THE RIGHT TO FREEDOM OF ASSOCIATION IN BANGLADESH: AN ANALYSIS OF LEGISLATION AND POLICY

by Borhan Uddin Khan*

This paper attempts to explore the development of the right to freedom of association in Bangladesh. It will investigate whether the political independence of Bangladesh resulted in elevating the workers' right to freedom of association in conformity with the ILO Conventions in comparison to the Pakistani period. Attempts will also be made to assess the compatibility of the legislation and policy with that of the ILO standards.

THE BEGINNING OF A NEW ERA

After emerging as an independent state, the Government of the People's Republic of Bangladesh adopted the entire body of labour legislation that was in force in the territory before the Declaration of Independence on 26 March, 1971.[1] With regard to international obligations in relation to the ILO Conventions, when the Government of Bangladesh applied to the ILO for membership, it formally accepted the obligations of the Constitution of the ILO and pledged to be bound by the Conventions which were in effect in its territory at the time of the declaration of independence. Thus, the citizens of this newly independent state were assured, *inter alia,* of the full enjoyment of the right to freedom of association in conformity with the Right of Association (Agriculture) Convention, 1921 (No. 11), the Convention Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948, (No. 87) and Right to Organise and Collective Bargaining Convention, 1949, (No. 98).

Having achieved independence, the year 1972 began with much expectation and enthusiasm amongst all sections of the society, particularly

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[1] See, Laws Continuance Enforcement Order, 1971, in 24 (1971-72) DLR, Statutes, p. 3; Bangladesh (Adaptation of Existing Laws) Order, 1972, in 24 (1971-72) DLR, Statutes, p. 135.

the working class. The workers were directly involved in the liberation struggle for political independence[2] and thousands of them went through a process of psychological and ideological transformation. They knew how to handle weapons, how to fight and lastly they were also assured by the political leaders that the future Bangladesh would ensure their material and social development. All these naturally raised their level of expectation to a certain extent which was difficult to achieve in a war-devastated country within a very short period of time.

Thus, before entering into the subject of right to freedom of association, it is necessary to recall briefly the situation that prevailed in Bangladesh after the independence of the country. The atmosphere in independent Bangladesh was well summarised by the Report of the ILO/SIDA Mission, headed by Mr. Givry, Chief of the Social Institutions Development Department of the ILO, who visited Bangladesh in 1973. He reported in the following terms:

> The Government was faced with a war-torn economy, disrupted communication system, social dislocation due to the return of hundreds of thousands of industrial workers from the refugee camps in India after about nine months. They were driven out from the factories by the 'settlers' with the help of Pakistani Army in 1971. When they returned home, they found their houses either destroyed or burnt down.
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> Industrial undertakings, most of which were owned and managed by West Pakistani employers were suddenly abandoned by these owners and managers and left uncared for.
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> Many workers, during their refugee life suffered privations, hunger and some of them took part in guerrilla activities. They returned with the liberation forces and found that the `settlers' fled away along with the Pakistanis. They were thus inclined to take over the enterprises in which they worked. Some Bengali owners were thrown away from their establishment and their industries were also taken over by the workers on the plea of a step towards socialism. The local Bengalee middle class people who were still serving in the enterprises during the war of liberation were regarded as 'collaborators' and the workers had no respect for them which resulted in complete indiscipline in the rank and file.[3]

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2 The contribution of the working class in the war of liberation has been recognised by the Government in its labour policy declared on 27 September, 1972, which reads as follows: "Government and people are grateful to the working class population of the country for their indomitable support during the war of liberation movement. It is also gratifying to note that a large number of workers crossed over and took part in the liberation movement and fought valiantly for the liberation and those who remained inside also rendered active support to the liberation movement". See, Labour Policy, 1972.

3 ILO, Report of the ILO/SIDA Mission on Workers' Participation in Management in Bangladesh, Geneva 1973, pp. 6-7.

This state of affairs, it appears, had contributed towards the imposition of certain restrictive laws by the Government immediately after independence. Accordingly, one of the first restrictive measures was the Presidential Order No. 55 of 29 May, 1972,[4] which banned all strikes and unfair labour practices in the nationalised industries.[5] It was provided in that Order that no workmen or trade union of workmen and no person acting on behalf of such trade union shall in any nationalised industries resort to strike from the date of commencement of the Order and such further period, which in the opinion of the Government was warranted in the interest of the national economy, as would be notified in the official Gazette from time to time.[6] It was further provided that no workmen or trade union of workmen and no person acting on behalf of such trade union by using intimidation, coercion, pressure, threats, confinement to a place, physical injury, disconnection of phone, water or power facilities and such other methods compel or attempt to compel the employer to sign a memorandum of settlement or agreement, to make any payment or other benefits.[7] It may be recalled that Convention No. 98 has been designed to ensure and promote voluntary negotiation and collective agreement,[8] not agreement through intimidation, coercion, pressure, threats etc. Thus, the imposition of agreement by the above means was beyond the scope of Convention No. 98. The prohibition of strikes in nationalised enterprises undoubtedly violated workers' right of association as the Committee on Freedom of Association has always regarded the right to strike as constituting a fundamental right of workers and their organisations if undertaken in furtherance of defending their economic interests.[9] The ban on strikes lasted for only six months.[10] However, even if it is argued that in view

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4 See, Bangladesh Nationalised Enterprises and Statutory Corporations (Prohibition of Strikes and Unfair Labour Practice) Order, 1972, in 24 (1971-72) DLR, Statutes, p. 146.

5 For a detailed account of the background, circumstances and scope of the nationalisation programme, see, Sobhan, R. and Ahmad, M., Public Enterprise in an Intermediate Regime: A Study in the Political Economy of Bangladesh, Dhaka, 1980, particularly Chapter 8; See also, Bangladesh Industrial Enterprises (Nationalisation) Order, 1972, in 24 (1971-72) DLR, Statutes, p. 24.

