisdiction of the Court of Assistant Judge is limited upto 20,000.00 taka. The pecuniary jurisdiction of the Court of Subordinate Judge is unlimited. So, a suit the value of the subject-matter of which exceeds 20,000.00 taka may be instituted in the Court of Subordinate Judge.

(c) **Territorial jurisdiction:-** Section 15 of the Code of Civil Procedure provides that "every suit shall be instituted in the Court of the lowest grade competent to try it." Suits regarding immovable property are to be instituted in the court within the local limits of whose jurisdiction the property is situate. But if the relief sought for can be entirely obtained through the personal obedience of the defendant, the suit may be instituted either in the court within whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.⁴

2. INSTITUTION OF SUIT

Every suit shall be instituted by the presentation of a plain,⁵ which contains the following particulars: (a) the name of the court in which the suit is brought; (b) the name, description and place of residence of the plaintiff and defendant; (c) the facts constituting the cause of action and when it arose; (d) the facts showing that the court has jurisdiction; (e) the relief which the plaintiff claims; (f) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and (g) a statement of value of the subject-matter or the purposes of jurisdiction and court-fees.⁶ Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed.⁷

The plaintiff shall file, along with the plaint, for each defendant a copy of the summons along with a pre-paid registered acknowledgement due cover with complete and correct address of the defendant written on it.⁸ The court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.⁹

When a suit has been duly instituted and admitted the court shall issue a summons to the defendant to appear and answer the claim on a specified date.¹⁰ A defendant to whom a summons has been issued may appear in person, or by a pleader¹¹ and file a written statement. If the defendant does not appear and it is proved that the summons was duly served upon him, the court may pass decree for the plaintiff *ex parte*.¹²

However, at the first hearing of the suit the court shall, after reading the pleadings, and after such examination of the parties as may appear necessary,¹³ ascertain upon what material propositions of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.¹⁴ Where at the first hearing of suit it appears that the parties are not at issue on any question of law or of fact the court may at once pronounce judgment.¹⁵ When the parties are at issue the court may then fix a day for applications for better particulars, admissions, discovery, interrogatories, inspection of documents and determining the mode of proof: another day is fixed for replies and third for disposal of preliminaries.

The court, after the case has been heard, shall pronounce judgment in open court and on such judgment a decree shall follow.¹⁶ Judgments of a Court of Small Causes shall not

contain more than the points for determination and decision thereon.¹⁷ Judgments of other courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.¹⁸

The decree shall be drawn up within seven days from the date of pronouncement of the judgment.¹⁹ The decree shall agree to the judgment: it shall contain the number of the suits, the names and descriptions of the parties, and the particulars of the claim and shall specify clearly the relief granted or other determination of the suit.²⁰

The Code of Civil Procedure, 1908, provides that a decree may be executed either by the court which passed it, or by the court to which it is sent for execution.²¹ The court may, on the application of the decree holder, order execution of the decree—(a) by delivery of any property specifically decreed; (b) by attachment and sale or by sale without attachment of any property; (c) by arrest and detention in prison; (d) by appointing a receiver; (e) in such other manner as the nature of the relief granted may require.

3. APPEAL, REFERENCE, REVIEW AND REVISION

Appeal: The Code of Civil procedure, 1908, provides appeal from original decree in the following cases: (a) an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeals from the decision of such court; (b) an appeal may lie from an original decision of such court; (b) an appeal may lie from an original decree passed *ex parte*.²² But an appeal shall not lie from a decree passed by the court with the consent of parties.²³

In the following cases appeals from preliminary decree and final decree have been provided in the Code of Civil Procedure, 1908. When a party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.²⁴ When an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority of such Judges.²⁵ Where there is no such majority which concurs in a judgment varying or reversing the decree appeal from, such decree shall be confirmed.²⁶

There are some orders from which appeal lies such as (a) an order under section 35-A; (b) an order under section 95; (c) an order imposing a fine or directing the arrest or detention in the civil prison of any person; (d) any order made under rules from which an appeal is expressly allowed by rules.²⁷

Reference: The Code of Civil Procedure, 1908, provides that any Court may state a case and refer the same for the opinion of the High Court Division of the Supreme Court and the High Court Division may make such order thereon as it thinks fit.²⁸

Review: Any person considering himself aggrieved — (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred, (b) by a decree or order from which no appeal is allowed by this Code, or (c) by a decision on a reference from a Court of Small Causes — may apply for a review of judgment to the Court which passed the decree or made the order, the court may make such order thereon as it thinks fit.²⁹

