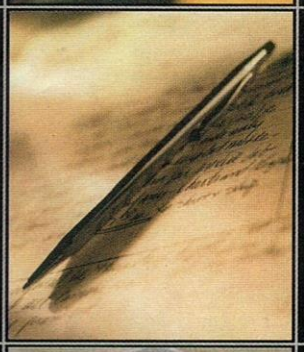

Justice

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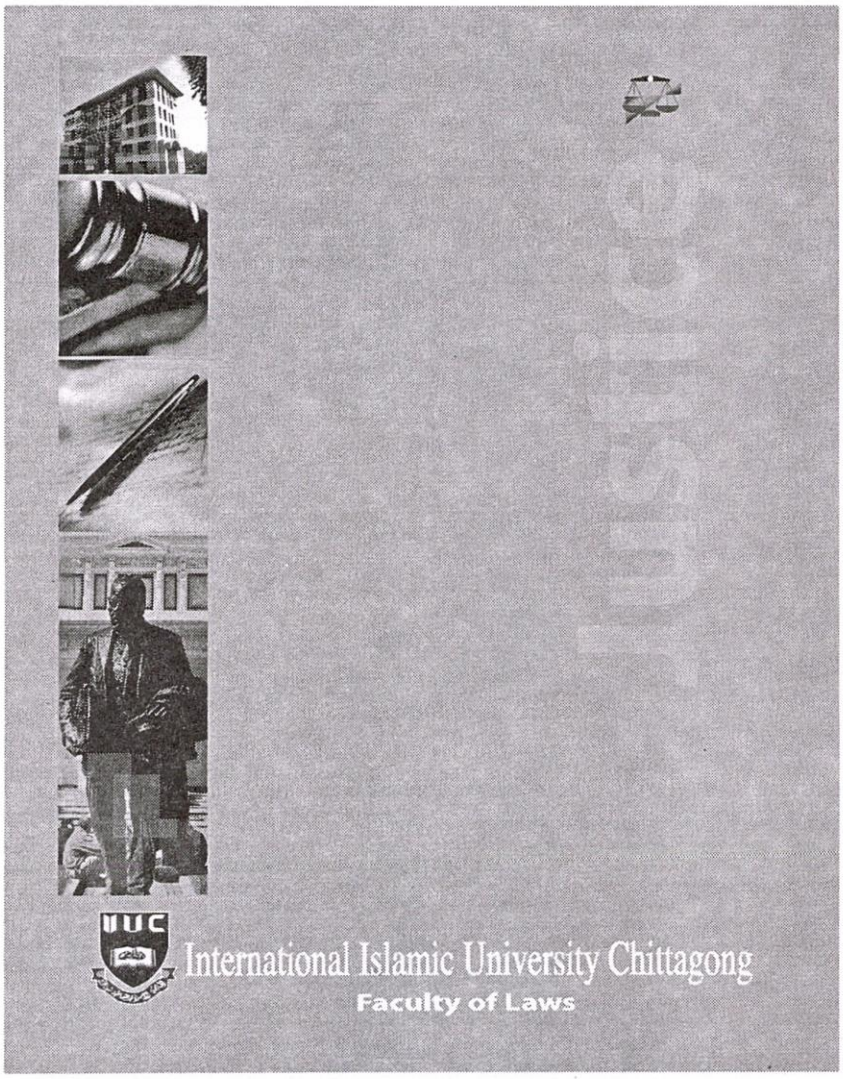
Justice



International Islamic University Chittagong

Faculty of Laws

Justice
Faculty of Laws
IIUC Law Club

January 2007

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Album of the Faculty of Laws

Editorial

We are thankful to Almighty Allah (SWT), for enabling us to bring out an exquisite Law Magazine, named 'Justice'. It is the 'day' of the days for all of us, since at long last, our longed-for dream to bring out a Magazine comes true. By overcoming some acclivity and declivity, in 2006, IIUC Law Club has been formed under the benign patronage of the Dean of faculty of Laws for the purpose of having clinical legal education, building up leadership ability and capacity to conduct research in legal matters, striving the students for acquiring skills in writing and promoting legal education so that students can acquire high standard legal education. For the materialization of these objectives, publication of magazine is one of best efforts. Magazine can help a lot to cultivate the merit and creative talent of the students. The student writers may be enthralled and encouraged seeing their research writings published and gradually can gain elevated scholarship and writing skills. Law is practical social science. Therefore, both academic and practical nature of legal education is essential. But in Bangladesh academic aspect of legal education predominates with the result that methods of teaching law are mostly lecture based. It is necessary to emphasis the need for practical methods of teaching law, i.e., Socratic method, problem method, case study, moot court and mock trial and clinical legal education etc.

Considering the legal education as practice oriented subject, IIUC Law Club has taken many initiatives, such as, to organize seminars, symposiums, debate, mock trials, legal projects etc. for building up the ability of the students to be successful professionals as well as accomplished academicians. Production of skilful lawyers is not enough; law is to be made helpful and useful to the common people at the same time.

This is the time to boost the merit and creativity of our students. The American young inventing new things are not different from ours. The difference is that they are industrious and systematic but we are lazy and disordered.

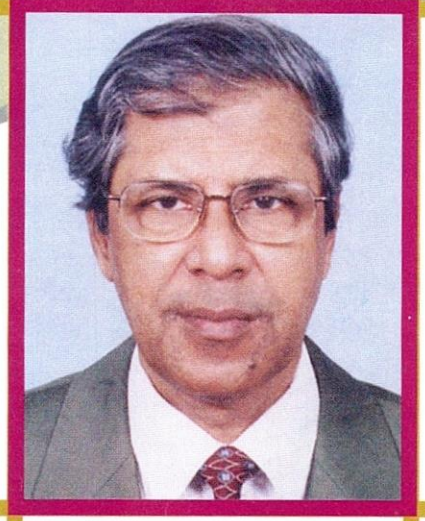
This is the first attempt of our Club. We are confident that this magazine will reflect the hopes and aspirations of the students to build our motherland into a 'utopia'. There may have been many mistakes or failures in our writing and endeavor but we are not pessimistic because "failure is the pillar of success".

We would like to acknowledge and put on record the contributions of all the teachers, its advisers and contributors who have undergone the pains to enrich our effort.

We would like to extend our warmest welcome to our dear friends, sponsors and press who so patiently and cheerfully goaded, prodded and reached out for help in getting the magazine come into being.

Beauty is truth; truth is beauty ; keeping this Keatsean message in mind we hope our magazine will be joy for all.

Mohammad Javedul Islam
Editor, Justice



Message

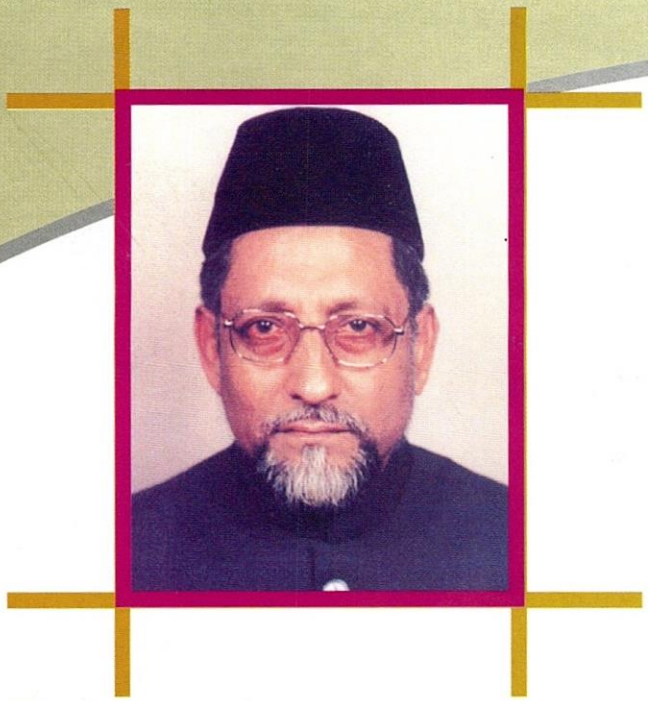
I am indeed delighted to learn that the students of law Department of International Islamic University Chittagong (IIUC) are going to publish a Souvenir on the occasion of the installation program of its Law Club.

I offer my warmest congratulations to the Faculty Members and students of Law department who have taken the initiative to launch the club. I am sure the Law Club will provide the students with a great scope of exchanging youthful and legal views full of expectations for the future. It will enable the future lawyers to develop their skills so that they can cope successfully in their professional life. I also hope the activities of the Club will equip the students with qualities to meet every situation in their respective field of works.

I welcome and appreciate the effort of the students to bring out the souvenir on the occasion of the installation program of the Club.

I wish this Program a great success.

Prof. Dr. A.K.M. Azharul Islam
Vice-Chancellor
International Islamic University Chittagong



Message

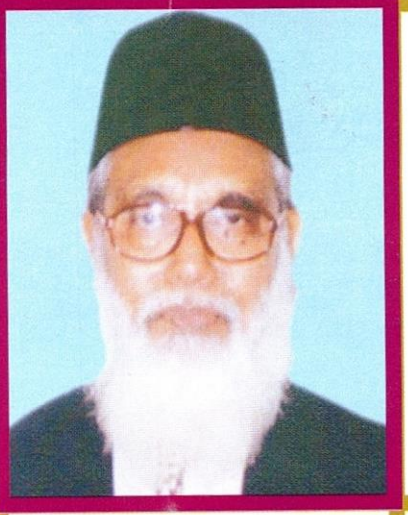
It gives me immense pleasure to learn that IIUC Law Club is going to bring out its ever first magazine very soon. It is undoubtedly a very praiseworthy step, and it will contribute to strengthen the integrity between the teachers and their students.

The Faculty of Laws is a comparatively younger Faculty of IIUC, which is going to bring forth its 1st batch of students with Graduation Degree in Law. But they are trying to keep pace with the others through their active participation in all curricular and co-curricular activities of the University.

It is further observed that an encouraging atmosphere of enthusiasm has been created in the recent days under the able leadership of Advocate Kazi Saifuddin Ahmed Chowdhury after his joining IIUC as the Dean of the Faculty, Evening LL.B program for the professionals has been introduced and all preparations are going on for opening the LL.M. Program at the City Campus.

I hope this magazine will contribute to introduce the Faculty of Laws and its various activities to the well wishes and to uphold the image of IIUC at large.

Prof. Dr. Abu Bakr Rafique
Pro-Vice-Chancellor
International Islamic University Chittagong



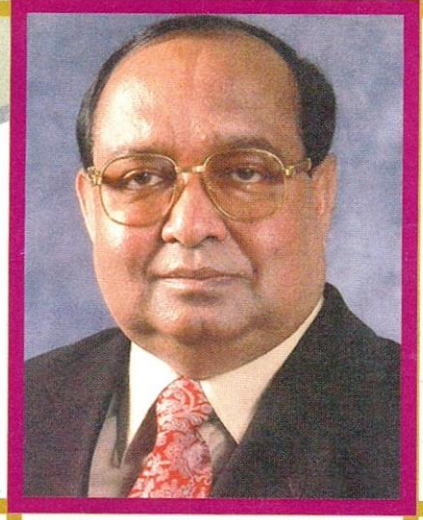
Message

I congratulate the member-students, Teachers, Advisors and Associates of the Law Club of the International Islamic University Chittagong, for taking the venture of causing publication of a journal of their own. It is, undoubtedly, a bold step taken by them for making a wide field prepared for the law learners of the university to express themselves in writing of their understanding of law and its social impact in the formation of a welfare democratic state, like Bangladesh, with the Islamic concept of human value.

I shall, reasonably, be expecting from the learned members of the Club to translate into action the maxims "unless one studies law his education remains incomplete"

I hope and pray for the progressive success of the Club.

Justice Mohammed Abdur Rouf
Former Chief Election Commissioner
&
Judge of the Supreme Court,
Appellate Division. Bangladesh

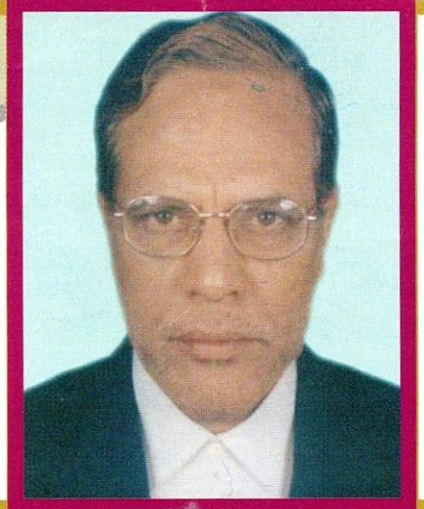


Message

I am indeed happy to know that the IIUC Law Club of the International Islamic University Chittagong has taken considerable pains to publish a Journal under the patronage of the Faculty of Law. I sincerely believe that the Journal will contain articles on contemporary legal problems with innovative and creative approaches by the students. The student writers will feel themselves encouraged seeing their research articles published and will gradually acquire high level of scholarship and writing proficiency. This Journal would go a long way for developing themselves in course of time as a matured and grown-up researcher. I expect that the Journal would bring fame, honour and glory for the Faculty of Law in particular and the International Islamic University Chittagong in general.

Let the Journal be warmly and cordially accepted by the legal arena of Bangladesh and flourish and bloom in years to come.

Professor Dr. M. Ershadul Bari
Vice-Chancellor
Bangladesh Open University



Message

It gives me immense pleasure to say something on the auspicious occasion of publication of IIUC Law Club magazine 'Justice'. I thank all my beloved colleagues and students who have been relentlessly working for materializing my dream of forming the Law Club and starting extra curricular activities alongside academic pursuits so that the solemn aim of International Islamic University Chittagong to produce men of worthy character having real education enriched by morality and humanity is achieved. I sincerely believe that through publication of 'justice' the IIUC Law Club has shown the shining path of co-curricular activities to the future students of the Law Faculty who, after successful completion of their studies, will surely become able lawyers, legal experts, Judicial officers and leaders of the country. I thank those who have given warm messages, contributed valuable articles and given advertisement to enrich our magazine. I have deep appreciation for all the members of the editorial board, specially for the Editor, who sincerely worked to materialize our dream. May Allah guide us in all our activities.

Advocate Kazi Saifuddin Ahmed Chowdhury
Dean, Faculty of Laws & President, IIUC Law Club
International Islamic University Chitagong

Message

It gives me much pleasure to Know that IIUC Law Club is going to publish a Magazine. This is an admirable venture. I trust students will take advantage of this publication by contributing to it with energy and enthusiasm.

I do hope that publication of this Magazine will make a meaningful contribution especially to the students of Law Department and will enrich the students intellectually, culturally and help them to become bright and conscious citizens of the country.

I congratulate those who have worked hard to bring out this Magazine.