6 For the text of the Order, see, 24 (1971-72) DLR, Statutes, p. 146.

7 See, section 3, Bangladesh Nationalised Enterprises and Statutory Corporations (Prohibition of Strikes and Unfair Labour Practice) Order, 1972, in 24 (1971-72) DLR, Statutes, p. 146.

8 Right to Organise and Collective Bargaining Convention, 1949, Article 4.

9 ILO, Committee on Freedom of Association, 27th Report, Case No. 156, Para 287; 172nd Report, Case No. 885, Para 384; 214th Report, Case No. 1067, Para 208.

10 The ban on strikes was automatically lifted on 29 November, 1972, as it was not subsequently extended by Government Gazette Notification.

of the national interest[11] to increase production, the interim measure may have been justified to reconstruct the national economy, one has to bear in mind that according to the ILO Committee on Freedom of Association, a general prohibition of strikes seriously limits the means available to Trade Unions to further and defend the interests of their members and the right to organise their activities.[12] Accordingly, protest came from the workers and one trade union federation namely, Bangladesh Workers Federation lodged a complaint (Case No. 729)[13] to the ILO Committee on Freedom of Association against promulgation of the Order.

A NEW POLICY FOR LABOUR

The independence of Bangladesh brought some changes in the context of Government's policy towards labour. Immediately after independence, the Prime Minister made a press statement on 9 February, 1972, which reads as follows:

> I assure our workers that the basic goal of the socialist economy, which we are committed to achieve, will be securing the rights of workers and ensuring their welfare. A plan is being prepared where by measures of nationalisation would be combined with new arrangements to ensure workers participation in the management of industries.[14]

Within this framework of reference, on 19 February, 1972, the Government appointed a committee, known as the Kamruddin Committee[15] to prepare a report on 'Workers Participation in Management'. Based on the recommendations of the Committee, on 27 September, 1972, Mr. Zahur Ahmed, Minister in charge of labour announced a new labour policy.

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11 The Prime Minister in a press statement on 9 February, 1972, urged the workers to maximise the production and to entrust themselves in the task of nation reconstruction. He particularly referred to the following: (a) The workers should not allow any consideration to stand in the way of putting the wheels of industry for production; (b) They should exert themselves to the utmost production; (c) For the time being the workers should accept the existing wage rates and other benefits. See, Ahmad, K., Labour Movement in Bangladesh, Dhaka, 1978, at pp. 100-101.

12 See above, note 11, 149th Report, Cases Nos. 676 and 803, para 79; 218th Report, Case No. 1115, para 259; 233rd Report, Case No. 1219, para 653.

13 See, ILO, Official Bulletin, Vol. LVII, Series B, No. 1 (Supplement), 1974, at pp. 288-90.

14 Quoted by Khan, M. M., and Ahmed, M., Participative Management in Industry, Dhaka 1980, at p. 56.

15 The Committee was headed by Mr. Kamruddin Ahmed who was at that time President of Bangladesh Employers' Association.

The policy significantly departed from the earlier policy of 1969[16] on the basis of which the Industrial Relations Ordinance, 1969, was promulgated. The new policy differentiated between private and public sector workers in respect of industrial relations. The right to collective bargaining was allowed to private sector workers but such rights were not granted to public sector workers. In relation to public sector industries, the policy proposed the constitution of Management Board[17] and Management Council[18] to resolve differences between labour and management through joint consultations instead of collective bargaining. The policy further envisaged as follows:

> Government feel that as there will be greater participation of workers in the management of nationalised industries, the differences will be resolved through joint consultative methods in the Management Board. In the circumstances there will be no necessity for collective bargaining by workers employed in industries nationalised or taken over by Government.[19]

Convention No. 98 is in no way limited to the private sector. It also applies to the public sector of the economy with the exception of public servants engaged in the administration of the state.[20]

Further, the right to strike as a means of settling disputes was not recognised in the policy but it was emphasised that differences between labour and management would be settled by peaceful means. It is nothing short of saying that industrial strike and collective bargaining is not a peaceful and constitutional method of settling disputes between labour and management. In order to justify the strategy of curtailing the right to strike and collective bargaining the Government adopted an idealistic approach by stating:

> ... as the fruits of the nationalised industries will be fully utilised for benefits of the entire population of the country ... there should not be any conflicts of interests between management and workers.[21]

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16 For a detailed discussion of the Labour Policy, 1969, see Khan, B.U., "The Development of Right to Freedom of Association in Pre-Independence Bangladesh (1919-1971): An Analysis Of Legislation And Policy," 1:2 (1997) Bangladesh Journal of Law, p.182.

17 The policy described Management Board as follows: "There shall be a top Management Board in nationalised/taken over industries consisting of two representatives each from employers and workers and one from Financial Institution for smooth functioning of industries."

18 The policy described Management Council as follows: "There shall also be workers Management Council at each industrial plant with equal number of management and workers to deal with the day to day problems and also disciplinary cases relating to the workers".

19 See, Labour Policy, 1972.

20 See, Article 6 of Convention No. 98.

21 See, Labour Policy, 1972.

Soon after the declaration of the policy there was serious resentment of and opposition to the policy amongst the workers, mainly due to the fact that the collective bargaining in matters of wages and fringe benefits was taken away.[22] Further, the policy was not accepted by the workers as it brought down the activities of trade unions to the state of a welfare organisation.[23] According to Ahmed "even the Jatio Sramik League, the labour front of the ruling party bitterly criticised it, as it was not in conformity with the ILO Conventions Nos. 87 and 98".[24] Against this restrictive policy Bangladesh Workers Federation filed a complaint (Case No. 729)[25] to the ILO Committee on Freedom of Association. After the Constitution of the People's Republic of Bangladesh had come into force on 16 December 1972, the Government decided that the implementation of the labour policy should be deferred till it was reviewed in the light of the Constitution and the Government was satisfied that the policy was not in violation of any provision of the Constitution.[26]

CONSTITUTIONAL GUARANTEE OF THE RIGHT

Soon after the declaration of the labour policy, the People's Republic of Bangladesh adopted its new Constitution. Following the modern trend, the Constitution contains in Part III a justiciable Bill of Rights.[27] It may be recalled that in respect of the right to freedom of association, the Pakistan Constitution of 1956 guaranteed this right in Article 10 of part II and exactly the same provision was also incorporated in right No. 7 of Part II of the Pakistan Constitution, 1962, which read as follows:

> Every citizen shall have the right to form associations or unions, subject to any reasonable restriction imposed by law in the interest of morality and public order.