Revision: The High Court Division of the Supreme Court may call for the record of any case which has been decided by

any court subordinate to it and, in which no appeal lies thereto, and if such subordinate court appears to have committed any error of law resulting in an error in the decision occasioning failure of justice, the High Court Division may make such order in the case as it thinks fit.³⁰

Besides these powers, the court may in many cases where the circumstances require it, act upon the assumption of the possession of an inherent power to do that real and substantial justice for the administration of which alone it exists.³¹ This inherent power of the court has been codified in the following word "Nothing in this Code shall be deemed to limit or otherwise effect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."³²

4. IMPACT OF LAW OF LIMITATION ON CIVIL PROCEDURE

The Code of Civil Procedure, 1908, must be read with the Limitation Act, 1908 (Act IX of 1908), because whether limitation is pleaded or not the Court shall dismiss a suit instituted, or an appeal preferred, and an application made, after the period of limitation which varies from ninety days to sixty years for different categories of proceedings.³³ However, some exceptions have been provided in which the period of limitation may be extended. These are as follows:

(A) **Prevention:-** The operation of limitation is prevented due to existence of any of the following grounds: (1) Where the plaintiff suffers from legal disability due to his minority, insanity or idiocy;³⁴ (2) where there is no person in existence capable of suing or being sued;³⁵ (3) where no specific injury has resulted

from the act complained of³⁶; or (4) where the right to sue is fraudulently concealed from the plaintiff by the defendant or any person through whom the defendant claims.³⁷

(B) Interruption:- The running of period of limitation is interrupted due to the existence of any of the following grounds: (1) continuing breach of contract or continuing wrong independent of contract³⁸; (2) acknowledgment³⁹; or (3) part payment.⁴⁰

(C) Suspension:- The running of period of limitation is suspended due to the existence of any of the following grounds: (1) where letters of administration to the estate of a creditor have been granted to his debtor, and the administration continues⁴¹; (2) where the defendant remain absent;⁴² (3) where the plaintiff has been prosecuting in good faith and with due diligence another civil proceeding against the defendant, for the same cause of action in a court which from defect of jurisdiction or other cause of like nature is unable to entertain it⁴³; (4) where the commencement of the suit has been stayed by injunction or like nature⁴⁴; (5) where the judgment-debtor took proceedings to set aside the execution-sale of property which the purchaser is seeking to recover by suits⁴⁵; or (6) where notice has been given to the defendant in accordance with the requirement of any law.⁴⁶

These are the main exceptional cases during the continuance of which time will not run against the plaintiff.

NOTES AND REFERENCES

1. Section 3 of the Code of Civil Procedure, 1908. See also section 3 of the Civil Courts Act 1887 (Act xii of 1887).
2. Section 24, *ibid.*

3. Section 9. *ibid.*
4. Section 16. *ibid.*
5. Section 26. *ibid.*
6. Rule 1 of Order VII, *ibid.*
7. rule 2. *ibid.*
8. Rule 1b of Order IV. *ibid.*
9. Rule 2 of Order IV, *ibid.*
10. Section 27 and rule 1 of Order V. *ibid.*
11. Rule 1(2) of Order V and rule 1 of Order VIII. *ibid.*
12. Rule 6 of Order IX, *ibid.*; *Amrit Nath v. Dhanput.* (1871) 15 W.R. 503.
13. Rule 1 of Order X of the Code of Civil Procedure. 1908.
14. Rule 1 of Order XIV. *ibid.*
15. Rule 1 of Order XV, *ibid.*
16. Section 33 and rule 1 of Order XX. *ibid.*
17. Rule 4(1) of Order XX, *ibid.*
18. Rule 4(2) *ibid.*
20. Rule 6(1). *ibid.*
21. Sections 38 and 39, *ibid.*
22. Section 96(1) and 96(2), *ibid.*
23. Section 96(3). *ibid.*
24. Section 97, *ibid.*
25. Section 98(1), *ibid.*
26. Section 98(2), *ibid.*
27. Section 104. *ibid.*
28. Section 113. *ibid.*
29. Section 114. *ibid.*