Mohd. Shamsul Islam
Secretary
Islamic University Chittagong Trust

THE 1972 CONSTITUTION OF BANGLADESH AND THE LOCAL GOVERNMENT

PROF. DR. M. ERSHADUL BARI*

Introduction

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

Local government is loosely defined, without making any reference to its financial and legal status and representative character, as "a public organization authorized to decide and administer a limited range of public policies within a relatively small territory which is a subdivision of a regional or national government."[4] It is that "part of the administration of a state or nation which deals mainly with such matters as concern the inhabitants of a particular place or district, including those functions which the central government considers it desirable to be so administered. The bodies entrusted with these matters are known as local authorities and are, in the main, elective."[5] In a similar way, Justice Shahabuddin Ahmed of the Appellate Division of the Supreme Court of Bangladesh commented in 1992 on the nature of the local government in the case of Kudrat-e-Elahi Panir V. Bangladesh[6] : Local government "is meant for management of local affairs by locally elected persons. If government's officers or their henchmen are brought to run the local bodies, there is no sense in retaining them as local government bodies.... Local Government is an integral part of the democratic polity of the country."[7] In relation to local government, local self-government, which sometimes implies the elective nature of such institution and, in a colonial rule, the prefix 'self' means that governmental institution at the local level is composed of natives, has been described in the Report of the Indian Statutory Commission, 1930 as a representative organization responsible to a body of electors, enjoying wide powers of administration and taxation, and functioning both as a school for training and a vital link in the chain organizations that make up the government of the country. The United Nations has defined 'local self-government' as "a political sub-division of a nation or state which is constituted by law and has substantial control over local affairs, including the power to impose taxes or extract labour for prescribed purposes".[8] Thus "Local governments are not true sovereign governments. As such they possess no independent sovereign powers or Authority, save those

*Hon'ble Vice-chancellor, Bangladesh Open University & Ex-Dean, Faculty of Law, Dhaka University.

delegated to them by state institutions and laws. In brief, they remain subject to the sovereign authority of the national and state governments".[9] Thus the essential features of a local government are: a) it is established by law; (b) it is generally an elective body composed of members elected by the people of an area or locality; (c) it has the power of administration over a designated locality and the authority to manage the specified subjects; (d) it has the power to raise fund through taxation within its area; and (e) it is ultimately accountable and subordinate to the national government. In this connection, the observations made by Justice Mustafa Kamal of the Appellate Division of the Supreme Court of Bangladesh in the case of Kudrat-e-Elahi Panir are worth-quoting: "Local government as a concept and as an institution, was already known to have possessed certain common characteristics, namely, local elections, procedure for public accountability, independent and substantial sources of income, clear areas for independent action and certainty of powers and duties and the conditions under which they would be exercised.[10] It should be stressed here that the quality and character of a local government are determined by a multiplicity of factors, for example, national and local traditions, customary deference patterns, political pressures, party influence and discipline, bureaucratic professionalism, economic resource controls, and social organization and beliefs.[11]

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

The Provisions of the Original Constitution of Bangladesh Concerning Local Government.
The 1972 Constitution of Bangladesh, which was adopted on 4 November 1972 and given into effect on 16 December 1972,declares Bangladesh as a unitary state. Although the original Constitution did not define the term 'Local Government', it contained a full chapter i.e. Chapter III) in part IV which provided for the composition and powers of local government institutions to be established in Bangladesh by an Act of Parliament. There were two Articles, 59 and 60, in the Chapter which laid down a framework concerning local government bodies. Article 59 provided that:

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

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

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

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

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

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

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

Although the learned Justice has maintained that "no Constitution contains any definitive provision on local government," and it "is the Constitution of Bangladesh [adopted in 1972] which for the first time devised an integrated scheme of local government,"detailed and comprehensive provisions concerning local government are to be found in the Constitutions of certain European Countries (i.e. France, ltaly and Germany) adopted in the 1940s.For example, the constitution of the French Republic, adopted by the national Constituent Assembly on 28 December 1946, contains exhaustive provisions regarding local government. The entire Part (Titles) X of the Constitution, which contains five Articles, deals with local administrative units. The provisions of the Articles relating to local government are quoted below:

"Art. 85. The French Republic, one and indivisible, recognizes the existence of the local administrative units. These units shall be the communes, the departments and the overseas territories.

Art. 86. The framework, the scope, the eventual regrouping, and the organization of the communes, the departments, and the overseas territories shall be determined by law.

Art. 87. Local administrative units shall be governed freely through councils elected by universal suffrage. The execution of the decisions of these councils shall be ensured by their mayor or their president.

Art. 88. The co-ordination of the activities of government officials, the representation of the national interests, and the administrative control of these units shall be ensured within the departmental framework by delegates of the government appointed by the council of ministers.

Art. 89. Organic laws will extend the liberties of the departments and municipalities; they may provide, for certain large cities, rules of operation and an administrative structure different from those of small towns, and include special provisions for certain departments, they will determine the conditions under which Articles 85 to 88 above are to be applied.

Laws will likewise determine the conditions under which local agencies of central administrations are to function, in order to bring the central administration closer to the people."

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

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

"Article 92. Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.

Article 93. The local public entities shall establish assemblies as their deliberative organs, in accordance with law.

The Chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities.

Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.

Article 95. A special law applicable only to one local public entity cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law."

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

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

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

Although Articles 59 and 60 of the Constitution were not restored by the First Martial Law Government (1975-1979), an Article for the promotion of local government institution was incorporated into the Constitution by the Proclamation (Amendment) Order, 1977 (order No.1 of 1977), issued on 23 April, 1977 by the President and Chief Martial Law Administrator Ziaur Rahman. This Article 9, which substituted for the provisions of original Article 9 concerning nationalism, provides that:

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

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

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

However, later the Constitution (Twelfth Amendment) Act, 1991, passed on 18 September, 1991 during the Civilian government of the Bangladesh Nationalist Party, restored Articles 59,60 and the sentence of Article 11 to the effect that " and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured." Two months six days after the restoration of these Articles in the Constitution regarding local government, on 23 Novemer, 1991, the Upazila Parishad (which had been established by the 1982 Martial Law Administration) was abolished through the promulgation of the Local Government (Upazila Paris had and Upazila Administration Reorganization) (Repeal) Ordinance, 1991. Although the Government constituted in November, 1991 a high powered "Local Government Structure Review Commission" to review and study the local government of Bangladesh and recommend a suitable, effective, responsible and accountable local government structure for the country, the Constitutional validity of the Ordinance was ultimately challenged before the Appellate Division of the Supreme Court in the case of Kudrat-e-Elahi Panir v. Bangladesh. With regard to the continuity of the system of local government institutions, the then Chief Justice of Bangladesh, Justice Shahabuddin Ahmed observed (in 1992) in that case:

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

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

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

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

"But there are other local bodies constituted by, and functioning, under different statutes. With the reappearance of Articles 59 and 60 with effect from 18 September, 1991, on which date the Twelfth Amendment of the Constitution was made, these local bodies shall have to be updated in conformity with Articles 59 and 60, read with Article 152 (1) for the lawful functioning of the said local bodies. The areas in which these bodies other than the Zilla Parishads have been constituted shall have to be designated as administrative units by amending these statutes. Designation afresh of the union and municipalities is also necessary in view of the fact that Act No. IX of 1973 along with the President's Order No. 22 of 1973 was itself repealed by Ordinance No. XC of 1976-Local Government Ordinance, 1976 in the case of Unions and Paurashava Ordinance, 1977-Ordinance No. XXVI of 1977-in the case of municipalities. Required designations by amending the relevant statutes with effect from the date on which the Twelfth Amendment of the Constitution was made should be provided as soon as possible-in any case within a period not exceeding four months from date. The other constitutional requirement for these local bodies is that they shall be entrusted to bodies "composed of persons elected in accordance with law." The

Existing local bodies are, therefore, required to be brought in line with Article 59 by replacing the non-elected persons by election keeping in view the provision for special representation under Article 9. Necessary action in this respect should be taken as soon as possible-in any case within a period not exceeding six months from date. In the suggested amending statutes, all actions taken by the local bodies concerned since 18 September 1991 should be ratified.[19]

Thus the local government institution unmistakably interwoven in the democratic fabric of the Constitution of Bangladesh. "It is to be remembered however that local government is a part of the constitutional system and therefore Chapter III of Part IV of the Constitution containing Articles 59 and 60 cannot ever been kept as a dead letter. Local Government cannot be abolished altogether. It must exist in some form, in some tier or tiers at any given point of time to give a meaning to Chapter III of Part IV and to justify its rationale, validity and existence. It is not a mere adornment in the Constitution.[20]

Conclusions :

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

References

1. IX Encyclopedia of Social Sciences, 451 (New York, 1968).
2. IV Encyclopedia Britannica, 644 (Chicago, 1981)
3. New Age Encyclopedia, 4 (Sydney, 1983)
4. Supra note 1, at 451
5. Supra note 3, at 3
6. 44 DLR (AD) 319
7. *Id.* at 330, 336
8. Quoted in Sodium, Kamal, "Local Government in Bangladesh, 4 (Dhaka, 1995)
9. Valent, William, Local Government Law 2 (American Case Book Series).
10. Supra note 6, at 341-342
11. Supra note 1, at 451
12. This was done in the case of unions and municipalities by the Parliament through the enactment of Bangladesh Local Govemment Union Parishad and Paurashava (Amendment) Act, 1973. Section 2C of the Act provided that "the unions and municipalities shall be administrative units within their respective areas for the purposes of Article 59 of the constitution of the People's Republic of Bangladesh." It was given retrospective effect from 22 March 1973 and incorporated in P.O. No. 22 of 1973 as Article 2C.
13. Supra note 6, at341
14. As Article 5 of the Constitution of the Italian Republic provides: "The Republic, one and indivisible, recognizes and promotes local autonomies. It effects in the state services the broadest administrative decentralization and adapts the principles and procedure of its legislation to the needs of autonomy and decentralization",
15. As Article 118 of the Constitution of the Italian Republic provides: "Administrative functions connected with...[certain] matters....are [to be] exercised by the region, with the exception of those of purely local interest, which may be assigned by law of the Republic to the provinces, communes, and other local agencies...The region normally exercises its administrative functions by delegating them to the provinces, communes, or other local agencies, or by making use of their offices,"

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

    Article 130 provides that "An agency of the region, established in the manner prescribed by law of the Republic, exercises, also in a decentralized manner a control over the legality of the acts of the provinces,. communes and other local bodies,"
16. Article 28 of the Basic Law of the Federal Republic of Germany provides that "(1) The constitutional order in the Leander shall conform to the principles of republican, democratic and social government based on the rule of law, within the meaning of this Basic Law. In each of the Leander, counties (kreise), and communes (Gemeinden) the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In the communes the communal assembly may take the place of an elected body.

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

(3) The Federation shall ensure that the constitutional order of the Laender conforms to the basic rigths and to the provisions of paragraphs (1) and (2) of this Article.
17. Supra note 6, at 336
18. Id at 329-330
19. Id. at 336-337
20. Kamal, Mustafa J in id., at 343

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QURANIC PENAL PROVISIONS VIS-A-VIS PENAL LAWS OF BANGLADESH

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According to the Holy Quran, Islam is the only accepted code of life to Almighty Allah.[1] It encompasses all aspects of human life. It suggests ways and means for all political, social, economic and other problems which the people encounter in their day-to-day life.

The rule of law must of necessity be upheld in the state for ensuring peace and tranquility. Obedience to law is one of the most important preconditions for ensuring peaceful co-existence and prosperous society. In this regard the Quran declares: "O you who believe, Obey Allah and obey the apostle and those who are in authority amongst you. If you differ in anything amongst yourselves, refer it to Allah and His apostle".[2]

In the capacity of the apostle of Allah Hazrat Muhammad (peace be on him) became ex-officio head of the state and he established the rule of law in the Medina-based Islamic state where no discrimination was found among the citizens in the eye of law. In fact, the prophet was sent to this earth to establish Islamic way of life. Therefore, those who follow the prophet, follow Allah. It has been stated in the Quran:

Take what the apostle assigns to you, and deny yourselves that which he withholds from you. And fear Allah, for Allah is strict in punishment.[3]

If any person violates the laws of the land and jeopardizes the normal life, Islam prescribes punishment for such a criminal. It is the solemn duty of the Government to inflict punishment as per law upon the wrong-doer for the prevention of offences. In this article I shall try to throw light on some penal laws of Islam, specially on those prescribed for murder and personal injury vis-a- vis the penal laws of Bangladesh.

The penal laws of Islam or Uqubat are called 'hudud'[5] in Islamic jurisprudence, it means prevention or hindrance by an ordinance or statute of Allah for omission of things lawful and commission of things unlawful. Uqubat covers two types of wrong-tort and crime. The former takes place when there is infringement of individual rights while the latter takes place when there is infringement of public rights. But the distinction between the two is very sharp since the rights of the public and those of individuals are often combined. In this context the necessity for strict definition of offences and definite prescription of punishment, therefore, are essential. The Qadi (Judge) is, however, forbidden to impose any penalty not prescribed by law. Thus the Quran warns:

"And whoever will not judge by what Allah has revealed are evil doers"[6]

Every civilized code of penal laws is based on the principle that the punishment of wrong should be proportionate to it. Ample scope, therefore, is provided to the Muslims and their states to formulate their penal laws in the light of the Quran and the sunnah. It is for this reason the Holy Quran does not go into many details and it speaks of punishment only in cases of the most glaring offences against person and property. Hadith is the next important source of Islamic law after the Quran. In this connection an oft-quoted hadith of the Prophet may be cited:

"I have left before you two things. You will never go astray so long as you will hold fast these two things -these are Quran and my sunnah (hadith)."[7] During the time of prophet punishments were inflicted according to the provisions of the Quran. OF course, in the absence of clear provisions in the Quran, the Prophet would prescribe punishment having regard to the nature and gravity of the offence.

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Categories of Specific Penalties:

Under Islamic law penalties may be divided into five :[8]

1. Physical punishment:
(a) Punishment by death.
(b) Amputation of limbs.
(c) Flogging or whipping.
(d) Stoning to death.
2. Imprisonment or exile.
3.Monetary fines or diat.
4. Admonition by Qadi or Tazir
5. Deprivation of the right of testimony.

The offences falling under each of these categories of punishment are well established in Islamic law. The offence punishable by specified hudud as are revealed from the Quranic provisions are divided into three categories:(1) offences affecting life and limb consisting of (a) homicide and (b) physical injury; (2) offences against family and morality consisting of (a) fornication and (b) false accusation of fornication and (3) offences against property consisting of (a) theft and (b) highway robbery.

Offences affecting life (MURDER)

Qatl or killing of a man by a man is no doubt the greatest crime in society. It has been denounced in the Quran:

"And kill not the life which Allah has forbidden except for the requirement of justice".[9]
Further it has been stated,

And they who..... Slay not the life which Allah has forbidden except in the requirement of justice.....and he who does this shall find a requital of sin; the penalty shall be doubled to him on the Day of Judgement and he dwell therein in abasement.[10]

The Muslim jurists have recognized three causes for the taking of life: (1) apostasy (2) intentional homicide (3) adultery

The Quran recognizes two types of homicide: (1) intentional homicide and (2) accidental. The punishment of intentional homicide has been prescribed in the Quran:

O You who believe! Retaliation or qisas of murder has been prescribed for you; the free man for the free man and the slave for the slave and the woman for the woman; but if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a relaxation from your lord and a mercy; and whoever exceeds the limit after this, he shall have a painful punishment. And there is life for you in the law of retaliation, O men of understanding, that you may guard yourselves.[11]

The Arabic word 'Qisas' is derived from qasasa meaning he followed his track in pursuit; it, therefore, means retaliation by slaying for slaying, wounding for wounding and mutilating for mutilating.[12]Therefore, it stands for the return of life for life in case of murder. It does not mean that the murderer should be killed in the same manner in which he committed the murder. It only means that his life should be taken as he took the life of other.[13] The law of retaliation in murder cases followed by the words "the free for the free, the slave for the slave and the woman for the woman", which have sometimes been misunderstood as meaning that if a free man has been murdered, a free man should be murdered in his place and so on. This is not true. The murderer should be murdered and not an innocent person. This is as per declaration of the Quran: And therein have we enacted for them, life for life.[14]

So the point is clear that whoever may be a free man or a slave or a woman or a rich or a poor, or a black or a white, the murderer himself is to be slain irrespective of his rank or race. The penalty of one person cannot be borne by other. This idea has been established from the following verse of the Quran, "and no bearer of burden shall bear the burden of another."[15]

and "pledged to Allah is very for his actions."[16] A review of these provisions makes it clear that the punishment of the person who has intentionally murdered another man without just cause is death or the blood money which to be paid to the family of the slain by the murderer and his family.

Accidental homicide arises, for example, if a man intends to kill an animal but unintentionally hits a man instead and causes his death. Regarding the accidental homicide the Quran provides:

"A believer shall not kill a believer but by mischance, and whoever kills a believer by mischance shall be bound to free a believing slave: and blood money shall be paid to the family of the slain, unless they remit it. But if the slain believer be of a hostile people, then let him confer freedom on a slave who is a believer and if he be of a people between whom and yourselves there is an alliance, then let the blood money be paid to his family and let him set free a slave who is a believer, and let him who has not the means, fast two consecutive months. This is the penance enjoined by Allah."[17]

The jurists have agreed on imposing blood money on one who kills another by mischance and also freeing of a slave or repentance to Allah through fasting. Some other jurists, in addition, hold the view that the killer may not take victim's property under will or succeed in interstate to the slain man's estate.[18]

Against the above context of Quranic penal law regarding murder, the Bangladesh Penal Code (originally, the Indian Penal Code, 1860) has classified killing of a man into: (a) culpable homicide not amounting to murder and (b) culpable homicide amounting to murder. Section 299 of the code defines culpable homicide (not amounting to murder) as "whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide" Section 300 of the code defines murder or culpable homicide amounting to murder as,

"Except in the case hereinafter, excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or 2ndly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or 4thly, If the the person committing the act knows that it is so imminently dangerous that is likely to cause death, and commits such act with any excuse for incurring the risk of causing death or such injury as aforesaid"

The one important exception under this section is "culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."