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22 Mortuza, G., "Labour Laws: Policies and Principles with Particular Reference to Bangladesh," in Industrial Relations Laws Policies and Principles, Dhaka, 1982, at p. 14.

23 The policy read as follows: "The absence of collective bargaining by workers in nationalised or taken over industries will not mean cessation of trade union activities. The functions of the trade unions will be: (i) In relation to ... nationalised and taken over industries, to promote measures for well-being of the working class, take care of safety and protection of labour at work place, provide training, education and other welfare facilities to the workers and thereby create conditions for higher productivity in the over-all interest of the country ... ."

24 Ahmed, M., "Labour Policy and Collective Bargaining," mimeo, a paper presented in National Seminar on Trade Union Development, Dhaka 1980, at p. 18.

25 See supra note 14.

26 ILO, Report of the ILO/SIDA Mission on Workers' Participation in Management in Bangladesh, Geneva 1973, p. 15.

27 Article 44 of the Constitution guarantees the right to move to the Supreme Court in accordance with Article 102(1) for enforcement of the fundamental rights.

Exactly the same provision has also been incorporated in Article 38 of the Constitution of Bangladesh, 1972. But in order to make this provision consistent with one of the fundamental principles of state policy, i.e., the principle of 'secularism' as provided in Article 12 of the Constitution, a proviso was added to Article 38 which limited this right in the following manner:

> Provided that no person shall have the right to form, or be a member or otherwise take part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose.

Thus, the framers of the Constitution had not only laid down the principle of right to form association but also provided the grounds and the extent of restriction of the right.

The principle of free choice of trade unions is an essential element of freedom of association which has been denied by the proviso to Article 38. This is clearly incompatible with Article 2 of Convention No. 87.[28] The Committee on Freedom of Association has emphasised that it attaches importance to the fact that workers and employers should in practice be able to form and join organisations of their own choosing in full freedom.[29] The Committee also observed that workers should have the right, without distinction whatsoever - in particular without discrimination of any kind on the basis of political opinion - to join the organisation of their own choosing.[30]

However, with the change of Government on 15 August, 1975,[31] the restrictive clause of the right to freedom of association, i.e., the proviso to Article 38 of the Constitution, was omitted by the Second Proclamation Order No. III of 1976. The restrictive clause being omitted, the constitutional guarantee of the right to freedom of association has been brought in conformity with the ILO Convention No. 87 as Article 8 of the Convention envisaged that in exercising the rights the workers and employers and their representatives shall respect the law of the land and the law of the land shall not be such as to impair the guarantees provided in the Convention.

The expression 'reasonable ' used in Article 38 implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to

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28 See, Convention on Freedom of Association and Right to Organise Convention, 1948.

29 ILO, Committee on Freedom of Association, 6th Report, Case No. 3, Para 1024; 157th Report, Case No. 827, Para 216.

30 ILO, Committee on Freedom of Association, 126th Report, Case No. 636, Para 25; 187th Report, Case No. 857, Para 268.

31 The constitutional Government under Seikh Mujib was overthrown on 15 August, 1975 by a military *coup d'etat*.

contain the quality of reasonableness and unless it strikes a balance between the freedom granted and the social control permitted by the Constitution, it must be held to be wanting in that quality. Reasonableness is itself a relative term. What is reasonable in one given set of circumstances may well be unreasonable in another different set of circumstances. Thus, there can be no hard and fast rule for determining the matter which may be considered for testing the reasonableness applicable to all cases. In the opinion of Justice Hamoodur Rahman:

> It will certainly depend upon the nature and extent of the restrictions sought to be imposed, the nature of the circumstances in which the restriction is to be imposed, the evil to be prevented or remedied, the necessity of urgency of the action proposed to be taken and the nature of the safeguards, if any, provided to prevent possibilities of abuse of power.[32]

The use of the word 'restriction' in Article 38 by itself indicates that the primary and initial test is that the restrictions cannot amount to a complete denial or total provision of the right for all times to come or for an indefinite period. According to Justice Hamoodur Rahman:

> By its very nature, the use of the word 'restriction' makes the extent of the encroachment a relevant factor in determining the reasonableness thereof. This again cannot be divorced from the nature of the right sought to be restricted and the nature of the restriction itself, for, under certain circumstances even the total provision, if it is for a limited period or to meet a specific well defined mischief, may be upheld as a reasonable restriction. Thus both the nature of the restriction imposed and its extent would be relevant for determining the validity of a law encroaching upon a fundamental right.[33]

This means that under certain circumstances it would be legitimate for Government to regulate the right in order to protect other rights, because no one has a fundamental right to immorality, obscenity, commission of offence, or doing of other illegal and unlawful acts. The right to freedom of association is, therefore, subject to this important qualification that reasonable restriction on its exercise may be imposed by the law in the interest of morality or public order. Hence, the right to freedom of association, like other rights, is a qualified freedom and is available within the limits prescribed by the Constitution. Thus Governmental measures bearing upon the right to freedom of association must ultimately pass the judicial test of reasonableness and the Constitution did not leave everything to the discretion of the legislature.

The right under Article 38 implies that several individuals having a community of interests can join together to form a voluntary association for the furtherance of a common lawful object. This right along with other rights,

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32 *Abul A'la Maudoodi vs Government of Pakistan*, in XVI (1964) PLD (SC) 788.