30. Section 115. *ibid.*
31. *Hukum Chand v. Kamalanand.* (1906)33 Cal. 927.
32. Section 151 of the Code of Civil Procedure, 1908.
33. Section 3 read with First Schedule of the Limitation Act, 1908.
34. Sections 6-7. *ibid.*
35. Section 17, *ibid.*
36. Section 24, *ibid.*
37. Section 18, *ibid.*
38. Section 23, *ibid.*
39. Section 19, *ibid.*
40. Section 20, *ibid.*
41. Proviso to section 9, *ibid.*
42. Section 13, *ibid.*
43. Section 14, *ibid.*
44. Section 15(1), *ibid.*
45. Section 16, *ibid.*
46. Section 15, (2), *ibid.*

CHAPTER IV

SOME CIVIL LAWS

1. LAW OF SPECIFIC RELIEF

The Court of Equity in England had evolved special reliefs by which the performance of every obligation undertaken by persons could be enforced against them. The courts of Indian Sub-continent had borrowed these rules from the Court of Equity and applied them as "justice, equity and good conscience." Attempts were made to modify them and many principles of Equity had been incorporated in a statute called Specific Relief Act, 1877 (Act I of 1877), the purpose of which was "to make these equitable reliefs to some extent available to persons entering into contract."¹

Under the Specific Relief Act, 1877, specific reliefs given (a) by taking possession on certain property and delivering it to a claimant; (b) by ordering a party to do the very act which he is under obligation to do; (c) by preventing a party from doing what which is under an obligation not to do; (d) by determining and declaring the rights of parties otherwise than an award of compensation; or (e) by appointing a receiver.² The specific performance of any contract may in the discretion of the court be enforced -- (a) when the act agreed to be done is in the performance, wholly or partly, of a trust; (b) when there exists no standard ascertaining the actual damage caused by non-performance of the act agreed to be done; (c) when the act agreed to be done is such that pecuniary compensation for its non-

performance would not afford adequate relief; and (d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.³

Under the Specific Relief Act, 1877, the following contracts cannot be specifically enforced: (a) a contract for the non-performance of which compensation in money is an adequate relief; (b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties or otherwise from its nature is such that the court cannot enforce specific performance of its material terms; (c) a contract the terms of which the court cannot find with reasonable certainty; (d) a contract which is in its nature revocable; and (e) a contract made by trustees either in excess of their powers or in breach of their trust.⁴

The Act gives jurisdiction to the court to rectify an instrument which, on account of fraud or mutual mistake, does not truly express the intention of the parties.⁵ A party to a written contract may sue to have it rescinded if it is voidable or terminable at his instance or if, for reasons not apparent on the face of it, it is unlawful and the defendant is more blame-worthy or if the holder of a decree of specific performance of a contract of sale or lease defaults in payment.⁶ Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding may cause his serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.⁷ 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.⁸

Under the head of preventive relief the Act deals with injunction. Temporary injunction may be granted at the period of a suit, and is regulated by the Code of Civil Procedure, 1908. A perpetual injunction can be granted by the decree made at the hearing and upon the merits of the suit.⁹ It can be granted to prevent a breach of an obligation in favour of the plaintiff.¹⁰ The court is entitled to grant mandatory injunction in order to prevent the breach of an obligation.¹¹

The Specific Relief Act, 1877, grants relief to the aggrieved parties in some specific cases where there are no other reliefs or where other reliefs are not adequate; and in this way the Act has codified some of the equitable principles and in some cases has made a remarkable departure from them.

2. LAW OF TRUST

Trusts, in the strict sense in which that term is used by English lawyers, that is to say, confidence to the existence of which a double ownership, a 'legal' and an 'equitable' estate, is necessary, are unknown to Hindu and Muslim laws.¹² But trusts in the wider sense of the word, that is to say, "an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner"¹³ are created by the people of Bangladesh (as well as of India and Pakistan) and are frequently enforced by the courts.

Under Trusts Act, 1882 (Act II of 1882), a trust may be created for any lawful purpose. A Trust for an unlawful, fraudulent or immoral purpose or a purpose opposed to public, fraudulent or immoral purpose or a purpose opposed to public

policy is void.¹⁴ A trust of immovable property may be declared by will or by registered instrument.¹⁵ In the case of movable property trust is valid after the ownership of the property is transferred to the trustee.¹⁶

A trustee must deal with the trust property as a prudent man would deal with his own.¹⁷ Where the trust is created for the benefit of several persons in succession, the trustee is bound to convert the wasting assets into property of a permanent-profitable character.¹⁸ The trustee must be impartial between co-beneficiaries, keep accounts and inform the beneficiaries about the trust property.¹⁹ Where the trust-property consists of money which need not be spent immediately, the trustee is bound to invest the money on some specified securities.²⁰ If he commits a breach of trust, he is liable to make good the loss which the beneficiary has sustained unless the latter has induced him to do it by fraud or has freely consented or acquiesced, with full knowledge of the facts of the case.²¹