A study of sections 299 and 300 of the Code appears that every murder is culpable homicide but every culpable homicide is not murder. An offence cannot amount to be a murder unless it falls within the definition of culpable homicide. The boundaries between section 299 and parts first to fourth of section 300 are very thin and are sometimes difficult to ascertain. The difference lies in the degree of probability of the death ensuing from the acts of the offender.[19]

Section 302 of the Code prescribes punishment for murder as, "whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine."

Capital punishment is not to be inflicted where the accused's conduct was abnormal and he appeared to have had mental imbalance at the time of committing murder.[20] But where murder was committed in cold-blood and no question of provocation was involved in the case and the offence was fully brought home to the accused, the sentence of death was held to be fully justified.[21] Capital punishment, under section 303 of the Code, is compulsory in case of a murder committed by a life convict.

Punishment for culpable homicide not amounting to murder has been stated in section 304 of the Code: "whoever commits culpable homicide not amounting to murder, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death: or with imprisonment of either description for a term which may extend to ten years, or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death."

The section prescribes two types of punishments applicable to different offences:
1. If the act by which death is caused is done with the intention of causing it or such bodily injury as is likely to cause death, the punishment is transportation for life or imprisonment of either description for a term which may extend to ten years and fine.

2. If the act is done with the knowledge that it is likely to cause death but without any intention to cause death or such bodily injury as is likely to cause death the punishment is imprisonment of either description for a term which may extend to ten years or with fine, or with both.

A comparative study between the Quranic law and the laws embodied in the Bangladesh Penal Code regarding intentional murder and accidental murder clearly manifests that under both the system of law, these are punishable offence. According to the Penal Code of Bangladesh, in case of culpable homicide amounting to murder, the maximum punishment is death sentence and the minimum punishment is transportation for life with fine. But according to Islamic penal law, murder is compoundable offence, its punishment is death sentence, but if the relatives of the slain deem it proper, they have the right to pardon the murderer. In that case the court cannot insist on taking the offender's life. Of course, he will have to pay blood money if the rightful claimants demand it.[22] In case of unintentional or accidental murder, Islamic penal law prescribes blood-money payable by the murderer to the family of the slain. The relations of the slain may even remit the blood money. But under the Bangladesh penal Code, as stated in section 304, the maximum punishment is transportation for life and the minimum punishment is imprisonment for ten years with fine.

In many civilized countries including Bangladesh the death sentence is sometimes commuted to transportation for life. The President of Bangladesh is empowered to do so under section 54, 55 and 55A of the Penal Code.[23] Some "civilized" countries are in favour of abolition of capital punishment, because they consider it as inhuman. If it is inhuman to insist on retaliation without considering other aspects of the subject, it is equally inhuman to encourage murder by totally abolishing capital punishment as has been done in some western countries including Britain[24] Islam warns not to exceed the limit in this respect.[25] Only the guilty person is to be killed and not his relatives. Recently in India, some five thousand Shiks were brutally killed for the murder of one person. Although the action against the suspected murderers of Mrs. Gandhi is essentially an extra-legal retaliation, the fact remains that such an action is foreign to the thoughts of the adherents of Islam. The Quran leaves no room for such extra-legal retaliation. It states that : "Whoever kills any one unless it be for man slaughter or mischief in the land, it is as though he slew all man,"[26] But in case of intentional murder, the murderer is to be punished by death unless otherwise excused. Because "every unpunished murder takes away something from the security of every man's life."[27]

Laws on Physical Injury

Of offences affecting limb:

Physical injury, like homicide, can be (a) intentional or (b) accidental. The same amount of pain, in the case of intentional injury, is to be inflicted upon the offender as has been suffered by his victim. He is also liable for compensation, which corresponds to blood-money (diyat) in homicide. But if the physical injury is accidental, the compensation is to be paid. This is in accordance with the provision of the Holy Quran which states that "And therein have we enacted for you life for life and eye for eye and nose for nose and ear for ear and tooth for tooth and wounds for wounds. But if any one remits the retaliation by way of charity, it is an act of expiation for him.[29]

Islam condemns transgression. It gives opportunity to the offenders to amend themselves by repentance and the victims of transgression have the right to forgive offenders. The Holy Quran gives guideline in this regard saying," And the recompense of evil is punishment proportionate thereto, but whoever forgives and offers opportunity for amendment, he shall have his reward from Allah,"[29] Similar verse is also available elsewhere in the Quran:

"And if you punish, then punish them with the like of that with which you were afflicted: but if you are patient, it will certainly be best for those who are patient."[30] The Quran further states that, "And he punishes evil with the like of that with which he has been afflicted and he has been oppressed, Allah will certainly aid him" [31] It is further stated therein, "whoever acts transgressively against you, inflict injury against him."[32]

Thus the Quran has laid down a unique rule that the person against whom wrong has been committed should in the first instance forgive the offender provided the latter amends by repentance. But if it is deemed necessary that the offender is to be punished, the punishment shall be proportionate to his offence. It must not exceed the limit.

The provision of the Bangladesh Penal Code with respect to physical injury is specific and more detail. Broadly speaking the Code classifies physical injury under 'hurt' and 'grievous' hurt. Section 319 of the Code defines hurt as "whoever causes bodily pain, disease or infirmity to any person is said to cause hurt." Under section 320 of the Code. "The following kinds of hurt only are designated grievous: - Firstly, Emasculation.[33] Secondly, permanent privation of the sight of either eye. Thirdly, permanent privation of the hearing of either ear. Fourthly, privation of any member or joint. Fifthly, Destruction or permanent impairing of the powers of any member or joint. Sixthly, permanent disfiguration of the head or face. Seventhly, Fracture or dislocation of a bone or tooth. Eighthly, Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits"

It is very difficult to draw a line between those bodily hurts, which are serious, and those which are slight. It is, indeed, absolutely impossible to draw such a line with perfect accuracy. However, hurt means simple hurt where as grievous hurt means serious hurt. In fact, grievous hurt is close to culpable homicide not amounting to murder, although the line between hurt and grievous hurt is a very thin one. In the former case, the injuries must be such as endanger life; in the latter, the injuries must be such are likely to cause death. Voluntarily causing hurt and voluntarily causing grievous hurt have been defined under sections 321 and 322 respectively.

The punishment for voluntarily causing hurt has been prescribed in section 323 according to which there shall be imprisonment up to one year or fine of take, up to one thousand or both; and the punishment for causing grievous hurt has been stated under section 325 as "whoever voluntarily causes grievous hurt shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

A comparative study between the penal laws of the Quran and that of the Bangladesh Penal Code on murder and physical injury manifests clearly that the purpose of both these provisions of law is to prevent the committing of offence in the society and with this end in view, specific punishments (hudud) have been prescribed against the offenders. It is the duty of the law-enforcing agencies to implement law in its true spirit. But in spite of clear provisions of law against murder, physical injury of a man and other offences, recurrence of those offences has become rampant in our society. In fact, there seems to be no fault in law. The absence of strict and fair execution of law, it is felt, is, among others, the prime cause of ever accelerating tendency in the number of offences. Justice and fairplay are somewhat absent from all walks of life. Criminal offences are increasing at an alarming rate. The nation should, therefore, think seriously of the means to stop it.

Mode of Execution of Punishment:

Punishment must be inflicted irrespective of power and position of the offender. During the time of the Prophet a woman of Quraish origin was guilty of committing theft. According to the Quran, punishment of theft is amputation of hand.[34] Some people interceded on her behalf through a favourite companion of the Prophet named usamah. At this the Prophet was enraged and said, "Do you intercede in the matter of a hadd (punishment)?" He then addressed the people saying. "People in the past had been destroyed only because, they would inflict punishment (hadd) on weak (ordinary) persons and they would exempt the aristocrats. I would cut the hand of my daughter, Fatima, if she would commit theft."[35] Ultimately her hand was cut off. Leniency, however, may be shown if the guilty person shows signs of repentance. The punishment of a pregnant woman is to be deferred[36] until she delivers her child.

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ISLAMIC LAW-PROCESS OF IMPLEMENTATION

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Islam is a complete code of life touching each and every aspect of human life as well as human society. Law generally means 'order' of the sovereign authority and in Islam that sovereign authority is Allah. Hence, Islamic Law is nothing but order of Allah for doing and not doing things by a human being and a human society. Islam as an effective system of belief and deeds emanating from that belief has been instrumental in shaping the destiny of humanity for the last fourteen hundred years and it is a proof of history that Islam as a ruling force and state power successfully controlled the affairs of the world for at least one thousand years until the colonial and imperialist powers deceptively took away this power from the hands of the Muslims. It is also a proof of living history that Muslims never forcibly subjugated any country or area, but did administer those areas with the full consent of the people therein and Islamic law always proved benign to the people for whom it has been prescribed by the great Creator of the universe.

But unfortunately a lot of misgivings and misunderstandings have been created by world-devourer imperialist powers and anti-God vested quarters against Islam and Islamic laws. Through their incessant false propaganda they have been to some extent successful in creating doubt about the benign character of Islamic law not only in the minds of the rulers and people in the West, but also in the minds of the fickle minded so-called Muslims in the Muslim countries. These weak Muslims have been shaped through imperialist-introduced education system only to say 'yes' to whatever the imperialists dictate.

These 'yes men' of the imperialists and neocolonial forces of the present day world have been controlling the media of the Muslim countries and are creating confusion about the Islamic law. Their argument is that Islam is only a 'religion' and Islamic law is not fit to be implemented in the present situation. Western educated weak Muslims have fallen easy prey to this vile propaganda of the imperialists. Cause of this vile propaganda is that the imperialist forces see in the implementation of Islamic law the end of their indiscriminate plundering of valuable resources of the Muslim countries. But fortunately for the bright future of the humanity, the Muslims of the present day world now feel the necessity of implementing the just and humanitarian Islamic laws for the establishment of much awaited world peace

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and achieving economic emancipation for the teeming millions who are kept under economic plunder and political hegemony of the imperialist powers led by U.S.A.

In the process of implementation of Islamic law, the 'fear' created by the enemies of humanity is to be removed first through a very earnest dissemination and propagation of the great humanitarian Islamic teachings and values. It is to be widely propagated that Islam is a 'middle path' and Muslims are the followers of that 'middle-path' as emphatically said in the Holy Quran. Islam abhors and does never give sanction to any 'extreme' path for achieving its noble goals of establishing justice and equality in human society. Islamic law ensures the establishment and pursuing of this `middle path'. World history and entire humanity clearly testify the benign character of Islamic law when this was in actual practice for a very long period in the history of mankind. That golden era of peace, justice, human dignity, economic prosperity and equality, political freedom and liberty, guarantee of equal rights to non-Muslims etc. is still shining in the pages of history and the entire humanity is eagerly awaiting the repetition of that 'golden era' of implementation of Islamic law for ensuring total well being of the people. The process of implementation of Islamic law is the same as adopted by the Holy Prophet (SM.) and his great Caliphs (RAD.) and disciples. The recent terrorism and indiscriminate killings of judges and innocent people by JMB terrorists in the name of implementation of 'law of Allah' are to be hated and uprooted, as their 'process' is not the process adopted by the beloved Prophet (SM). Muslims of present day world are aware and in favour of implementation of Islamic law and they are taking gradual steps to establish Islamic law through peaceful and democratic process as shown by the great Prophet (SM). The need of the hour is to create awareness among the people of our country about the necessity of early implementation of Islamic law so that they achieve real emancipation from all kinds of inequality and injustice. We are hopeful that people will soon reach the golden days of successful implementation of Islamic law and in so reaching will ensure their complete freedom from the clutches of man-made laws, imperialist hegemony, imposed mercantilism and economic plunder in the name of globalization.

ECONOMIC TRANSACTION IN THE EYE OF ISLAMIC LAW

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1. Introduction:

Islam is the complete code of life. Islam covers every side of human being. Now the debate whether Islamic economic system is able to satisfy the demand of modern world has come to an end. Muslim community has established Islamic bank all over the world by which Islamic economic transaction has been brought to light. It is said in the holy Quran: "And when the prayer is finished, then may you disperse through the lands, and seek of the bounty of Allah; and remember Allah frequently that you may prosper."[1]

So economic transaction is a part and parcel of Islam. In this article present Islamic view towards economic transaction and legal business practices in Islam will be discussed.

2. Islamic View Towards Economic Transaction:

Allah has approved trade and prohibited usury (*Riba*).[2] Islamic banking is based on profit – loss system due to the prohibition of *'riba'* in the holy Quran. Literally *'riba'* means money increase, or increment of anything from its original amount.[3] But all increases are not considered as *riba* in Islam. Money may increase business activities as well. This increase is not at all considered as *riba*. This is *halal* in Islam which prohibits only those increases that are charged on the loan with a prefixed rate.[4]

In shariah, the meaning of the term *'riba'* is used in two senses. The first is *"riba-al-nasi'ah"* and the second is *"riba-al-fadl"*. The term *nasi'ah* comes from the root *nasa-a* which means to postpone, to defer, or to wait, and refers to the time that is allowed for the borrower to repay the loan in return for the 'addition'. So *riba-al-nasi'ah* means interest on loans. On the other hand, *riba-al-fadl* means hand-to-hand purchase and sale of commodities.

It covers all spot transactions involving cash payment on the one hand and immediate delivery of the commodity on the other.[5] The word *fadal* signifies the excess charged in the exchange or sale of things of homogeneous nature or similar of the same species.[6]

The *Shariah* clearly prohibits both forms of *riba*. "Considered from the legal point of view there is a marked difference between the two. While *nasia* relates to the excess charged in loan transactions, *fadal* relates to excess charged in sale transactions. While *nasia* is forbidden by the clear text of the Quran, *fadal* is prohibited by the *Sunnah* or traditions of the Prophet (sm). If we probe deep, it becomes evident that *nasia* was in vogue in the *Jahiliyya* and is forbidden in Islam because of its evil and cruel nature, whereas *fadal* is prohibited by the prophet (sm) as a precautionary and preventive measure lest it should lead to *nasia* ".[7] And what is prohibited, as a preventive measure is not unlawful in itself.[8]

It is important to realize that the Islamic community has no objection to true profit as a return on entrepreneurial efforts that benefits the society. Furthermore, in the case of *riba-al-fadl*, the Islamic community is only interested in ensuring justice and fair play in spot transactions to avoid any exploitation through unfair exchanges.

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3. Attitude of Islam towards interest:

Muslim scholars equate interest with *riba,* the term used in the holy Quran.[9] The Islamic rules regarding interest are discussed below:

3.1. Shariah Law:

In the shariah, *riba* technically refers to the premium that must be paid by the borrower to the lender along with the principal amount as a condition for the loan or for an extension in its maturity.[10] So *riba* is the predetermined return on the use of money. In the past there had dispute about whether *riba* refers to interest or usury but there is now consensus among Muslim scholars that the term covers all forms of interest and not only excessive interest[11] As an excess over the principal is *riba*, it covers usury and interest both.[12]

3.2. Quranic Prohibition on Interest:

The Islamic restriction on interest is quite explicit and unequivocal. All transactions based on *riba* are strictly prohibited in the Quran. The prohibition of *riba* appears in the Quran in four different revelations:[13]

3.2.1. The First Revelation:

"That which you give in usury for increase through the property of other people, will have no increase with Allah. But that which your give for charity, seeking the countenance of Allah (will increase): it is these who get a recompense multiplied".[14] It was revealed in Makkah and emphasized deprivation of God's blessing for a man making interest transaction and charity having the essence of manifold rise.

3.2.2. The Second Revelation:

"That they took usury, though they were forbidden and that they devoured men's wealth wrongfully, we have prepared for those among them, who reject faith, a grievous punishment".[15] In early Madinah it severely condemned interest-referring prohibitions taken place in previous scriptures.

3.2.3. The Third Revelation:

"O you, who believe! Don't devour usury doubled and multiplied, but fear Allah that you may (really) prosper".[16] It enjoined Muslims to keep away from riba.