33 Ibid., at p. 787.

described as fundamental rights under Part III of the Constitution, have been guaranteed by declaring that the state shall not make any law inconsistent with any provision of part III of the Constitution, and any law so made shall to the extent of inconsistency be void.[34] Thus, it implies that so long as the purpose for which an association or union is formed is lawful, law imposes no restriction on the association or union. In this sense the right to form an association is a Constitutional right.

Regarding formation of an association the Supreme Court of Bangladesh in the case of *Asaduzzaman vs Bangladesh*[35] has emphasised that:

> The word 'form' in Article 38 does not limit the exercise of that right to the formation of an association. The right to form an association must of necessity imply the right to continue and carry on the activities of the association as well.[36]

But at the same time the court clearly specified that Article 38 cannot, however, be involved for support, sustenance or fulfillment of every object of an association.[37]

Accordingly, it has been held in the case of *Abu Hossain vs. Registrar of Trade Unions*:

> The constitutional provisions do not guarantee the right of registration *of Trade Unions*[38] for the purpose of working as a bargaining agent under the labour laws which thus can be regulated as it is not so guaranteed under the provisions of Article 38 of the Constitution.[39]

It must be emphasised that the Constitution does not give the unions any privileged position in the labour-employer relationship. A member of a union is on the same footing, so far as the law is concerned, as any other person seeking employment and there is no compulsion on the employer to treat a member of a union on a footing different from non-members of a union. It is for the union to protect the interests of its members, the Constitution does not give any direct protection to them.

LIMITATION OF THE RIGHT TO COLLECTIVE BARGAINING IN PUBLIC SECTOR INDUSTRIES

The liberation of Bangladesh marked a new phase in the socio-politico-economic milieu of the country. In anticipation of establishing a socialistic

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34 See, Article 26 of the Constitution of Bangladesh.
35 See, 42 (1990) DLR (AD) 144.
36 Ibid., at p. 151.
37 Id.
38 Italics added.
39 See, 45 (1993) DLR (HCD) 196.

economy,[40] the Government of Bangladesh nationalised 85% of industries. This step ultimately ushered in a new dimension in the field of labour management relations in general and collective bargaining in particular in the public sector industries.

The Government, being the largest owner of industries, preferred to bring some sort of uniformity in wages and fringe benefits of the nationalised industries.[41] To this end, the Industrial Workers' Wages Commission was constituted on 1 June, 1973, in order to review the wage structure, including fringe benefits, and to make suitable recommendations for them. In September 1973, the Commission submitted its recommendations fixing wages, bonuses, medical allowances, house rent allowances, conveyances allowances etc. for workers of public sector manufacturing industries.[42] It is apparent from the Report that the Commission took care of most of the terms and conditions of service of workers which are generally considered as subject-matter of collective bargaining by workers.

The recommendations of the Committee were accepted by the Government and for implementation of the new wage scales, a new law, the State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Ordinance, 1973, was promulgated.[43] Section 3(1) of the Ordinance reads as follows:

> Notwithstanding anything contained in the Industrial Relations Ordinance, 1969, (xxiii of 1969), or in any other law or any rule, regulation, by-law, agreement, award, settlement, custom, usages or terms and conditions of service for the time being in force, the Government may, with a view to implementing such recommendations of the Commission as may be accepted by it, by notification in the official Gazette, determine the wage, bonus, medical allowance, house rent allowance, conveyance allowance and leave which shall be payable or admissible to any worker employed in any State-Owned Manufacturing industry, and no such worker shall receive or enjoy, and no person shall allow to such worker any

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40 Article 10 of the Constitution of the Peoples' Republic of Bangladesh read as follows: "A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man". Further, Article 13 read as follows: "The people shall own or control the instruments and means of production and distribution, and with this end in view ownership shall assume the following forms: (a) State ownership, that is ownership by the state on behalf of the people through the creation of an efficient and dynamic nationalised public sector embracing the key sectors of the economy".

41 Alam, F., "Collective Bargaining in Bangladesh's Jute Industry", in IV:1-2 (1981) Punjab University Management Review, p. 66.

42 For details, see, Report of the Industrial Workers' Wages Commission, 1973.

43 For the text of the Ordinance, see, 26 (1974) DLR Statutes 134.

wage, bonus, leave, medical allowance, house rent allowance and conveyance allowance in excess of what is so determined.

Further, it provided that all agreements, settlements and awards, whether made before or after the commencement of this Ordinance, in respect of any matter determined by the Government under section 3(1) shall be void.[44] Accordingly, it was a punishable offence for any person to receive or enjoy any wage, bonus, medical allowance, house rent allowance, conveyance allowance in excess of what was determined by the Government.[45]

Later, on 5 February, 1974, the 1973 Ordinance was repealed by another legislation which was titled as the State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Act, 1974. The new Act covered all the provisions of the repealed Ordinance except the clause relating to punishment and declared that the Act has been promulgated to give effect to the Fundamental Principles of State Policies set out in Article 10 of the Constitution of the People's Republic of Bangladesh.

It appears that the provisions of the State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Ordinance, 1973, followed by the State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Act, 1974, were not in accordance with the provisions of Convention No. 98, as both restricted the right of collective bargaining with regard to wages and fringe benefits in the state-owned manufacturing industries and thus curtailed what is considered to be a basic trade union right. The question may, however, be raised as to whether the power given by the Ordinance of 1973[46] and the Act of 1974[47] to the Government to determine unilaterally the wages and terms of employment of industrial workers in the state-owned manufacturing industries was considered as a 'temporary measure' dictated by the circumstances of Bangladesh at that juncture, or as a 'permanent feature' of the new labour policy of 1972, based on the assumption that under a system of public ownership of undertakings, in the management of which the workers will be called upon to participate, there is no need for collective bargaining.[48]

If the first option of the alternative is chosen, i.e., if it was a 'temporary measure', it can be argued that there were a number of reasons which might have justified temporary suspension of collective bargaining with regard to

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44 Ibid., section 4.