A trustee is entitled to have in his possession the instrument of trust and all the documents of title relating solely to the trust-property.²² The trustee is entitled to expense incurred in the execution of the trust and in the realization, preservation and protection of the trust-property.²³ He may recover over-payments, he has made, from the beneficiary.²⁴ He may apply to the court for its opinion, advice or direction on management or administration of the trust-property.²⁵ When the duties of a trustee are completed, he is entitled to have his accounts settled and an acknowledgement from the beneficiary that nothing remains due.²⁶

The beneficiary has a right to the rents and profits of the trust-property.²⁷ Where the execution of a trust by the trustees is impracticable, the beneficiary may institute a suit for the

execution of the trust, and the trust shall be executed by the court until the appointment of a trustee or new trustee.²⁸ Where a trustee has wrongfully bought trust-property the beneficiary has a right to have the property declared subject to the trust: he may take similar action in regard to property in the hands of a third party other than a transferee for value without notice of the trust.²⁹ He has, as far as possible, the same rights over the proceeds of sale in the hands of a trustee as he had in the trust-property.³⁰ Where the trustee wrongfully mingles the trust-property with his own, the beneficiary has a charge over the whole fund.³¹

A Trust is extinguished --- (a) when its purpose is completely fulfilled; (b) when its purpose becomes unlawful; (c) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise; or (d) when the trust being revocable, is expressly revoked.³² A trust created by will may be revoked at the pleasure of the testator.³³ Moreover, the Act provides other methods of revocation of a trust.

The trusts Act, 1882, though based on the equitable principles but in it there are some elements of prevailing custom of the Indian Sub-continent. The very concept of trust makes departures from the English concept and these departures are available in many sections of the Act.

3. LAW OF TRANSFER OF PROPERTY

Before passing the Transfer of Property Act, 1882(Act IV of 1882), the transfer by act of the parties was conducted by the English law of real property. But the English law of real property being generally unsuitable to circumstances in the Indian Sub-continent the Transfer of Property Act, 1882, was

passed in which the departures from the English law are more pronounced.³⁴

The Transfer of Property Act, 1882, is limited to transfer *inter vivos* and subject to exceptions its provisions do not apply to the Muslims.³⁵ Unless a different intention is expressed or necessarily implied, the whole interest of the transferor is passed.³⁶ No transfer of property can operate to create an interest which is to take effect after the life-term of one or more persons living at the date of such transfer, and the minority of some persons who shall be in existence at expiration of that period, and to whom, if he attains full age, the interest created is to belong.³⁷

While legal proceedings are pending regarding any right in immovable property, it cannot be dealt with by any party to the proceedings so as to affect the rights of any other party.³⁸ Every transfer of immovable property made with intent to defeat or delay the creditor, except to a transferee in good faith and for consideration, is voidable at the option of any creditor so defeated or delayed.³⁹

The doctrine of part performance as developed in England in the case of *Maddison v. Alderson*⁴⁰ has been imported into Indian Sub-continent in "a modified form"⁴¹ in section 53A as inserted by section 16 of the Transfer of Property (Amendment) Act, 1929 (Act XX of 1929). The object of this section is to prevent a transferor or his successor-in-interest from taking any advantage on account of the non-registration of the document provided the transferee has performed his part of the contract and in pursuance thereof has taken possession of some immovable property.

A sale of immovable property of the value of one hundred taka and upwards can be made by registered instrument.⁴² If

part of immovable property subject to a mortgage is sold the purchaser is entitled to have the mortgage satisfied as far as possible out of the part retained by the vendor.⁴³ A mortgage other than a mortgage by deposit of title deeds, for taka one hundred and upwards can only be effected by registered instrument signed by the mortgagor and attested by at least two witnesses.⁴⁴ A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.⁴⁵ A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale.⁴⁶ If any party is deprived of the property received by reason of any defect in the other's title, he is entitled to compensation or the return of the property delivered, if still in the possession of the other party.⁴⁷

Gift of immovables is made by the registered instrument or movables either by registered instrument or delivery.⁴⁸ If the donee dies before the acceptance, the gift is void.⁴⁹ A gift comprising both existing and future property is void as to the latter.⁵⁰ A gift revocable at the donor's will is void but a gift revocable on the happening of a future uncertain event is valid.⁵¹

The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent.⁵² The transferee of an actionable claim may, upon the execution of such instrument of transfer, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit of proceedings and without making him a party thereto.