3.2.4. The Fourth Revelation:

"Those who devour usury, will not stand except as stands one whom the Satan by his touch has driven to madness, which is because they say: 'Trade is like usury', but Allah has permitted trade and forbidden usury. Allah will deprive riba of all blessing, but will increase deeds of charity and Allah does not love any ungrateful sinner".[17] "O, you who believe! Fear Allah and give up what remains (due to you) from riba, if you are indeed believers. And if you do not, then take notice of war (against you) from Allah and His Messenger, and if you repent then you have your principal (without *riba*) and don't deal unjustly and you shall not be dealt with unjustly".[18]

The last verses were revealed near the completion of the prophet's (sm) mission and are found to be giving strong verdict against *riba.*

3.3. Sunnatic Prohibition on Interest:

Awon Ibn Abu Zuhaifa (R:) reported that he said, I saw my father buying a blooded slave. The blooded instruments were destroyed by the order of father. I asked him its reason. He said that the Prophet (sm) prohibited from taking the price of dog & blood, and from tattooing on skin and from making tattoo, and from giving and taking interest, and blamed the picture drawer.[19]

Abdullah Ibn Masud (R) reported: The Prophet (sm) blamed usuree, usurer, witnesses of usury and the compounder of usury contract.[20]

Abu Huraira (R) reported: The Prophet (sm) said: There are seventy-three classes of riba. The lowest class among them is to marry own mother (to commit intercourse with his own mother).[21]

A' isha (R) reported: She said: When the last ayats of sura Al- Bakara about interest were revealed, the Prophet (sm) read those ayats to the people (prohibiting riba) and also prohibited business of wine.[22]

4. Islamic principles relating to commercial transaction (Mu'amalat):

Here a number of the important principles of the shariah with regard to commercial transactions are to be highlighted which are as follow:

4.1. Ibahah (Principle of permissibility):

The Shariah norm regarding commercial transactions and contracts is that they are permissible unless there is a clear injunction to the contrary. The presumption of Ibahah is mainly concerned with those commercial transactions that are permissible and nothing in them is forbidden; as Ibn Taymiyyah points out, "Unless God and His Messenger have decreed them to be forbidden.[23] But God Most High never prohibited a contract in which there is benefit for Muslims and does not inflict any harm upon them.[24] The principle of ibahah has been adopted and applied in commercial transactions by almost all the madhahib schools. Thus the legal maxim of *fiqh "al-asl fifashya al-ibahab"* (permissibility in the basic norm in regard to mings) is considered to be based on the authority of the Quran, which are as follow: "We have subjugated to you all that is in the heavens and the earth"[25]. He it is who created for you all that is on the earth.[26] God has explained to you in detail what is forbidden to you unless you are compelled to it.[27] And God will not mislead a people after he has guided them, so that he makes clear to them what to fear (and what to avoid)".[28] The above Quranic declarations imply that it is permissible for mankind to utilize the resources of the universe unless it is prohibited.

4.2. Taysir (Bringing ease) and Raf-al-Haraj (Removal of hardship):

Making things easier for people and removing unnecessary hardship from them are among the cardinal objectives (maqasid) of the Shariah. The subject is referred to in a number of Quranic verses and also in many hadith : "Allah wishes to lighten your difficulties, for man was created weak".[29] "Allah intends every facility for you, and he does not want to put you into difficulty"[30] "As for him who gives (generously), in pious and accepts what is good, we facilitate for him the way to ease".[31] "And if (debtor) is in straitened circumstances, let there be postponement till (he is in ease)".[32] "Allah has imposed no hardship (haraj) in religion".[33]

While commenting on the quranic verse that 'Allah has imposed no hardship in religion', the renowned companion Ibn Abbas regarded a concrete manifestation of this to be the fact that Islam validates expiation (kaffarah) and leaves the door open to repentance (tawbah).[34]

The Sunnah is entirely supportive Of the Quranic directives on taysir, e.g-the Prophet (sm) instructed two of his leading companions, Abu Musaal-Ashari and Mu'adh Ibn Jabal, upon the departure as judges to the Yemen, to the following: "Let the two of you bring ease, not hardship, and give good news, not gloom".[35]

It is, therefore, firmly established that prohibiting what God has made permissible is no less a sin than permitting what is prohibited. The main direction of the evidence of the Quran and Sunnah is clearly to narrow down and minimize the scope of prohibition and try in this way to lighten the burden on the people.[36]

4.3. Hurriyyah al-Ta'aqud (Freedom of Contract):

Muslim jurists have differed as to whether the Islamic legal norm with regard to contracts is permissible, prohibitive, or an intermediate position between two. The majority have taken the view that the parties create a contract by their mutual agreement, but that the legal effects of that contract, such as the transfer of ownership in the case of sale, or the permissibility of sexual relation in the case of marriage,

are determined by the Shariah.[37]

The parties are at liberty to make agreement but stipulations of this kind are valid in so far as they are authorized by the sources of Islamic law. The Hanafis divide contractual stipulations into the three types: valid (*Sahih*), irregular *(fasid)* and void (*batil*).[38] A valid stipulation in that which either reiterates and endorses the substance of the contract, or does not seek to change its requirements. An irregular stipulation is one which, though advantageous to one or other of the parties, is not validated by the law. Stipulations which are neither valid nor voidable are deemed to be wholly null and void (batil).

4.4. Talil (Ratiocination):

The position of the shariah in the area of muamalat, specially with regard to illicit gain (riba), hoarding and risk-taking (gharar), are predicated on the prevention of conflicts, exploitation and injustice among people. These are not, in other words, founded on devotional principles but on rational causes. This is an important shariah principle that is sometimes neglected by those who maintain that the intellect and human reason have no place in the Shariah. Many problems in the fields of Islamic economics, banking and finance arise from this inability to understand the proper role of reason in the Shariah. Ijtihad is the main vehicle by which the shariah can be adjusted so as to accommodate social change, and it relies, to a large extent, on the proper understanding and application of *talil.*[39]

4.5. Urf (Role of Custom):

The changing needs of a society are often reflected in its customs, which are in many ways the vehicle of society's adjustment to new conditions. Custom has played role in the development of the Shariah in the form of *ijma* (general consensus), *maslahah* (public good) and fatwa (juristic opinion). It is said in the Quran, on the subject of maintenance (*nafaqah*), that "let those who possess the means provide in accordance with their means".[40] Similarly a legal maxim of fiqh says that "What is proven by *urf* (custom) is like that which is proven by a Sharia proof.[41]

There is thus unequivocal recognition of the authority of custom as a proof and basis for adjudication, especially in civil transactions and commerce. In order to be valid, *urf* must fulfill certain conditions, namely that it must be dominant practice and that it does not violate the injunctions of the Shariah or the clear stipulations of a contractual agreement. When *urf* (custom) fulfills all the necessary requirements, it is authoritative.[42]

4.6. Gharar (Uncertainty and Risk-taking):

The literal meaning of the word *gharar* is fraud, but in transactions the word has often been used to mean risk, uncertainty and hazard. In a contract of sale the word *gharar* often refers to uncertainty and the ignorance of one or both parties of the substance or attributes of the object of sale, or of doubt over this object's existence at the time of contract.[43] Muslim jurists have differed widely on the definition of *gharar* but the majority includes both ignorance of the material attributes of the subject matter of sale, and also uncertainty regarding its availability and existence.[44] Depending on its scale and magnitude, *gharar* may render a contract totally null and void, or it may constitute a cause for indemnity and compensation. It is reported in a hadith that the Prophet (Sm) prohibited the sale of *gharar.*[45]

4.7. Bay al-gha'ib (Sale of the Unseen) & Bay al-Madum (Sale of Non-existence):

With regard to the sale of the unseen, or the sale of what is not visible (bay al-gha'b), such as sale of nuts in their shells, or that of crops not yet grown to maturity or the sale of fish in a pond, the schools of law have held different views on the subject, on the ground of their respective perception of *gharar.*[46] Imam Al-shafi considered *gharar* in bay *al-ghai'b* to be excessive, Imam Malik viewed it be negligible and Abu Hanifa considered it to be no problem so long as the buyer is granted the option of viewing.[47] Ibn

Taymiyyah said that "These kind of sales, such as that of the offspring of an unborn animal (habal al-habalah) or the sale of fruit prior to its ripening, are forbidden because of the presence of an element of risk-taking that involves devouring the property of others.[48]

There is also controversy, as noted above, regarding the validity of sale of the non-existent (*bay al-madum*). Many scholars have stated that there is a general consensus *(ijmaa)* among the leading schools of law on the prohibition of this sale.[49] Actually the presence or absence of *gharar* in *bay al-madum* has been judged and evaluated differently by the scholars, and a clear departure from the earlier assessment has been developed in the subsequent evolution of juristic ijtihad.[50]

4.8. Bay-bi-sir' al-Suq (Sale at the Market Price):

Sale is, by definition, the change of values between two parties by mutual consent. Muslim jurists have generally held that mutual consent can only materialize if the parties know the price of the object of the sale. There is unanimity among the scholars of the madhahib that the price must be determined at the time of contract, but there is disagreement about the exact nature of this requirement.[51]

4.9. Subject-matter of Contract:

The subject matter or object of the contract must exist, be defined and be deliverable at the time of the contract. It is also said that the subject matter must not only exist but also be owned by the seller at the time of contract because there is the title of a direct translation of a well known hadith- "Sell not what is not with you".[52] But there is a discrepancy in its authenticity and chain of transmission and the rulings that we have may, therefore, be seen as manifestations of juristic ijtihad which command no finality, and the matter may thus be said to remain open to further interpretation.[53]

5. Legal forms of Business Practice in Islam:

A number of business practices, good or bad, emerge and were in practice in the then Arabia during the period of the Prophet (SM). Advent of Islam rectified evils associated with all business practices condemned or discouraged by Shariah. Legal forms of business practice in Islam are administered by the four sources of Islamic Law such as the Quran, the Hadith, the Ijma and the Qiyas. Business practices as approved by Islam are as follow:[54]

5.1. Mudarabah partnership:

This is a business contract under which the entrepreneur obtains finance from a financer on the condition that he will conduct the business alone without taking any help from the financier. This prescribes that under such an arrangement the entrepreneur or the manager will share in the profits of the business as agreed in the contract. If there is any failure in the business, entire losses are to be borne by the financier and the manager will go without a reward. This is known as Mudarabah Partnership.

5.2. Shirka/ Musharaka Partnership:

When some persons jointly make a business, the partners enjoy similar business rights and have unlimited liability to their creditors. They share in the profits of the business in the agreed proportion and bear losses, if any, in proportion to capital supplied. This partnership relationship is known as Shirka / Musharaka partnership.

5.3. Commission (Juala) & Agency (Wakala):

In case of financier being himself a trader, manufacturer, producer or importer, he as a managing party may offer himself to promote the business on a commission basis. In other words, he may earn a commission on the goods procured on behalf of the businessmen. He may also act as agent for the businessman to secure business orders. Islamic business law calls the former activity Juala (Commission business) and the latter wakala (agency).

5.4. Bay Salam (Deferred Delivery):

There can be a contractual agreement between the businessman and the financier that the former will arrange a deferred supply of the goods to be produced, imported or procured by himself, at a concession rate, on the condition of an advance payment by the latter (purchaser). This is a business arrangement, which as per Islamic Law, is termed as Bay Salam.

5.5. Bay Istisna:

When a manufacturer, an artisan or a craftsman takes orders with or without advance payment for manufacturing the articles himself or through hired laborers, the arrangement is known as Bay Istisna.

5.6. Muzaraa & Musaqat:

A farmer having no land or only a small price of land may go for a sharecropping arrangement with somebody else's land. This is known as *Muzaraa.* If the arrangement is made for planting and tending of fruit trees or maintenance of an orchard, it is termed as Musaqat. Both the schemes are allowed in Islam.

5.7. Bay Muajjal & Mrabaha:

Sale on credit under Islamic law, is known as Bay Muajjal and payment by installment is called Taqsid. There might be two ways of quoting the sale price- a) the seller may quote a lump sum price for cash or credit sale, and b) he may charge on his offer a rate or an amount of profit over and above the known cost price. Quotations of the kinds mentioned above as in (b) are known as Murabaha.

5.8. Lease & Hire Purchase:

Lease means to permit somebody or obtain the use of something in exchange for rent Here leasing may take place in a situation when machinery of items involving a huge cost are beyond affordability of the purchaser. In this situation one may take lease of the item from its owner and make installment payments, including the price of the goods along with a share of profit to the owner, until the full payment is done. The ownership remains with the owner until the price of the goods repaid. In case of hire purchase the mechanism is almost the same except the ownership of the hired item remains joint until the purchaser pays the last installment and ownership shifts exclusively to him.

5.9. Trust (Amana):

The term Amana is used to mean a responsibility arising out of contract of safekeeping *(wadia).* When an employer hands over his property to an employee, it becomes a trust (Amana). Amana may be with or without agreement The general rule of a trust is that it is not a thing for which compensation has to be paid. However, in the case of destruction or damage to a trust without any fault being committed by the trustee, the trustee should be paid compensation. On the other hand, the one who has wrongfully approached the property in trust is responsible for indemnifying the loss whether or not he was at fault.

5.10. Deposits (Wadia):

Wadia or deposit arises when a person keeps his property with another person for safekeeping allowing him to use it without the intention of receiving any return from it.

5.11. Lending for Gratuitous Use (Ariya):

When lending takes place between a lender and the borrower with contention that the former will not charge any thing for the use of thing he lent out, it is called *Ariya.*

5.12. Pledge (Rihn):

A pledge is a security commitment in terms of property provided by the borrower against a loan, the payment of which may be recovered from the value of the property. The Quran supports the idea of furnishing a pledge against a debt.

5.13. Surety Ship (Kifala):

Kifala means an obligation that a person wants to assume in addition to his exiting obligation in respect of a demand for something. This may relate to a person, finance or an act. When it relates to a person, *kifala* involves production of a person for whom the *kifala* (bail) has been given. When it relates to finance, *kifala* means an obligation to be met in the event of principal debtor's inability to honor his obligation. When it relates to an act, *kifala* implies timely delivery of the thing contracted by the principal.

5.14. Transfer of Debt (Howala):

Howala means transferring a debt from one debtor to another. First debtor is released from debt when *Howala* takes place. The difference between *kifala & howala* lies in the fact that in the former case the principal debtor is not released but in the latter case the principal debtor is released.

6. Islamic Law Relating to Loan Transactions:

The text of the Quran, dealing with transactions involving future obligations is as follows: "O ye who believe! When ye deal, one with another in lending for a term named, reduce it to writing. Let a scribe write down faithfully as between parties: let not the scribes refuse to write: as God has taught him, so let him write. Let him who incurs the liability dictate, but let him fear his Lord God, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully and get two witnesses out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is juster in the sight of God, more suitable as evidence and more convenient to prevent doubts among yourselves but if it be transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing, But take witnesses whenever ye make a commercial contract: and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So fear God: for it is God that teaches you. And God is well acquainted with all things."[55]

The first part of the text deals with transactions involving future payment, and the second part with transactions in which payment and delivery are made on the spot. As to the transactions of the first part written document is recommended while the transactions performed on the spot require no evidence in writing except oral witnesses and even these oral witnesses are dispensed with if the parties trust each other: Let the trustee (faithfully) discharge his trust, and let him fear his Lord.

The word *salaf* literally means a loan, which draws forth no profit for the creditor. In its wide sense it includes loans for specified periods, i.e. short, intermediate and long-term loans. But if it is immediately to be paid it is called *qard* or loan payable on demand. This is, in fact, a particular kind of *salaf.*[56]

The literal, meaning of qard is 'to cut'. It is so called because the property is really cut off when it is given to the borrower. Loan advancing by way of *qard* is, according to the sayings of the prophet, more pleasing to God than alms giving? Its legality is proved, beyond doubt, by the Sunna or traditions of the Prophet (SM) and the *ijma* or the consensus of jurists.[57] The Shafii School describes *Qard* as *hasan* or beautiful which is referred to in the Quran: Who is he that will loan to God a beautiful loan (*qardan hasnan*), Which God will double into his credit and multiply many times? It is God that giveth (You) want or plenty and to Him shall be your return.[58] It may be said that *Qard* is a kind of loan advanced for the benefit of the borrower.[59]

To sum up, according to Islamic law, loan may consist of every thing that is valuable. Lending and borrowing are indeed, unavoidable in this worldly life, and, therefore, permissible in Islam. Loan under Islamic law, may be classified into salaf and qard. The former being for a fixed time and the latter on demand. And every loan that draws forth or stipulates profit is unlawful.[60]

7. Conclusion:

Islamic basic principle regarding economic transaction should be considered and applied in day to day monetary transaction. Islam has come to establish a smooth society, free from all types of exploitation and injustice. Islamic Law has clearly prohibited riba because of its injustice and hardship to the people. At the same time it has considered some basic means of transaction which have already been applied in monetary transaction by Islamic Bank. If the Islamic principles and means of economic transactions are applied everywhere, exploitation-free society will be established.