45 Ibid., section 5.

46 State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Ordinance,1973.

47 State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Act, 1974.

48 See, Labour Policy,1972.

wages and fringe benefits in the prevalent circumstances of Bangladesh at that time. The ILO/SIDA Mission Report of 1973[49], depicted the situation of post-independent Bangladesh in the following terms:

> Management people were wrongfully confined and forced to enter into agreements which were binding on management under the law and by that way made them pay much more money than the companies could offer.[50]

The armed struggle which resulted in the independence of Bangladesh not only attributed to the destruction of economic potential of the country but also caused social problems such as change of attitude and conduct of some people which may be inherent to the situation of a newly independent country having won its independence through armed struggle. Therefore, recourse to coercion and physical violence was considered by some as the best means to obtain economic advantages. For many workers, collective bargaining seemed to be exclusively looked at as a means of submitting to the owners a 'charter of demands' and exercising intimidation, threats or even physical pressure on them until they accepted to meet the demands.

In such a situation, it may well be argued that in order to restore the very possibility of promoting an appropriate system of collective bargaining based on rational dialogue and suited to the needs of a developing country like Bangladesh, it was first necessary to clear the ground and put an end to unfair practices which have nothing to do with true collective bargaining by withdrawing temporarily from the sphere of negotiations between management and workers at the industrial unit level the subject of wages and other fringe benefits which is the most likely to give rise to such practice.

In its General Survey on the Application of the Convention on Freedom of Association and on the Right to Organise and Collective Bargaining made in 1973, the ILO Committee of Experts on the Application of Conventions and Recommendations noted:

> In view of the serious problems that can arise in certain circumstances in the economy of a country, it would be difficult to lay down absolute rules concerning voluntary collective bargaining, and Governments might feel in certain cases that the situation calls at times for stabilisation measures during the application of which it would not be possible for wages rates to be fixed freely by means of collectively negotiations. Such a restriction, however, should be imposed as an exceptional measure and to the extent necessary, without exceeding a reasonable

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49 ILO, Report of the ILO/SIDA Mission on Workers Participation on Management in Bangladesh, Geneva 1973.

50 Ibid., at p. 7.

period, and it should be accompanied by adequate safeguards to protect workers' living standard.[51]

Thus, it is apparent that if the suspension of the right to collective bargaining in respect of wages and fringe benefits was a temporary measure, then the promulgation of the State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Act, 1974, could not be said to have infringed the ILO requirements or standards as that being justified by the circumstances prevalent at that time.

However, the deliberate omission of the Legislature in prescribing any time limit for the operation of the Ordinance of 1973[52] and subsequently by inserting in the Act of 1974[53] that the provisions of the Act have been made to give effect to the fundamental principles of state policy as set out in Article 10 of the Constitution.[54] made it clear that it was not a temporary measure but a permanent feature based on the assumption that under a system of public ownership of undertakings in the management of which the workers will be called to participate, there will not be no need for collective bargaining.[55] It is to be noted that whilst the ILO advocates collective bargaining as a general principle and while the Governments which have ratified Convention No. 98 are under an obligation to promote and encourage collective bargaining, it is left to each country to decide what is the best machinery to be established in order to put this principle into practice. Thus, instead of providing a suitable machinery for collective bargaining, the act of curtailing the right to collective bargaining of the workers of public sector industries, in matters of wage and fringe benefits has undoubtedly resulted in breaching the Government's commitment to be bound by the provisions of the ILO Conventions which it has ratified.[56] The Government's action did not go unchallenged as National Workers Federation (Jatiya Sramik Federation) filed a complaint (Case No. 816)[57] to the ILO Committee on Freedom of Association alleging that the

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51 ILO, Report of the Committee of Experts on Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution), Vol. B, Geneva 1973. p. 75.

52 State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Ordinance, 1973.

53 State-Owned Manufacturing Industries (Terms and Conditions of Service) Act, 1974.

54 Ibid., section 5.

55 See, Labour Policy, 1972.

56 For the Government's commitment to be bound by the ILO Conventions it has ratified, see, ILO, Record of Proceedings, International Labour Conference, 57th Session, Geneva 1972, p. 301.

57 See, ILO, Official Bulletin, Series B, Vol. LXX, No. 1, 1976, p. 2 ; Vol. LXI, No. 1, 1978, p. 2; Vol. LXI, No. 2, 1978, pp. 6-8.

legislation in question had put an end to collective bargaining in public sector industries.

The implementation of the Industrial Workers Wages Commission's recommendation through promulgation of the State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Act, 1974 could not satisfy the workers because at the time of implementation, those recommendations could not compensate for the escalation in the rate of inflation.[58] Nothing was done in respect of workers' participation in management. Industrial disputes continued to rise. The industrial unrest coupled with other political factors prompted the Government to declare a state of Emergency throughout the country.

THE RIGHT UNDER THE STATE OF EMERGENCY AND MARTIAL LAW

On 28 December, 1974, the President under Article 141 of the Constitution proclaimed a state of Emergency[59] throughout the country. By a separate Order,[60] issued on that day he suspended, *inter alia*, the right of any person to move any court for the enforcement of the right to freedom of association as guaranteed under Article 38 of the Constitution. Thus, the suspension of enforcement of right to freedom of association resulted in denying the right, as the workers would not get justice in case of denial of such right by the employer or for that matter by the department of labour. Further, section 19 of the Emergency Powers Rules, 1975,[61] promulgated under section 2 of the Emergency Powers Ordinance, 1974,[62] provided:

> If in the opinion of the Government it is necessary or expedient so to do for ensuring the security, the public safety or interest of Bangladesh, or for securing the maintenance of public order or for maintaining supplies or services essential to the life of the community, the Government may, by general or special order, applying generally or to any specified area and to any undertaking or establishment or class of undertaking or establishments make provision:
> (a) for prohibiting, subject to the Order a strike or lock-out ... .