These are the kinds of transfer which the Transfer of Property Act, 1882, deals with. The Act, is not a complete

Code. So, when the provisions of the Act are not applicable to a case, the courts are entitled to apply rules of English law, not inconsistent with the Act, as rules of justice, equity and conscience.⁵⁴

4. LAW OF REGISTRATION

The Registration Act, 1908 (Act XVI of 1908), enacted provisions complementary to those in the Transfer of Property Act, 1882, which made a registered instrument essential to the validity of certain transfers. Moreover, the Registration Act, 1908, provides certain documents of which registration is compulsory. The following documents shall be registered: (a) instrument of gift of immovable property; (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, any right, title or interest of the value of one hundred taka and upwards, to or in immovable property; (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; (d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent; and (e) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, any right, title or interest of the value of one hundred taka and upwards, to or in immovable property.⁵⁵

These documents are registrable within four months of execution, but take effect from the date of execution.⁵⁶ Other instruments creating interests in property may be registered at the

option of a party,⁵⁷ and generally take effect against unregistered instruments. A document required to be registered does not operate to create any right, title or interest unless it has been registered.⁵⁸

The instruments presented for registration are authenticated by the Sub-Registrar, and often enquiry into the identity of the parties and witnesses, and after he is satisfied that the party changed understands the tenor of the instrument.⁵⁹ All registered documents are copied and indexed by the Sub-Registrar, so that an intending purchaser or mortgagee can find in the registration office a complete record of any transaction other than devolution on death, affecting the land in question but the State does not guarantee any title.⁶⁰

Notes and References

1. M. C. Setalvad, *op. cit.*, at p. 91.
2. Section 5 of the Specific Relief Act, 1877.
3. Section 12, *ibid.*
4. Section 21, *ibid.*
6. Section 35, *ibid.*
7. Section 39, *ibid.*
8. Section 42, *ibid.*
9. Section 53, *ibid.*
10. Section 54, *ibid.*
11. Section 55, *ibid.*
12. *Tagore v. Tagore*, 9 B. L.R. 401.
13. Section 3 of the Trusts Act, 1882.
14. Section 4, *ibid.*

15. Section 5, *ibid.*
16. *Ibid.*
17. Section 15, *ibid.*
18. Section 15, *ibid.*
19. Section 17 and 19, *ibid.*
20. Section 20, *ibid.* *Learoyd v. Whiteley*, 12: A.C. 727.
21. Section 23, *ibid.*
22. Section 31, *ibid.*
23. Section 31, *ibid.*
24. *Ibid.*
25. Section 34, *ibid.*
26. Section 35, *ibid.*
27. Section 55, *ibid.*
28. Section 59, *ibid.*
29. Section 62, *ibid.*
30. Section 63, *ibid.*
31. Section 66, *ibid.*
32. Section 77, *ibid.*
33. Section 78, *ibid.*
34. Alan Gledhill, *op. cit.*, at p. 310.
35. Sections 5 and 2 of the Transfer of Property Act, 1882.
36. Section 8, *ibid.*
37. Section 14, *ibid.*
38. Section 51, *ibid.*
39. Section 53, *ibid.*
40. (1883) 8 A.C. 467.

41. D.F. Mulla. *The Transfer of Property Act. 1882* (Bombay: N.M. Tripathi Private Ltd., 1973) p. 284.
42. Section 54 of the Transfer of Property Act. 1882.
43. Section 56. *ibid.*
44. Section 59. *ibid.*
45. Section 107. *ibid.*
46. Section 107. *ibid.*
47. Section 118. *ibid.*
48. Section 123. *ibid.*
49. Section 122. *ibid.*
50. Section 124. *ibid.*
51. Section 126. *ibid.*
52. Section 130(1). *ibid.*
53. Section 130 (2). *ibid.*
54. *Jeypur v. Rukmim.* (1919) 42 Mad. 589 P.C.
55. section 17 of the Registration Act, 1908.
56. Section 23. *ibid.*
57. Section 18. *ibid.*
58. Section 49, *ibid.*; *Basawara v. Kalkapa.* (1878)2 Bom. 489; *Connecticut Insurance Co. v. Kavanagh.* (1892) A.C. 473.
59. Sections 31-35 of the Registration Act, 1908.
60. Section 51-57. *ibid.*