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Analysis of Some Silent Features of Family Courts Ordinance and Case Study

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1. Introduction:

Family Courts have been established in 1985 by "The Family Courts Ordinance, 1985" aiming at solving some family disputes like dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children as there was no court in these regard before the promulgation of this ordinance. This court plays a vital role to maintain internal peace and security in the society by disposing family disputes.

2. Historical Background of Establishing Family Courts:

As there were no separate Family Courts before establishing Family Courts under "The Family Courts Ordinance, 1985", family related disputes were tried then together with other civil or criminal proceeding. For these reason, justices were delayed. Many were deprived of getting proper judgment for the cause of lengthy judicial process, poverty, illiteracy or ignorance of law. So, female society of erstwhile Pakistan deeply felt for establishing separate Family Courts, especially for the disposal of family disputes. As a result "West Pakistan Family Court Act, 1964, (Act number xxxv of 1964) passed and Family Courts were constituted. On the other side agitation for establishing such Family Courts were going on in East Pakistan. As a result Govt. forms a law committee for considering and scrutinizing the recommendations of Law Reform Committee in 1958 and 1967. This Committee submitted its report to Govt. on 31st October in 1976 with some recommendations which includes, establishing separate Family Courts about family matters like-Dissolution of marriage, Restitution of conjugal rights, Dower, Maintenance, Guardianship and Custody of Children etc. To make those recommendations effective govt. promulgated "Law Reform Ordinance, 1974". Later on Family Courts were constituted in 1985 under "The Family Courts Ordinance 1985".

3. Some Lackings of the Family Courts Ordinance:

3.1. Whether the family courts would deal only with the family matter of Muslim community or of all communities:

No where in the Family Courts Ordinance 1985 it has been mentioned clearly whether the Family Courts would deal only with the family matters of Muslim community or of all communities .So uncertainty lasted for a long time until in 1998, a special High Court Bench of the Supreme Court in a path finding judgment removed all the questions regarding Family Court's jurisdiction.

Section 5 of the Family Court Ordinance, 1985 speaks about the jurisdiction of the family courts which reads as: " Subject to the provisions of the Muslim Family Laws Ordinance, 1961(vii of 1961), a Family Court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely: -a) dissolution of marriage b) restitution of conjugal rights c) dower d) maintenance e) guardianship and custody of children".

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In Krishnapada *Talukdar Vs Geetasree Talukdar*[1] the question was whether a woman, Hindu by faith, could file a suit in a Family Court for maintenance against her husband. The honorable judge of the High Court Division in a judgment on 5th June 1994 held that "As per the provisions of the present ordinance, all the sections have been made available for the litigants who are Muslims by faith only". Just a few days later on 25th July 1994 in *Nirmol kanti Das Vs Sreemati Biva Rani's*[2] case the Hon'ble High Court Division expressed diametrically opposite view and referring section 3 of the Ordinance held that the provisions of Family Courts Ordinance shall have effect notwithstanding contained in 'any other laws' for the time being in force. From the expression 'other laws', it appears that the Family Court Ordinance controls the Muslim Family Laws Ordinance, 1961, and not vice versa. Thus, any person professing any faith has a right to bring a suit for settlement and disposal of disputes relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. And so, a Hindu wife is entitled to bring a suit for maintenance against her husband in a Family Court. *In Meher Nigar Vs Md Mujibur Rahman*[3] case the High Court Division corroborated the abovementioned view by holding that the provisions of the Family Courts Ordinance are applicable not only to the Muslim community but also to other communities constituting the populace of Bangladesh.

Such dissimilar views and confusing decisions removed by a path- finding decision in *Pochon Rikssi Das Vs Khuku Rani Dasi and others*[4] upholding that "the Family Court Ordinance has not taken away any personal right of any litigant of any faith. It has just provided the forum for the enforcement of some of the rights as is evident from section 4 of the Ordinance, which provides that there shall be as many Family Courts as there are Courts of Assistant Judges and the later courts shall be the Family Courts for the purpose of this Ordinance". Moreover, in *Pochon Rikssi Das Vs Khuku Rani Dasi and others* case court also declared that Family Courts Ordinance applies to all citizens irrespective of religion. So from the abovementioned case law we easily come to a decision that now there should not remain any confusion regarding the jurisdiction of the Family Courts.

3.2. Whether tribal people can take recourse to a Family Court or not:

According to section 2 (2) of the Family Courts Ordinance, 1985, "It extends to the whole of Bangladesh except the districts of *Rangamati Hill Tract, Bandarban Hill Tract* and *Khagrachari Hill Tract"*. The fact is that initially the hill districts used to be governed by Hill Districts Regulation of 1900 and it was repealed in 1983 but as no new law has been introduced for administering the area, as per provisions of General Clauses Act, the repealed law is still in force and the Hill Districts Regulation is still continuing, resulting in exclusion of the Family Courts there. This does not mean that tribal people cannot pray remedy to a Family Court. The suits among aboriginal or adibasi or tribal people can be tried by a Family Court if they reside within local limits of the Family Court.

3.3. Application of Civil Procedure Code in Family Court:

3.3. a. Amendment of Pleadings:

According to order VI rule 17 of "The Code of Civil Procedure, 1908" (Act v of 1908), pleadings can be amended at any stage of the suit if that is necessary for the purpose of determining the real questions in controversy between the parties. Moreover after presentation of the pleadings, other logical and legal

[1] 14(1994)BLD415
[2] 14(1994)BLD(HCD)413
[3] 47 DLR18
[4] 50 (1998) DLR(AD)47

grounds may arise, necessitating amendment of plaint. But Family Court Ordinance does not provide any provision for amendment of pleadings like Civil Court that follows the Code of Civil Procedure. But what actually is the matter? Is there no scope for amendment of pleadings in Family Courts? As to this the Supreme Court has given differing opinions. In *Azad Alam vs Jainab Khatun* and others[5],

the full bench of Appellate Division of the Supreme Court upheld the view that plaint can not be amended under the Family Courts Ordinance and that was expressed in view of the provision under section 20 of the Family Courts Ordinance which provides "Save as other wise expressly provided in by this ordinance the provisions of the Civil Procedure Code, except sections 10 and 11, shall not apply to the Proceedings before the Family Courts."

A few months later, In *Nazrul Islam Majumdar Vs Tahmina Akhter alias Nahid* [6] a High court division bench expressed opposite view. The court held that: "An amendment of the plaint insofar as it does not change the nature and character of the suit would be allowed always in a suit. And the guiding principle for the amendment of plaint is that it ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings.—and the principle applicable to the amendment of the plaint is also applicable to the amendment of written statement." In the case of satish Vs Govt. of India[7] , the Calcutta High Court reiterated the same principle. It has been again reiterated in *Rajeshawar Vs Padam*, [8] And it is the consistent view that court can take into account subsequent view even necessitating amendment by addition of new relief that may be allowed to do complete justice.

In the light of the above mentioned judgment we can merely come to a decision that as there is no alternative provision for the amendment of pleadings in the Family Court Ordinance, the provision of the Civil Procedure Code as to the same will apply in the Family Courts. But we can not reach such a conclusive decision because of the judgment of Appellate Division and provisions of Bangladesh constitution as article 111 of Bangladesh constitution provides "The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it."

3.3. b. Injunction:

The rules and provisions about Injunction have been provided through Order 39 of the Code of Civil Procedure and in chapter IX and X of the Specific Relief Act, 1877. However, the Family Courts Ordinance does not have any mentioning of it.

Consequently, Family Courts had to face a great problem in the very first suit of Ramgong of Laksmipur in1985, the very year of the commencement of Family Courts Ordinance. The fact of the suit was that the plaintiff, the husband, filed the suit against the defendants, his wife and others, for restitution of his conjugal life. In the said suit the plaintiff also field an application for temporary injunction restraining the marriage of her wife, who claimed that she had divorced her husband, elsewhere till the disposal of the suit. The prayer for injunction was rejected; then the plaintiff preferred appeal to the district Judge wherein also the prayer was rejected on the ground that the provisions of Code of Civil Procedure granting Injunction is not applicable in the proceedings under Family Courts Ordinance. Consequently the Plaintiff moved the High Court Division which also confirmed the decision of the lower courts holding that Family Courts Ordinance 1985 is a self contained Ordinance providing the mode and method of trial and disposal of suits, and as section 20 thereof makes all the provisions, except section 10 and 11, of the

[5] 1(1996)BLC (AD)24
[6] 47(1995)DLR(HCD)235
[7] AIR 1960(CAL)278
[8] AIR 1970 (Raj)77

Code of Civil Procedure inapplicable, no other Provisions of C.P.C will be applicable in the proceedings of Family Courts[9].

In *Younus Mia Vs Abida Sultana Chandana*[10], divisional bench of High Court Division observed that it is a cannon of interpretation that an attempt should be made to discover the true legislative intent by considering the relevant provision in the context of the whole statute, and subsequently observed that Code of Civil Procedure itself does not create any court nor does define the word 'Court'. Its preamble said that it is the intent to regulate the procedure of the Courts of Civil Judicature. Basically, the Code of Civil Procedure is a procedural law and, therefore, there is no difficulty in its applications to proceedings of a civil nature suit pending courts of any kind. Therefore, the bar in applying the Code to the proceedings before the Family Courts imposed by section 20 of the Ordinance is not and cannot be an absolute bar, but it must be a qualified and limited bar. Enactment of section 20 was thus only being necessary due to certain procedures prescribed in the Ordinance. The procedural bar to the provision of the Code of Civil Procedure as contemplated in the section 20 of the Family Courts Ordinance is absolute or qualified, we should think about the issue again as a demand of time.

3.4. Whether the power of Magistrate to act under section 488 of Criminal Procedure Code has been taken away by Family Courts Ordinance:

Whether the power of Magistrate to act under section 488 of Criminal Procedure Code has been taken away is a controversial issue as different courts observed different decisions in this regard. In *Rezaul Karim Vs Rashida Begum*[11] case it is mentioned that, the power of Magistrate to act under section 488 of Criminal Procedure Code has not been taken away by promulgation of the Family Courts ordinance.

In *Zinnatan Nessa Vs Md. Kaloo Mia*[12] Court observed that section 5 of Family Courts Ordinance gives exclusive jurisdiction to the Family Court to try any suit for maintenance. An application for maintenance under section 488 of Code of Criminal Procedure is not a suit and, as such, the provisions of the Family Courts have not taken away the power of the Magistrate to order for Maintenance.

But in *Pochon Rikssi Das Vs Khuku Rani Dasi and others*[13] case another view was expressed. It was observed in the above-mentioned case that after coming into force of the Family Courts Ordinance the Criminal Court's jurisdiction has been ousted in respect of awarding maintenance except in case of pending proceedings.

So it is still now a question, whether the power of Magistrate to act under section 488 of Criminal Procedure Code has been taken away or not after promulgation of Family Courts Ordinance and such confusion should be removed as early as possible by taking necessary steps.

4. Conclusion:

Despite some lackings and contradictions, Family Courts, established under Family Courts Ordinance, have been playing a significant role in disposing family disputes specially in case of establishing rights of women and children. It can be made more effective in achieving its goal with some necessary amendments and by removing its short comings and contradictions which is now the demand of time. Establishment Family Courts is a path- finding step for the women and children of Bangladesh in achieving equality, development and peace.

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[9] The Daily Star, September 23,2006
[10] 47(1995) DLR(HCD)331
[11] 1 BLC198
[12] 1995 BLD545
[13] 50 DLR 47

THE PRESIDENTIAL ELECTION OF THE UNITED STATES OF AMERICA

Shahidul Islam

1. **Introduction:** The United States of America became independent on 4 July, 1776 with the adoption of the Declaration of the Independence of 55 representatives of 13 colonies. However her independence was absolutely recognized in 1783 with the achievement of absolute freedom of her 13 colonies. A convention of all these 13 colonies (states) was convened under the chairmanship of George Washington at the Philadelphia with a view to framing a new constitution in 1783. Accordingly the constitution was framed and enforced on from 1789. The constitution so adopted provided for the arrangements of all the branches and departments of the USA including the President, the head of the executive. This is an effort to bring light on the election system of the President of the USA.

2. **Qualifications:** The Constitution of the USA significantly provides for the qualifications for a person to contest in the presidential election. As per the Constitution, s/he should be a natural born citizen or citizen of the USA, at the time of the adoption of the constitution, has been staying in the USA for a consecutive period of 14 years and has attained 35 years of age.

3. **Tenure of the Office of the President:** At the time of framing the Constitution there was long debate and controversy as to the tenure of the office of the President, though, finally it was decided that the term should be four years. However nothing was said in the Constitution with regard to the question of re-eligibility. Almost two hundred years since after the adoption of the Constitution, in 1951 the Twenty Second amendments to the Constitution specified that none could hold office of the President for two terms whether consecutive. After that amendment, any one who has held office of the President, or acted as President, for more than two years for a term to which some other person was elected president, shall not be elected to the office of the President more than once.

4. **Process of Election:** The process of Presidential election in the USA is not as common as it is usually found in the contemporary world. After a long debate at the Philadelphia convention the method of indirect election among numerous proposals was adopted. The entire process can be pictured out as under:

4.1. Election directly by the Representatives of Electoral College
4.2. Election by the Members of the House of the Representatives

4.1. Election directly by the Representatives by the Electoral College

4.1.1. Appointment of Electors: It has been mentioned earlier that the President of the USA is not elected directly by the citizens of the country following the principle of adult franchise. S/he is elected indirectly. For this purpose, each of the States of the USA has been constitutionally empowered to appoint Electors, in such manner as the State Legislature deems fit and the number of the Electors will be equal to the total number of Senators and Members of the House Representatives of that State. The Electors are the members of the Electoral College. In 1964, an amendment to the Constitution provided for the provision of another three Electors from

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Washington D C. So now the total number of the Electors stands as 538 that include the total Washington D C. So now the total number of the Electors stands as 538 that include the total number of Senators, of the members of the House of Representative plus three from Washington D C.

4.1.2. Election for the Electors: To be qualified to vote for the presidential election the Electors so appointed have to come in open competition. This election takes place on first Tuesday next after the first Monday of November. As to the qualification to compete in this election it has been said in the Constitution that every one eligible to compete in the Congressional election can also compete in this election excepting those who are either a Senator or Representative, or person holding an office of Trust or Profit under the USA. Every citizen of at least 18 years of age of the USA is eligible to vote in for the election of these Electors. The candidate securing the majority of the votes of his or her constituency wins that poll. In this way the total 538 Electors are elected.

4.1.3. Casting of Votes: This is the very important phase in the process of the Presidential election of the USA. All the Electors elected in the aforesaid manner vote in this phase to the candidates contesting for the office of the President. This election takes place on first Monday next after the second Wednesday of December. They meet in their respective District and vote by secret ballot for two persons, of whom one at least not be an inhabitant of the same State with themselves.

4.1.4. Counting of Votes: After completion of vote, the Electors viz. the members of the Electoral College make a list of all the persons voted for, and of the number of votes for each; then that is transmitted sealed to the Washington D C directed to the President of the Senate after duly signed and certified by them. Next year, on January 6, The President of the Senate opens the ballot boxes in presence of the members of both the Senate and House of Representative for counting the votes. A candidate contesting for the office of the President wins all the vote of a State if s/he wins the majority votes of the Electors of that State.

4.1.5. Announcement of Result: In the USA, a person contesting for the office of the President needs at least 270 Electoral College votes which constitute the majority in the poll. After counting the votes, the candidate who wins the at least 270 Electoral College Vote becomes the President of the USA.

4.2. Election by the Members of the House of Representative: This process is applied when none of the candidates contesting for office of President wins the required majority. In that case, the members of the House of Representative, by secret ballot, elect one among the three top scorers in the poll. Since the independence of the USA all the Presidents have been appointed by the votes of the members of the Electoral College excepting two.