In pursuance of the above Rule, on 6 January, 1975, the Government by an Executive Order[63] prohibited strikes and lock-out in all undertakings and establishments in Bangladesh, both private and public sector. A general prohibition of the right to strike of its kind was in contradiction with Article 10 of Convention No. 87 which recognises the right of trade unions to formulate

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58 Supra note 5, at pp. 524-28.

59 For the text of the Proclamation of Emergency, see, 27 (1975) DLR Statutes 76.

60 For text of the Order, see, 27 (1975) DLR Statutes 78.

61 For the text of the Emergency Powers Rules, 1975, see, ibid., at p. 6.

62 For the text of the Emergency Powers Ordinance,1974, see, ibid., at p. 76.

63 S.R.O. 14-L/75/S-VII/14(17)/74/12 dated 6 January, 1975.

and defend the rights of their members. The same prohibition also violated Article 3 of the same Convention, which gives to the unions the right to organise their activities and to formulate their programmes.

Soon after the Proclamation of Emergency, on 25 January, 1975, the Constitution (Fourth Amendment) Act, 1975, was passed.[64] Article 117A of the Constitution provided that the President may by an Order direct that there shall be only one political party in the state. Under these new powers, on 24 February, 1975, the President of the Republic issued an Order introducing one-party system in Bangladesh.[65] The single national party formed was to be known as the Bangladesh Krishok Sramik Awami League (hereinafter referred to as BAKSAL) i.e., Bangladesh Peasants' and Workers' National Party.[66] However, BAKSAL was to have five fronts of which one was Jatiyo Sramik League[67] i.e., National Workers' Organisation. Following the formation of the one party system in March 1975, the President of Bangladesh addressed a labour rally in Tejgaon, Dhaka, where he announced that "there will be one labour front in the country as there will be only one political party".[68] Accordingly, the Jatiyo Sramik League which was the existing labour front of the Government became the only labour front of the country under the constitutional framework. Hence, there was no scope for the existence of other labour organisations or unions.

The principle of free choice of trade unions is an essential element of freedom of association. According to the decision of the ILO Committee on Freedom of Association while it may be to the advantage of workers to avoid multiplicity of trade union organisations, and while Governments may, in certain cases, consider that a single trade union movement is more convenient for an adequate representation of workers and their participation in the social and economic field, unification of unions should be the result of a voluntary decision of the workers and should not be imposed or maintained by legislation or other compulsory means.[69] Thus, unification of trade union movement imposed through state intervention by legislative means runs counter to the principle embodied in Article 2 and 11 of Convention No. 87.[70]

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64 For the text, see, 27 (1975) DLR Statutes 87.

65 See, Bari, E., Martial Law in Bangladesh 1975-79: A Legal Analysis, unpublished Ph.D. Thesis, University of London, 1985, at p. 32.

66 Ibid, p. 32.

67 See, Ahmed, K., Labour Movement in Bangladesh, Dhaka, 1978, at p. 123.

68 Id.

69 ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva 1985, p. 47.

70 The ILO Committee of Experts in 1973 commented on Egyptian legislation which aimed at unification of Trade Unions in the following manner:

The system of one national union lasted for only a few months until the assassination of President Sheikh Mujib by a group of army officers, which led to the proclamation of Martial Law on 15 August, 1975.

On 1 December, 1975, the Martial Law Authority promulgated the Industrial Relations (Regulation) Ordinance, 1975, which was the first piece of legislation after the independence of Bangladesh, dealing directly with workers' right to association. It was not enacted to supplement the existing legislation on workers' right to association i.e., the Industrial Relations Ordinance, 1969, but to over-ride it.[71] Section 4 of the Ordinance clearly discouraged the formation of new workers association as it envisaged "unless the Government otherwise directs there shall not be any registration of new trade unions under the Industrial Relations Ordinance, 1969".[72] Unions registered prior to the promulgation of the Industrial Relations (Regulation) Ordinance, 1975, were allowed to exist but their functioning was restricted as no election for determination of collective bargaining agent under the IRO, 1969[73] was allowed.[74] This provision was in contradiction of Article 3 of Convention No. 87 which reads as follows: "Workers' ... organisation shall have the right to ... elect their representatives in full freedom ...". Again, reading section 7 of the Industrial Relations (Regulation) Ordinance, 1975, it appears that though after the promulgation of the said Ordinance no election could take place for determination of collective bargaining agent i.e., union representatives, yet in unions where collective bargaining agents already existed nothing debarred them from functioning. However, it was provided that where there was no collective bargaining agent in any establishment the registrar shall constitute a Consultative Committee which shall consist of equal number of workers and employers to be selected by the registrar.[75] Thus, in the name of constitution of the 'Consultative Committee', contrary to

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Section 162 of the Labour Code, as amended, which prohibits the establishment of more than one general Trade Union of workers in the same occupation or trade, or more than one Trade Union committee in any one town or village, as mentioned in section 159, would appear to be incompatible with Articles 2 and 11 of the Convention.
See, ILO, Report of the Committee of Experts on the Application of Conventions and Recommendation, Report III (Part 4 A), 1973, pp. 113-114.

71 See, section 3 of the Industrial Relations (Regulations) Ordinance, 1975, 27 (1975) DLR Statutes 203.

72 It may be mentioned that sections 5 and 6 of the Industrial Relations Ordinance, 1969, deal with the procedure of registration of Trade Unions.

73 Sections 22 and 22A of the Industrial Relations Ordinance, 1969, deal with election of collective bargaining agent.

74 See, section 7 of the Industrial Relations (Regulation) Ordinance, 1975.

75 See, section 8 of the Industrial Relations (Regulation) Ordinance, 1975.

Convention No. 87.[76] the Ordinance under discussion substituted the provision for the election of workers' representatives with that of selection by the registrar of Trade Unions.

Further the promulgation of this Ordinance was a serious set-back in the development of workers' right of association as a certain category of workers, i.e., persons employed as members of watch and ward or security staff or confidential assistants whose right of association had been recognised since the enactment of the very first legislation on the subject i.e., the Trade Unions Act, 1926 and till the date of passing this Ordinance, have been denied their right of association.[77]

Before adoption of the Freedom of Association and Protection of the Right to Organise Convention, 1948, (No. 87) by the International Labour Conference, which provides full freedom in electing the representatives of workers' organisation, when the Indian Parliament passed the Trade Union Act, 1926, it provided that 50% of the total office bearers of the union could consist of persons, who were not actually employee or engaged in the industry with which the union was connected.[78] All subsequent legislation on the issue,[79] despite the fact that full freedom has been provided in Convention No. 87, reduced the limit to 25%. This may be explained to have provided at least limited freedom in electing those people as union executives who were not actually employed or engaged in any establishment. But ironically, ignoring the provisions of the ILO Convention totally and also the fact that trade unions had been enjoying this right since 1926, the Government by promulgation of the Ordinance[80] curtailed the exercise of this right at plant level unions though allowed at federation level unions.[81]

In exercise of the powers conferred by section 66 of the Industrial Relation Ordinance, 1969, the Government on 26 February, 1977 promulgated Industrial Relations Rules, 1977. Rule 10 outlined the powers and functions of the Registrar introducing external supervision of the international affairs of Trade Unions. This provision empowered the Registrar to enter any Trade Union or federation of Trade Unions and make such inspection of the office or

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76 See, Freedom of Association and Protection of the Right to Organise Convention, 1948, Article, 3.

77 See, section 5 of the Industrial Relations (Regulation) Ordinance, 1975.

78 Supra note 16.

79 See, Trade Union (Amendment) Ordinance, 1960, section 9; Trade Union (Amendment) Ordinance, 1961, section 3(2); East Pakistan Trade Unions Act, 1965, section 24; Industrial Relations Ordinance, 1969, section 7.

80 See, section 6 of the Industrial Relations (Regulation) Ordinance, 1975.

81 For reasons of prohibiting the persons not actually employed in the establishment to become trade union official, see below.

premises and of any register of documents and seize any such record, register or other documents which he would deem necessary for carrying out the purposes of the Ordinance. No objective criteria was provided for such inspection. The failure to indicate any objective criteria for inspection on the part of the Registrar leads us to the contention that the provisions are violative of Article 3 of Convention No. 87. If the administrative authority has discretionary power to examine the books and other documents of an association, conduct an investigation and demand information at any given time, there is a grave danger of interference which may be of such nature to restrict the guarantee provided for in Convention No. 87. Although the application of legislative provisions and union rules concerning an organisation's administration must by and large be left to the members of the Trade Union, the principle set out in the Convention do not exclude the external control of the internal acts of an organisation where they are alleged or where there are major reasons for believing them to be against the law (which should not of course infringe the principles of freedom of association) or the Union's Constitution.[82]

Since independence of Bangladesh in the year 1971, the Industrial Relations Ordinance, 1969, which was promulgated during the closing years of Pakistani rule, continued to be the governing legislation of the workers' right to freedom of association and collective bargaining. Although its unfettered operation was restricted and curtailed by other legislation,[83] it was not until the enactment by the Martial Law regime of the Industrial Relations (Amendment) Ordinance, 1977, that the provisions of the Industrial Relations Ordinance, 1969, were directly altered, imposing further restrictions on the workers' right to freedom of association. One of the crucial restrictions has been the ban on the functioning of unregistered unions. Section 5 of the Industrial Relations (Amendment) Ordinance, 1977, reads as follows: "No trade union which is unregistered or whose registration has been canceled shall function as a trade union". Such a restriction had never existed nor was subsequently imposed by other legislation since the enactment of the first legislation on the subject i.e. the Trade Unions Act, 1926. The insertion of this new provision, "no trade union to function without registration", in other words, envisages that registration is not only a pre-requisite but mandatory for trade unions to

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82 See, ILO, Freedom of Association and Collective Bargaining: General Survey, Geneva, 1983, at p. 59.

83 See, for example, Bangladesh Nationalised Enterprises and Statutory Corporations (Prohibition of Strikes and Unfair Labour Practice) Order,1972, in 24 (1971-72) DLR Statutes 146; State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Ordinance, 1973, in 26 (1974) DLR Statutes 161; Industrial Relations (Regulation) Ordinance, 1975, 27 (1975) DLR Statutes 203.

function. Thus, it is apparent that any future establishment of unions would be subject to registration amounting to 'previous authorisation' within the meaning of Article 2 of Convention No. 87 as without such authorisation, i.e., registration, unions would not be able to function. This view is supported by the fact that the activities of unregistered unions were made punishable as section 61A of the Industrial Relations Ordinance, 1969, as inserted by the Industrial Relations (Amendment) Ordinance, 1977[84] reads as follows:

> Whoever takes part, or incites others to take part in the activities of an unregistered trade union ... shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five hundred Taka, or with both.

But on the other hand the Committee on Freedom of Association observed: "the principle of freedom of association would remain a dead letter if workers are required to obtain any kind of previous authorisation to enable them to establish an organisation".[85] The requirements of registration as the Committee on Freedom of Association further observed "must not be such as to be equivalent in practice to previous authorisation, or as to constitute such an obstacle to the establishment of an organisation that they would amount in practice to outright prohibition".[86] Furthermore, the Committee on Freedom of Association while recognising that, in certain circumstances, it may be legitimate for registration to confer advantages on a trade union organisation in respect of such matters as to representation for the collective bargaining, consultation by the Governments, or the nomination of delegates to international bodies, it should not normally involve discrimination of such character as to render non-registered organisation subject to special measures of police supervision in such a way as to restrict the exercise of freedom of association.[87]

The Industrial Relations (Amendment) Ordinance, 1977, not only prohibited the function of unregistered unions but also imposed restrictive conditions for the registration of unions. Section 4 provided that a trade union of workers shall not be entitled to registration under this Ordinance unless it has a minimum membership of thirty per cent of the establishment or group of establishments in which it is formed. It is apparent from the above provision that in one establishment no more than three unions could be established.