5. Conclusion: Many criticize the process of presidential election of the USA undemocratic in the sense that in this process opinion of the majority is not reflected directly. An analysis conducted by Jognath Mukhpadhaya reveals the fact that in the election of 1824 Andrew Jackson could not win the poll though he got 1,53,544 votes which was 43.1% of the total votes casted while Quincy Adams got 38.8% of the total votes casted but win the poll because of this process of election. This process has also been subject to criticism on another ground that it is time consuming and expensive.

PROTECTION OF HUMAN RIGHTS IN ISLAMIC LAW

A. Z. M. Obaidullah*

Human being, as the best creation of the Almighty Allah and as the most social being on the earth developed norms, values, and laws to continue the process of development. As individual and as member of the society every person has got some rights which are reciprocated by some duties too.

When we talk about 'rights' automatically the second question comes whose rights, what rights and how the rights are to be restored and ensured. We can go into the details of human rights available as texts and practices around us.

Every human being is supposed to enjoy some rights such as right of living, right of being esteemed, freedom of thought, behaviour and propagation, right of equality, security, residence, justice, right of participation in developing the social life, economic rights covering rights of ownership, labourers rights, some familiar rights covering parents rights, reciprocal rights of couples, children's' rights, right of enjoying public education, sanitation and social security, political rights, rights of minorities, right of refuge while emerges, right of insurance and social security Specially for the aged, children, the disabled and helpless, more over some moral rights such as neighboures right, servants right, friend's right, master's rights, rights of the people in faith, partner's right and right of the others. The list of the rights is becoming longer with the development and complexities of the society when discussed in detail. Again, apart from the common rights women community was supposed to get some special rights considering their delicate biological and social aspects.

Why the Question of Protection Comes?

If we give a deep but short thought on the above mentioned aspects of human rights we'll witness a very discouraging picture prevalent all over the world. There are hundreds of human rights organization shouting and fighting for the restoration of those rights and promoting the cause of the ill fate humanity but seems those are of no avail.

Yes, one very important thing we have to consider is that, rights are of two types basically, first one- the natural rights came from the nature, given by the creator and established only with the creation of human being. There are other rights proclaimed and enacted by the materialistic worldview obviously diverse and deviated with the time, conditions and history. Because of the sources of the law pertaining to all those.

History reveals that rights were always been subjected to be denied, deprived and rejected by the people in power to ensure their dominance over the ruled, controlled and oppressed. As Marxist view projects. "Law is the will of the ruling class transformed into legal regulations" Accordingly, there is no right or wrong, justice and injustice. The question is only which interest comes out as the winner of the struggle.

Law has always been a way for the weak to oppose the strong, in the same way as the liberty of opinion and belief. Primarily the right to have different opinion and different belief. The laws start where the limitation of the power begins and where it has taken the stand of the weak as opposed to the benefit of the strong. This is why every people fight for a constitution and every king tries to get rid of it.

We have constitution, legal frame works, declarations every where yet human rights are simply denied in a disgraceful converted manner because of the neo-kingship in the coverage of lofty and high sounding complex terminologies which seldom get realized.

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So, there are frustration everywhere, dictatorship over ruled the laws, dictatorship of proletariat or of the king. The ill-fated humanity is awaiting a savior, emancipator and protector to enjoy the rights they are deprived of.

Why Prevalent Laws Failed?

If we examine the history, practice and interpretation of laws around the globe we'll be surprised witnessing the shortcomings of those laws to protect the human rights. More discouraging is the attitudinal declination of the people with whom the responsibilities of establishing these laws are vested.

The international Human Rights Declaration, 1948 Covered almost all aspect of human rights but still it has many more limitations. 30 Articles in the declaration talk about every thing but the implementation.

Paradoxical is the act of UN itself, it talks about equality of human being but at the same time recognizes inequality by recognizing veto powered holders of which bother the public, national or international interest except their own. As a result, again, the human rights are being violated by the power mongers, who was entrusted to safe guard those.

Some body may raise some very simple questions regarding the past and present bombardment, massacre, haulocust, killing and deprivation in the globe as if those ill fate people, their children, their properties justly treated. War against terror, holds no just ground to kill innocent children, women, orderly persons or to destroying mass, public and general properties.

How Islamic Law Can Protect These?

Islamic laws are natural, humanistic, all encompassing and subject to change if necessary and deemed fit. Sources of the law are four, Al Quran, Al Hadith, Ijma and Qiyas. Main laws are derived from the direct instructions of the holy Quran, these laws are precise natural as given by the Almighty Allah who needs no legal protection for Himself, rather all he has given only to protect the rights of the creatures proportionately. On the other hand, details of the law was given and practiced by the Messenger of Allah, guide and friend of the humanity. Prophet Mohammad (SW) whose every word and actions are being saved without any distortion. Hadith left no untouched that the human life has. Those are all logical, practicable and issue universal.

The third source is consensus of the fokaha (shariah experts) and the 4th one is Qiyas (personal opinion) of the rightful scholars. It is marked that, almost all muslim scholars (aimma) and the rulers (caliph) developed their own book of interpretation for shariah laws, that deemed necessary in their time.

As Allah is the Lord, Creator, protector sustainer of the universe and its inhabitants, he could easily give the laws that cover past-present -future perspectives, which only He can see from the same platform for His omnipresent, all knowing characteristics.

Whenever, these laws were established in any society country that got a total charge. World witnessed a complete realization of those in the time of prophet (Sw) which were carried on in the time of his great and pious caliphs.

These laws can solve today's problem regarding human rights if properly and wisely executed. The door of 'Ijtihad' (needful thoughts for change) is always open, room for change is there as per the need of the day without any prejudice. That's the great aspect of its acceptance for persons, group, and places(without any difference).Islamic law gives no chance for any winner group(considering the class struggle) to deprive the defeated, rather rulers are more accountable to the ruled.There is no special rules for the victors, rulers or the clergies, on the contrary it has inclination to the losers, poorer and oppressed.

OMBUDSMAN: THE MECHANISM FOR PROMOTION OF CIVIL ADMINISTRATION AND PROTECTION OF CITIZEN'S RIGHTS

Mohammad Javedul Islam*

Introduction:

Governance is a mechanism through which the relation between those who govern and those who are governed is expressed. A good governance is characterized by an accountable government at the top, an independent judicial system, freedom of thought and expression and above all freedom of choice for its citizens.[1] On the other hand, poor governance is characterized by arbitrary policymaking, unaccountable bureaucracies, unenforced or unjust legal system, the abuse of political power, a civil society unengaged in public life and widespread corruption. Poor governance also undermines all efforts to improve policymaking and creates durable institutions[2]. The idea of Ombudsman, therefore, evolved in response to the growing concern for the protection of the individuals against the ever-expanding state horizon. While the Court system resolves conflicts between individuals; the institution of Ombudsman emerged as a mechanism to deal with administrative corruption and maladministration. The institution is increasingly assuming such a significant role that it is now identified as a 'watch -dog' of the administration and protector of the 'little man' against arbitrary administrative discretion by investigating complaints of individual's concern grievance against a Governmental agency and it recommend measures for the systematic improvements to overcome those defects to ensure transparency, efficiency and accountability in the system of governance.

Meaning and Development of The Institution of Ombudsman:

The word 'Ombudsman' has been derived from the Swedish word 'Ombud' which in Swedish language commonly denotes a person who acts as agent, spokesman, and representative for another person. So, ombudsman means the man or official who represents the people in their grievance or who acts as a commissioner of the parliament to redress the grievances of the people. He is also called 'grievance man'.[3] A universal definition of ombudsman is yet to be elaborated. However Ombudsman Committee of International Bar Association has given the following definition.

"An ombudsman is an office provided for by the constitution or by the action of the legislature or parliament and headed by an independent high legal public official who is responsible to the legislature or parliament, who receives complaints from the aggrieved person against Governmental agencies, officials and employees or who acts on his own motion and has the power to investigate, recommend corrective action and issue reports."[4] In the word of S.K. Agarwal, the term Ombudsman refers only to institutions which have three basic and unique characteristics.

i) the Ombudsman is an independent and non - partial office of the legislature who supervises the administration;

ii) he deals with specific complaints concerning maladministration or may proceed on his own information;

iii) he has the power to investigate, criticise, and report back to the legislature but not to refer for administrative action.

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1. Mohammad Shahidul Alam & Naser Ahmed. Towards Good Governance in Bangladesh, Typed seminar paper BIAM, August 1994.

2. Kabir, Abul hasnat Manjurul, Ombudsman for Bangladesh, Problems & Prospects (a paper read 1996)

3. Halim, Muhammad Abdul. Constitution, Constitutional law & Politics: Bangladesh Perspective.

4. Frank. B. Ombudsman Revisited: London 1975 p.56.

In short, in the word prof. Garne, we can say that Ombudsman is an officer of parliament, having as his primary function, the duty of acting as an agent for parliament, for the purpose of safeguarding citizen, against abuse or misuse of administrative power by the executive.[5]

The office of Ombudsman was created first in 1809 when Sweden adopted its new constitution. The institution of Ombudsman remained a unique Swedish phenomenon until Finland, another Scandinavian country adopted it.[6] Subsequently Sweden established the office of the 'Military Ombudsman' in 1915 to defence and military administration. Now there are four parliamentary ombudsmen working in Sweden. One of them is the Chief Parliamentary Ombudsman.[7] Besides these parliamentary Ombudeman, there are some non-parliamentary ombudsman in Sweden like i) Equal opportunities Ombudsman ii) Children Ombudsman iii) The press Ombudsman iv) The Ombudsman against Ethnic Discrimination V) The Consumer ombudsman. Later on, other Scandinavian countries e.g. Denmark and Norway established it in 1954 & 1960 respectively. The office of Ombudsman has been established in some common law countries like New Zealand in 1961, UK in 1967 and Australia in 1973 being the leading examples. Among our neighbouring countries Pakistan, India and Srilanka have established this institution. In India, Ombudsmen are known as Lokpal and Lokayakta.Bangladesh parliament has passed the Ombudsman Act in 1980. In2006, Bangladesh parliament has enacted the Tax Ombudsman Act to improve Tax administration and to prevent the harassment of taxpayers by the tax officers.

Salient Features of Ombudsman:
The following are the basic features of Ombudsman:

1. Independence:
Independence is one of the fundamental features of the Ombudsman. Therefore, independence from executive intervention has been identified as the most important criterion of the Ombudsman.

2. Power of investigation:
Ombudsman is empowered to investigate complaints of maladministration against various governmental agencies or other public bodies. The office can call for information and documents from any one including minister and officials.

3.Power to recommendation:
This office is not empowered with enforcement mechanism and can only make recommendation to the offending body to rectify injustices.

4. Annual report:
Preparing annual reports are one of the main functions of the Ombudsman. The productions of meaningful annual reports are one of the considerable importances. Because these (a) help publicise the operations of the office to policy makers, legislators and the public (b) are also a useful channel for the communication of recommendations and improvements in the machinery of Government.

5. Accessibility:
This office is easily accessible to general people. Therefore, the complaints may be a simply written exposure of the facts or it may be made orally.

6. Jurisdiction:
A clearly defined jurisdiction of this office is also an absolute pre-requisite, so that there would be no duplication of efforts, problems of co- ordination and confusion among the public in general.

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5. Administrative law, 1985, p 85
6. LAPCS.
7. Ganguli, Basudev, Administrative Tribunal Act, 1980
8. Halim, Muhammad Abdul. Constitution, Constitutional Law &Politics: Bangladesh Perspective.

Necessity of Ombudsman: Bangladesh perspective:

The institution of ombudsman has achieved a wide spread appeal for its intrinsic quality of making public administration responsive, adaptive and sensitive to the needs of the people.[9] Bernard Frank, who was the Chairman of the Ombudsman Committee of the International Bar Association identified the following reasons for the establishment of the office of the Ombudsman.

1. The modern state has been assuming an enormous multitude of function as a result of social and welfare, legislation, education, medical, history and social security affecting the life and property of anyone. Extensive powers and discretion have granted to all types of boards, agencies and departments, possibilities of friction between officials and citizens have been greatly increased. Protection of the individual is required against executive and administrative mistake and abuse of power.
2. The traditional concern for the guarantees of the legal rights of the individual has been even greater in modern society. The activities of public administration have become so comprehensive and the power of bureaucracy so great that the legal status of the individual needs additional protection.
3. The Ombudsman gives the citizens an expert and impartial agent without personal cost, to complain without delay, without tension of adversary litigation and without requirement of counsel or intervention of those highly placed.
4. The presence of the Ombudsman also has a psychological value. His office gives the citizens the confidence that there exists a watchdog for the people who hold the Government accountable[10]

The main duty of the ombudsman is to fight against the maladministration of public servants. There is no doubt that maladministration breeds corruption. Maladministration refers to corruption, nepotism, administrative inefficiency, delay, negligence, bias and unfair preference. Maladministration may be divided into three parts: first -maladministration connected with executive action of the Government, secondly-maladministration connected with the discretionary power of the Government. Thirdly -maladministration arising out of faulty law.[11] According to K.C. Wheare maladministration may constitute by the following ways:

a. transgression of law by the administrative authority. This could arise from i. failure to carry out a duty imposed by law ii. action going beyond the powers conferred by law iii. use of legal power for the purpose for which it is not intended iv. not following a procedure laid down by law v. making of arbitrary decesions **b.** action of officials actuated by bribery or corruption **c.** maladministration though not necessarily illegal. such as. i. delay in reaching decision ii. rudeness iii. unfairness iv. bias v. incompetence vi. negligence vii. and misconduct etc.[12]

Almost 35 years ago Bangladesh was born out of a bitter and bloody struggle of independence. There were some significant goals: to establish democratic government through direct participation of the people, to establish the rule of law and ensure good governance, to remove exploitation and injustices from the society and to form a national identity based on history, language and religion. If we deeply observe, we will see that after 35 years of our independence, we could not have achieved those noble goals of our independence. Rather, we have established rule of men in the name of rule of law, in absence of transparency, effectiveness, accountibility of the administration; maladministration has established in every sector of the Government. This maladministration has created corruption, nepotism, unfair preference etc. In our country corruption has assumed such a degree that general people are losing their confidence in the whole governance.[13] Corruption has paralyzed all sectors and institutions of the Government,

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9. Towards Establishment of the Office of Ombudsman. This a Project of Legislative Advocacy And Participation of the civil Socisty (LAPCS)

10. (Frank. B. Ombudsman revisited. London.p.56)

11. Interim report of the Administrative Commissions: Problems of the Redress of Citizen's Grievance. New Delhi 1966

12. Wheare K.C. Maladministration and Its Remedies London-1973

13. Towards Establishment of the office of Ombudsman. This a Project of legislative Advocacy And Participation of the Civil Society. (LAPCS)

all developing programmes of the country are being impeded only for this corruption, thousands of crores take are wasting for corruption. A recent survey carried out, after examining the Corruption Database Report and documents over 2000 cases of corruption spanning 38 sectors, by the Transparency International Bangladesh, shows that the most common form of corruption was found arising out of abuse of power, bribery and extortion following close behind. It also shows that the country lost US$ 75 million to corruption in 2005. Of the 38 sectors surveyed, education, police, health & welfare and private sector were listed as the most corrupt.[14]

The mechanisms that are prevalent in our country for reducing corruption and maladministration are not so strong. That is why corruption is not being removed and is beyond control. Again if someone goes to court against those corruption, he can't get proper remedies for procrastination of the judicial process and delay in reaching decision. For these reasons people are not interested to sue those corruption and consequently, corruption is being increased. In the above circumstances, there must be a system in the public administration by which 1. public administration will be improved and 2. Rights and security of the citizens will be ensured and protected. Although there are many criticisms regarding Ombudsman, many countries of the world have improved their civil administration and ensured citizen's rights by establishing this institution. The fundamental function of the Ombudsman is to ensure transparency in the Government. In promoting transparency in all aspects of the administration, maladministration may be checked. The Ombudsman can deal with many matters of the maladministration that are not subject to court review. The ombudsman will function informally without the assistance of the lawyers to be engaged by the complainants. In this way justice may be within the reach of common people who are often unable to pay the fees demanded by the lawyers and also it will be able to investigate complaints quickly and give redress to the grievances of public.[15] Ombudsman may pursue long-term investigation and research into recurring problems of maladministration. He may identify legislative policy and procedural deficiencies and recommend measures for the systematic improvements to overcome those defects and review administrative actions to ensure transparency, efficiency and accountability in the system of Governance.[16]

From the above discussion, it is clear that the Ombudsman may be considered as a 'watchdog' against maladministration of the Government and it plays a vital role to ensure the rights of the people. In developing countries like Bangladesh, the establishment of the Ombudsman is, obviously, necessary. Because the socio-economic development of those countries are being impeded for the maladministration.

Ombudsman in Bangladesh:

The Scandinavian concept of the Ombudsman has been adopted in our country to ensure transparency and accountability in the civil administration and to promote democratic governance, rule of law and human rights.[17] Art.77 of the Constitution of Bangladesh provides that parliament may by law establish the office of the Ombudsman. Once established, the Ombudsman shall have the power to investigate any action taken by a Ministry, public officer or statutory public authority and such other powers and function as may be prescribed by the parliament. The Ombudsman shall prepare an annual report concerning the discharge of his functions and such report shall be laid before the parliament.[18] To fulfill the constitutional obligation The Ombudsman Act was passed in 1980. This Act provides elaborately the appointments, terms, removal, functions, powers and immunes of the Ombudsman.

It is a great matter of pleasure that Bangladesh Government has realized the necessity of this institution and in 2006, Bangladesh parliament has enacted the Tax Ombudsman Act, 2006 to improve and promote the Tax Administration and to prevent the harassment of the Taxpayers by the Tax officers.

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14. TIB report-2006
15. Halim, Muhammad Abdul. Constitution, Constitutional Law & Politics : Bangladesh Perspective.
16. LAPCS
17. Ibid
18. The Constiution of the People's Republic of Bangladseh. Act.77

We expect that this institution will be effectively fruitful in the Tax administration as soon as possible. We also believe that if this institution is established in those sectors which are seriously victim of corruption, such as- police, family & welfare, education, water, PDB,Gas; the socio economic development of the country may hasten by removing all maladministration of those sectors.

Ombudsman in Islam :

There is a system of the Ombudsman in Islam. In the holy Quran the Ombudsman is called the 'Hisbah' which means accountability.[19] According the Holy Quran, the function of the 'Hisbah' is to call people to do good and forbid for doing what is bad. [20] The existence of the Ombudsman was found in the period of the Prophet (SAW) and in the period of the four pious Caliphs of Islam. Though at that time the word Ombudsman was not used directly but all powers and functions of the Ombudsman were effectively observed. During the period of Omar (RA) this institution got its formal shape. Omar (RA) used to play himself as a "watchdog" of the Governmental administration. He himself used to go round the city at night to find out the needs and requirements and conditions of the people and he also used to try to identify whether there is any maladministration, injustice or corruption in the Government administration. If he found any corruption or violation of the citizen's rights, he would immediately take initiatives to redress those corruption and violation. Omar (RA) was the just ruler in the history of the world. He declared that "don't obey me when I'm disobeying Allah. I explain to you the rights you have over me and you are free to demand them anytime". He used to involve spies behind public officers to prevent the maladministration and corruption and would take necessary actions as per their reports. During his period, the office of Qazi would enjoy the powers of the Ombudsman like present time. The Qazi could deal with many matters of maladministration that are not subject to court review or are not serious enough to warrant the high cost of the court review. So, from the above discussion it is clear that about 1500 years ago this institution played significant role in promoting the government administration and to ensure the rights of the citizens.

Conclusion:

On the basis of the above discussion, it is clear that corruption, nepotism, administrative inefficiency, delay, negligence, bias, unfair preferences etc. are born in the womb of maladministration. When maladministration is created, the citizen's rights are violated by the Government. Therefore, there must be a mechanism like Ombudsman which will prevent the maladministration and improve the Governmental administration on the one hand, on the other hand, it will ensure the rights of the citizens in every sector of the Government and help in doing full and complete justice to aggrieved person. But his success depends upon the existence of reasonable well-administered state. He can't carry on with the situation where administration is infested with undue patronage and corruption.

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19. Mahbubul Islam, Dr.A.B.M.Islamic Constitution: Quranic &Sunnatic Perspective.
20. Al Imran. 3:110, Al hajj 22:41.

ARTICLE (70) NEEDS AN AMENDMENT

Md. Ridwan
7th semester

Article 70 of Bangladesh Constitution :

(1) A person elected as a member of parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in parliament against that party.

Explanation: if a member of parliament-

a) being present in parliament abstains from voting, or
b) absents himself from any sitting of parliament,

Ignoring the direction of the party which nominated him at the election as a candidate not to do so, he shall be deemed to have voted against that party.

(2) if, at any time any question as to the leadership of the parliamentary party of a political party arises, the Speaker shall, within seven days of being informed of it in writing by a person claiming the leadership of the majority of the members of that party in parliament, convene a meeting of all members of parliament of that party in accordance with the rules of procedure of parliament and determine its parliamentary leadership by the votes of the majority through division and if in the matter of voting in parliament, any member does not comply with the direction of the leadership so determined, he shall be deemed to have voted against that party under clause (1) and shall vacate his seat in the parliament.

(3) this sub- Article is about the independent candidate.

So Article (70) of our constitution can be considered as one of the main obstacles of our democracy. According to article 70 - no member of the ruling party can exercise his democratic right to dissent even when the government passes an undemocratic law. Due to this barrier of the constitution the members of the ruling party fails to express their own opinion and they have to act according to the choice of their leader. This process undermines the whole spirit of responsible government and leads to be elected dictatorship in Bangladesh. This is also contrary to Article -39 of our constitution that is the freedom of speech.

In developed Country like Britain the member of the ruling party enjoy enormous power to criticize their government which leads their parliament to come to a fruitful ending with the free opinion of all the members. But unfortunately we do not have this tradition. However, it is true that anti hopping law is salutary from one point of view since it strengthens the fabric of parliamentary democracy by curbing unethical and unprincipled political defection. But it would be more advantageous if this law is only imposed during the time when the cabinet faces a confidence motion. Therefore, Article 70 of the Constitution needs amendment from this aspect and all political parties should be united to remove this drawback of our Constitution for the sake of fruitful parliamentary democracy.

DEATH PENALTY IN VARIOUS COUNTRIES

Nur Mohammad

5th semester

The highest punishment of offence is death penalty. In the history of punishment, capital punishment has always occupied a very important place. In ancient times and even in the middle ages, sentencing of offenders to death was a very common kind of punishment. There are several methods to execute death penalty in various countries. In ancient society, death penalty was executed by striping. In ancient Greek Roman and other countries death penalty was executed through crucification and through beheading. Even at present K.S.A and some other countries are executing death penalties through beheading. Two pretentious religious preachers were given death penalty through burning by the king of **Bubaline.** In ancient period, heinous offenders were made to throw before ferocious wild animals in order to execute his death penalty. With the invention of gun, the method of firing squad to execute death penalty has been used rapidly. Hanging is a commonly practiced method to execute death penalty in Bangladesh. There is a common saying that many convicts of death penalty were getting escaped from the execution of the penalty same as the execution of death penalty for not taking place in time. As a result, some changes have been made in the order of executing capital punishment. In **17th July 2002,** remarkable school student **Shihab's** murder case, four murderers have been given death penalty. In this case, the Court ordered that **"convicted to be hung until his death is confirmed,"**[1] Now a days, USA has taken a strategy to prevent mercilessness in executing death penalty. Now they use electrical chair, gas chamber and injection as a means for executing death penalty. Death penalty of Socrates was executed by making him drink hemlock, a strong poison. The then president of Romania, **Mr. Chosesque** was given death penalty, which was executed in firing squad. In 1789, a French doctor proposed to cut off the head of convicts as a means of executing death penalty by a special machine. The name of that machine is **Gilotine,** it was named after the name of that doctor. It takes one or two minutes for executing death penalty. This method had been used rapidly during the revolution of French.

At present, there are more than three hundred convicts of death penalty waiting for the execution, in different Jails of Bangladesh. After the liberation of Bangladesh, death sentence of more than 215 convicts was executed by hanging in the Central Jail of Dhaka.

Amnesty International (a leading human rights organization) and other international human rights organizations have been demanding for a long period for the abolition of death penalty. According to their report, more than seventy countries have abolished death penalty.

Generally, though it is not acceptable to all persons, nevertheless, it is exemplary punishment to prevent offence and establishing justice in the society. **Sir James Fitzjames Stephen,** the draftsman of the Indian Penal Code, says in his "Essay on Capital Punishment" that ``No other punishment deters man so effectually from committing crimes as the punishment of death....the threat of instant death is the one to which resort has always been made when there was an absolute necessity of producing some results."[2]

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1. 54 DLR.page 35
2. Mahajan, VD.Jurisprudence&Legal Theory.p.150.

1. FACTS & FIGURES

Death penalty

* By 2005, 122 countries had abolished the death penalty in law or in practice
*In 1977, the year when the USA resumed the use of the death penalty and AI convened a groundbreaking international Conference on the Death penalty, only 16 countries were abolitionist.
*1..... Country known to AI that still executed juvenile offenders in 2005

Hypocrisy

*In 2005, the US Administration acknowledged the use of "Renditions" rendition is the practice of transporting persons forcibly and without due process from one country to another where they risk being interrogated under torture or ill treatment. Renditions are illegal under international treaties to which all European governments are party.

*2005.... year in which evidence was made public of involvement of European governments in US- led renditions.
*1000... approximate number of secret flights directly linked to the CIA that used European airspace between 2001 and 2005, some of which may have carried prisoners.
*100s.... estimated number of persons who may have been subject to renditions around the world.
*6... number of European countries implicated in the rendition of 14 individuals to countries where they were tortured.

*1.... number of European countries that has issued arrest warrants for CIA agents suspected of kidnapping prisoners for rendition

Duplicity

Governments championed human rights on the one hand, and undermined them on the other.

Torture

*141.... countries party to the UN Convention against torture and other ill- treatment.
*104... countries out of the 150 countries in AI' s 2006 report that have tortured or ill treated people.
*Paralysis of the International Community

*The conflict in Darfur has been described as staggering in scale and harrowing in nature. Urgent action is needed by the united Nations and the African Union to protect civilians in Darfur.

Armed Conflict

*2.2 million..... number of refugees and people displaced by the conflict.
*285,000..... estimated number of deaths from starvation, disease and killings in Darfur since 2003.
*7.000..... number of African Union monitors deployed in Darfur.
*13.... number of UN Security Council resolutions adopted on Darfur.

Failed promises

*At the Millennium Summit in 2000, the world's leaders set clear targets to solve some of the most vexing global social problems. But they failed to turn their promises into performance.
*Government promised to achieve universal primary education by 2015.
*100 million + ... number of children who remain out of school.
*300,000 ... estimated number of child soldiers.
*46%..... number of girls in the world's poorest countries with no access to primary education.

2. Human Rights and health

What is the human right to health?

Every woman, man, youth and child has the human right to the highest attainable standard of physical and mental health, without discrimination of any kind. Enjoyment of the human right to health is vital to all aspects of a person's life and well-being, and is crucial to the realization of many other fundamental human rights and freedoms.

The Human Right at issue

Human Rights relating to health are set out in basic human rights treaties and it includes:

The human right to the highest attainable standard of physical and mental health, including reproductive and sexual health.

The human right to equal access to adequate health care and health related services, regardless of sex, race, or other status.

The human right to equitable distribution of food.
The human right to access to safe drinking water and sanitation.
The human right to an adequate standard of living and adequate housing.
The human right to a safe and healthy environment.
The human right to a safe and healthy workplace, and to adequate protection for pregnant women in work proven to be harmful to them.

The human right to freedom from discrimination and discriminatory social practices, including female genital mutilation, prenatal gender selection, and female infanticide.

The human right to education and access to information relating to health, including reproductive health and family planning to enable couples and individuals to decide freely and responsibly all matters of reproduction and sexuality.

The human right of the child to an environment appropriate for physical and mental development.

3. Child Labour in Shrimp Sector:

The shrimp has been enriching the rich and affluent urban people of the country though it is depriving the poor rural communities that are engaged with this sector. It is mainly the women and children of shrimp farming communities who suffer the most while their basic human rights are also violated.

Although lots of discussion and consultation have been held about the child labourer in shrimp industry but still no steps were taken to stop child repression in shrimp farming. As a result the child labour who are engaged with this sector are being deprived of their basic child rights according to the Child Right Convention and domestic laws of the country.

Large numbers of children are involved in shrimp farming in the south- west part of Bangladesh like Satkhira, khulna and Chittagong. Mainly the poorest fisherman family and farming community are engaged in shrimp farming. Thousands of children from rural areas have been hired for this work for their cheap labour in processing factories or depots as shrimp fry collector, which are among the lowest paid jobs in shrimp production.

Thousands of children from the age of six to seven are employed in shrimp fry fisheries. This work entails dragging mesh nets through the brackish waters and sorting the catch. Collection is often time-consuming and children have to work up to 13-14 hours daily and within that time they had to spend 6-8 hours under the water. As a result most of them are suffering from various diseases like, skin and respiratory diseases, urinary problems, sunstroke and hepatitis B infection. No health care services are provided for them and they are so vulnerable that they cannot even complain for that.

1. Anticipatory bail

Anticipatory bail is also known as pre-arrest bail. But the question is can some one be enlarged on bail when he was already a freeman? Usually it is granted even though no warrant for arrest has been issued. However we have decision of the Honourable Court saying a person cannot be admitted to bail unless he is in custody or under some other form of restrain, reported in 5 DLR (FC) 143 [Crown vs. khusi].

Usually an application for anticipatory bail is made after the filing of First Information Report (FIR) and before submission of the Charge Sheet. It is made under section 498 of the Code of Criminal Procedure, 1898 even though section 498 deals with regular bail. Considering socio-economic condition and political unrest of our society the Hon'ble Court may allow this extraordinary remedy of anticipatory bail, amongst other, on the ground that the facts and materials disclosed an ulterior motive, political or otherwise, for harassing the accused and not for securing justice, in a particular case. Usually the prayer portion of the application has two parts i.e. (1) Rule in the form of a show cause notice and (2) ad- interim bail. Normally the prayer is framed in the following manner: 'wherefore it is most humbly prayed that your Lordships would graciously be pleased to issue a Rule calling upon the Deputy Commissioner, Nilphamarti to show cause as to why the Petitioner should not be enlarged on anticipatory bail in Saidpur P.S Case no. 23 dated 12.6.1991 corresponding to G.R.No. 196/2002 under Section 399/402 of Penal Code now pending in the Court of First Class Magistrate, Nilphamari and the Petitioner further prays for ad-interim bail till disposal of the Rule'.

A careful observation of the prayer will reveal that only Rule contains the word anticipatory bail and issuance of the Rule opens the door for bail. Things will be clearer upon examining the order which is usually passed by the Court. Usually the Rule is issued in the manner it is prayed and ad-interim order is passed saying 'not to arrest or humiliate the petitioner for a certain period (or till disposal of the Rule) or till submission of the Charge Sheet (CS) whichever is earlier'. That means after submission of the Charge Sheet you cannot make an application for anticipatory bail.

One of the main grounds of these kinds of applications is political ground. The magistrate being part of the executive may not grant bail at the instigation of the party in power. Under these kinds of situations usually it is ordered to surrender before the judicial officer (e.g. Sessions Judge) instead of any Magistrate. However, on many occasions even though there was no such prayer for any direction from the Court yet the court orders surrender frustrates the entire purpose of making an application for anticipatory bail. These kinds of directions sometimes may be interpreted as an order of arrest upon surrender. You came for bail now you must surrender and get arrested. As the tribunal before which you will have to surrender lacks power to grant bail. If you do not surrender you risk being held on Contempt of Court. Although for ends of justice the court has immense inherent power. However the question is, under the existing provisions of law, can the Court pass an order of direction to surrender before a court which lacks power to grant bail? Sometimes although the FIR contains a name yet no allegation is revealed therein against that person. Under these kinds of situations usually the order is passed asking the authority not to arrest unless the Petitioner is wanted in a specific case.

The question is can the police arrest someone who is not wanted in any specific case (except under section 54)? Obviously the answer is no. Then why do we need an order from the Supreme Court just confirming the law? Similarly should the police be stopped from investigation an alleged crime? Once again the answer should be negative. If we do not allow the police to investigate properly how would he submit his report (i.e. Charge Sheet or Final report)?

2. Confidence in law and order machinery

People are found to take law in their own hands. Killing of so- called terrorists or hijackers by the mobs are a common phenomenon. Killing in police custody also happens . No report is generaly found to be published in any of those killings. More horrifyingly another trend is going on now when people from two neighbouring villages, armed with deadly weapons, are fighting in presence of police. People are inciting and inviting other people to attack using loudspeakers of village mosque. As if we are in a medieval era when one tribe is used to attack another tribe. People expect that these types of lawlessnes come to an end.Things have improved much in the past few weeks.People expect more improvement.

The Flame that Flames

Md. Shahidul Islam

The waves of the ocean
Continues to flow on,
And still I dream to own
You, in lively motion.

The breeze with gentleness
As moves in silence,
The love of your fragrance
Still continues me to ablaze.

At night the moon shines
With eternal loveliness,
Merging me to reminiscence
With perpetual blessedness.

The river moves to the ocean
Intensifying its vigour and strength,
Your smiling which are evergreen
Continues to enliven me at present.

Flowers with their fragrance
Provides people with freshness,
So is the case with your association
Providing me hopes and aspirations.

Now you dwell away, beyond
The reach of my physical bond,
But the string of mental bondage
Eternally continues me to ablaze.

Certainly the physical world
Will prove it impossible,
But the flame that flames in the eternal world
Gestures! Yes, still it is possible.

Problems or no Problems

Md. Abul Hasan

There are some people who have no problems
like money, industries and properties
But those people have some problems
like obesity, hypertension & diabetes.

There are some people who have no problems
like moving here & there,
But those people have some problems
like taking essential care.

There are some people who have no problems
like controlling any situation or crime,
But those people have some problems
like taking decision in time.

Valiant Witness of this Flag

By Al Mahmud

Look, today is the day for watching this Flag.
Start talking,spell out
The Language of freedom. Let me keep on gazing with you.

I stand beside you with my opaque tearful eyes,
How crimson is the ciecle
Sitting inside the green flag,
As if this sun has been painted with the red blood corpuscles
of the treedom-seeking people of the world.

So many people speak out from within me
The bright gaze of so many aspirations,of those
Who never came back.
I recall one person. His camp was on the path leading to
Bamtia bazar from Montala Station. While receiving training
There was a scar in his elbow because of bleeding.
He did not return. There was no language or words
In the Bangla dictionary to console his mother.
In response to my allusion while I stood before her,
The lady only looked up at the sky
With tearful eyes. As if she could see her son
Inside that spherical sun.

I knew another person
Who went to war from Comilla. This bullet had
Struck her waist. I went to see her at Agartala hospital.
She colud not walk anymore, though the doctors could
Bring out the poisonous piece of lead.
I took her to the ceelebrations of freedom.
After putting her on a wheel -chair. Some drops of her blood.
Lay on the red part of that flag.
As I look on, I recall her constantly.
It is amazing that the history of liberation war
Has been written by excluding her name.
She was the member of a Hindu family of Comilla.
Her father's profession was music.

I bear witness to the red corpuscles of her blood
Which mingle in the red part of that flag.
Oh history, write her name.

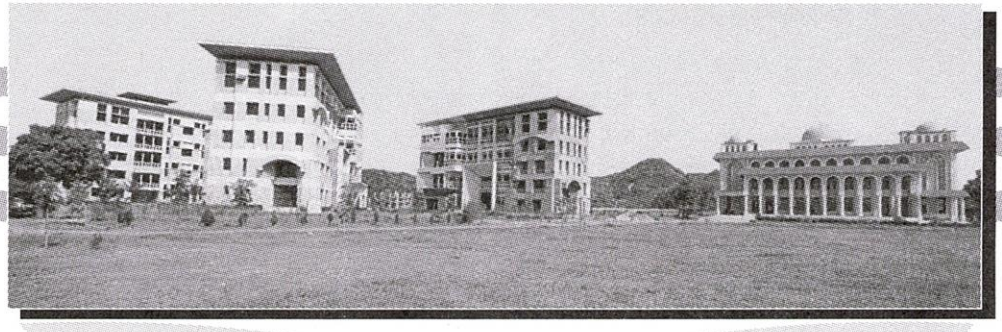
Another boy had jumped into the fray
Beside the custom colony of Kushtia,
He attempetd the wipe out an enemy jeep with bombs
But part of his arms, thigh and back were torn away
By that blast. Hasibul Islam
had launched that attack by uttering 'Allahu Akbar'
His heart remains stuck on that flag
After flying out from his chest.
Write down his last words - 'Allahu Akbar'

Oh the noisy mega-city of Dhaka
You have to write on thate blood -drenched sphere
These extraordinary narratives. You have to see
Who creates history? And who snatches away
The medallions of valour!

Look, today is really the day for watching flag.
Speak out, Pronounce the
Language of freedom.
Let me keep on gazing with you.

Translation : Helal uddin Ahmed

International Islamic University Chittagong



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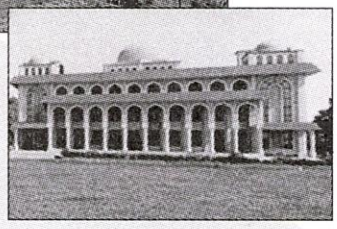

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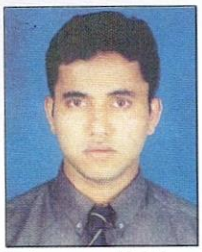

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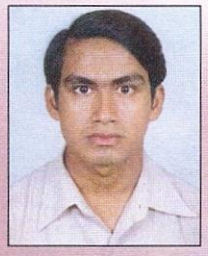

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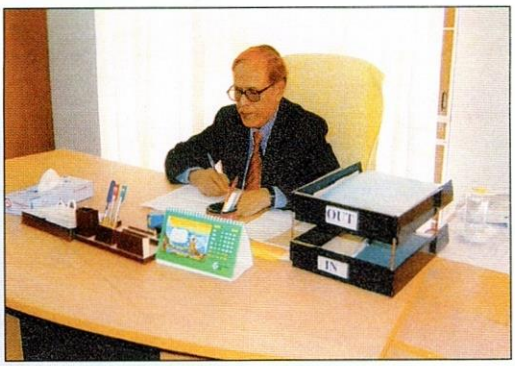
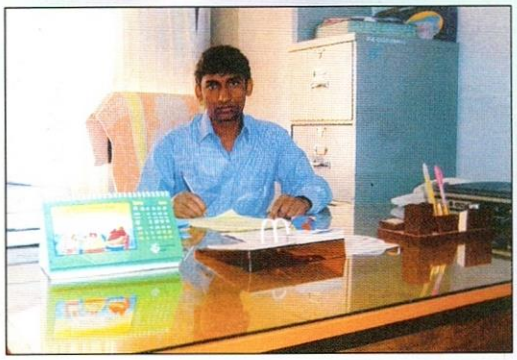
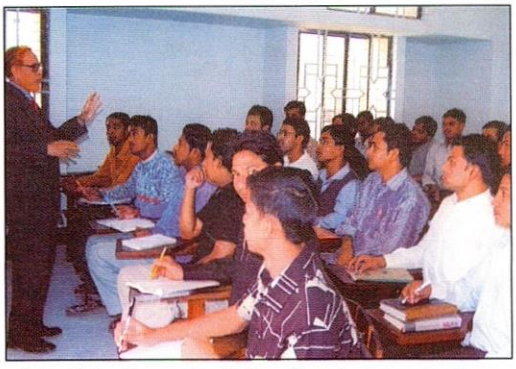


Adv. Kazi Saifuddin Ahmed Chowdhury, Dean
Faculty of Laws, is busy in his office

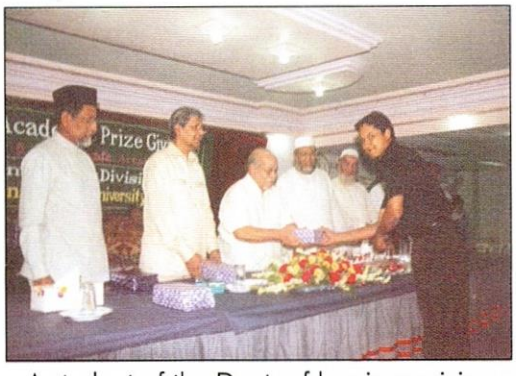


Md. Jalal Uddin, Head in Charge of the
Dept. of law, is working in his office.

Teachers of the Dept. of law in front of the
Faculty Building

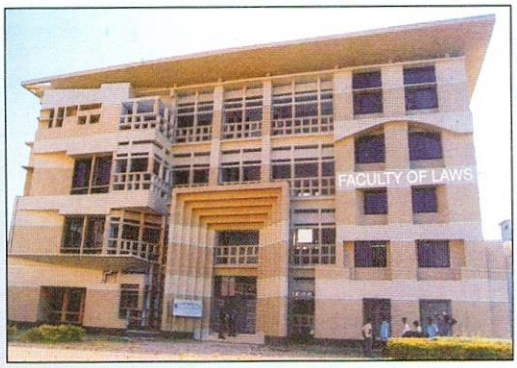


Hon'ble Dean is delivering lecture before
the students



A student of the Dept. of law is receiving
academic excellent result prize from the
Hon'ble Chief guest.

Album



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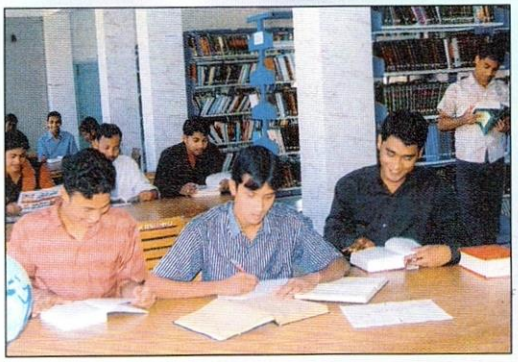
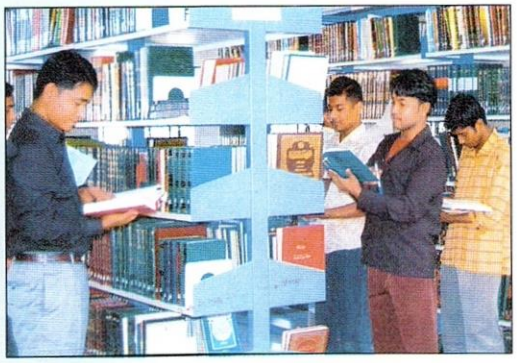
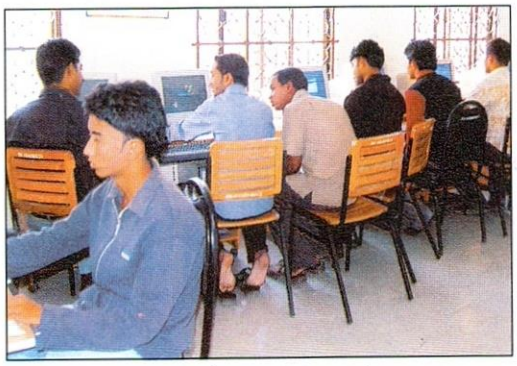
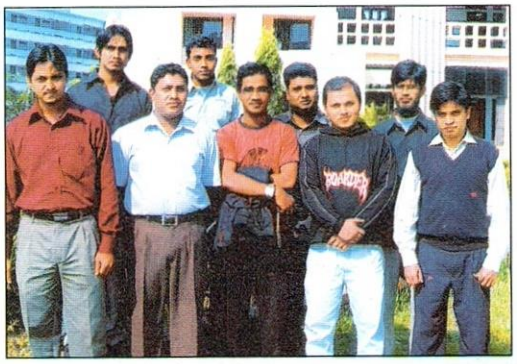




Students are busy in the Library



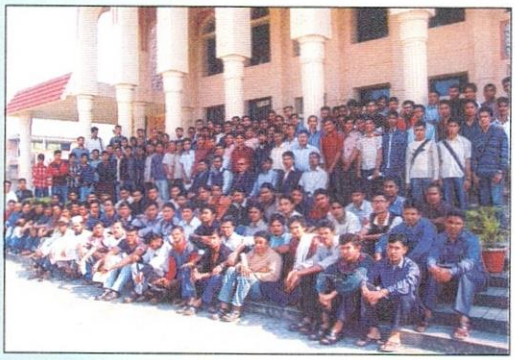
Students are browsing on internet



Pioneer batch of students of the Dept. of Law

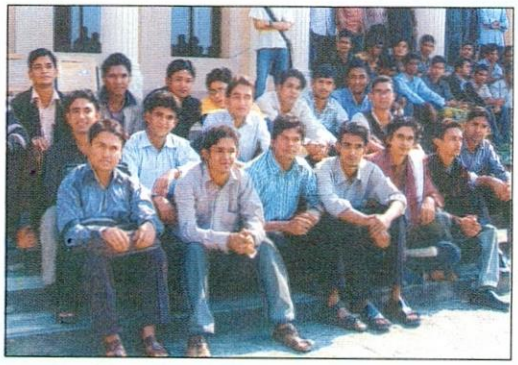
Album

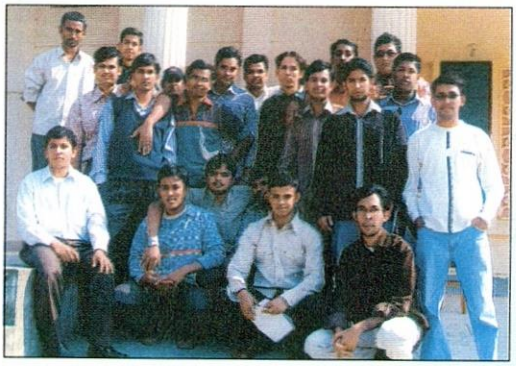
Executive council members of the Law Club



Students of the Dept.of Law

Students of the various semesters





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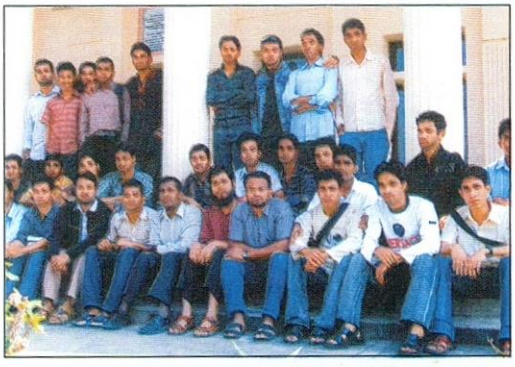
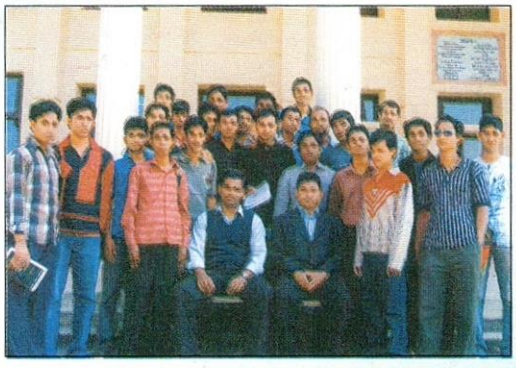
Central Library building





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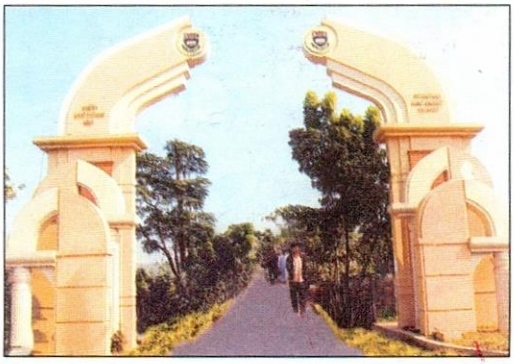
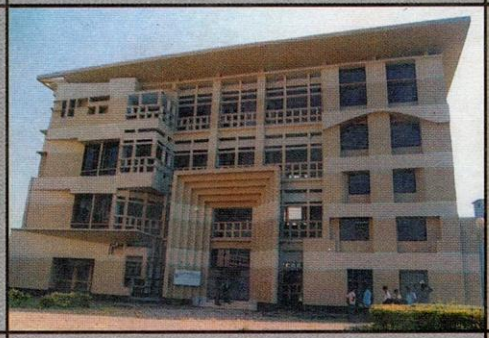
IIUC Permanent Campus





International Islamic University Chittagong

Faculty of Laws
Main Campus, Kumira