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84 See, section 20 of the Industrial Relations (Amendment) Ordinance, 1977, in 29 (1977) DLR Statutes 214.

85 ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva 1985, at p. 56.

86 Ibid., at p. 57.

87 See, ILO, Committee on Freedom of Association, 74th Report, Case No. 298, Para. 45; 107th Report, Cases Nos. 251 and 414, Para 39.

Thus, the freedom of workers to establish a fourth organisation in their establishment being curtailed, they undoubtedly became subject to limited freedom in contradiction to the promise of full freedom to establish organisations of there own choosing as enshrined in Article 2 of the Right to Organise and Collective Bargaining Convention, 1948, (No. 87). Another issue to be analysed here whether the minimum requirement of 30% workers to be entitled to registration as a trade union amounts to previous authorisation. It may be argued that the 30% requirement as such may not amount to `previous authorisation' though by dictating the terms of establishing the unions and thereby depriving the workers of their authority to decide, this provision undoubtedly violated another basic guarantee of the workers right to freedom of association i.e., 'establish and join organisation of their own choosing'. Nevertheless, reading with the prohibitive clause as specified in section 5, i.e., 'no unions to function without registration', the 30% workers requirement clause amounts to 'previous authorisation' within the meaning of Convention No. 87 as even 29% workers organised together to form an union would not be able to function as they would be denied registration by the Registrar of Trade Unions and would also be punishable if functions.[88] On this point the Committee on Freedom of Association has observed:

> The formalities prescribed by legislation should not be of such nature as to hamper freedom to form trade unions nor be applied in such a way as to delay or prevent the setting up of occupational organisation.[89]

Whatever criticism may be centred against the Industrial Relations Rules, 1977 and the Industrial Relations (Amendment) Ordinance, 1977 it was only after promulgation of this Ordinance on 18 July, 1977, that the Martial Law Government on 20 July, 1977, by an executive Order issued in pursuance of section 4 of the Industrial Relations (Regulation) Ordinance, 1975[90] provided that "the Government is pleased to direct that registration of new trade unions is hereby permitted under the provisions of the Industrial Relations Ordinance, 1969."[91] Another executive Order issued on the same day in pursuance of

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88 See, section 61A of the IRO, 1969 as amended by section 20 of the Industrial Relations (Amendment) Ordinance, 1977.

89 See, ILO, Committee on Freedom of Association, 177th Report, Case No. 889, Para 332 and 119th Report, Case No. 891, Para 74.

90 Section 4 of the Industrial Relations (Regulation) Ordinance, 1975, reads as follows: "Unless the Government otherwise directs there shall not be any registration of new trade union under the said Ordinance". Here the said Ordinance means Industrial Relations Ordinance, 1969.

91 See, S.R.O. 226-L/77/S-VII/1(47)/76, Bangladesh Gazette, Extraordinary, July 20, 1977.

section 7 of the Industrial Relations (Regulation) Ordinance, 1975,[92] provided that "the Government is pleased to direct that election for determination of collective bargaining agent is hereby permitted under the provision of the Industrial Relations Ordinance, 1969." Thus after the promulgation of the Industrial Relations (Amendment) Ordinance,1977, the Martial Law Authority shifted from its earlier stand by issuing the executive Orders and thereby removing the restriction on registration of new trade unions and election of collective bargaining agents which created a dead-lock in the activities of trade union affairs. The right to registration of new trade unions was thus revived but it was subject to limitations as mentioned earlier.

THE RIGHT IN THE AFTERMATH OF EMERGENCY AND MARTIAL LAW

The Martial Law proclaimed on 15 August, 1975 was withdrawn on 6 April, 1979 and constitutional Government began to function. Within a few months, on 27 November, 1979 the Emergency which was declared on 28 December, 1974 and which continued during the continuance of Martial Law was also withdrawn. With the withdrawal of the Emergency the general ban on strikes which was imposed on 6 January, 1975 by an executive Order[93] issued under Emergency Powers Rules, 1975 ceased to have effect and thereby the workers' right to strike under the Industrial Relations Ordinance, 1969 was restored.

In March 1980 the second labour policy of Bangladesh was announced by Mr. Reazuddin Ahmed, the then Minister in charge of labour. This policy, unlike the first one declared in September 1972, expressly recognised the right to strike and lock out as an instrument of collective bargaining. While guaranteeing workers the right to strike, the policy specified that the right could be exercised only after securing, through secret ballot, support of the majority of the workers of the collective bargaining agent.[94] The policy emphasised growth of leadership from among the rank of workers and described it to be natural and desirable. The Government further asserted in the policy that there was no dearth of leadership amongst the workers. Accordingly, with a view to fostering their leadership, Government expressed its intention to retain the existing practice of formation of executive committee of trade unions at plant level with representatives from amongst the workers.

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92 Section 7 of the Industrial Relations (Regulation) Ordinance, 1975, reads as follows: "Unless the Government otherwise direct, there shall not be any election for determination of the collective bargaining agent under the said Ordinance". Here the said Ordinance means Industrial Relations Ordinance, 1969.

93 See, S.R.O. 14-L/75/S-VII/14(17)/74/12, dated January 6, 1975.

94 See, Labour Policy, 1980.

The non-workers were, however, allowed to be elected as office bearers of trade union federation at industry and national level. As to the formation of trade unions, the policy noted that the Government believed that there was need for the growth of healthy trade unionism and the right to form trade unions. It was however emphasised that the right of association should not be extended to persons employed in security services, such as security staff, watch and ward etc.

From the declaration of the above policy, it is apparent that with regard to workers right of association, apart from recognising the right to strike, the Government simply reaffirmed the stand taken by the Martial Law authority in 1975 as reflected in the Industrial Relations (Regulation) Ordinance, 1975. Hence, it appears that the Industrial Relations (Regulation) Ordinance, 1975 occupied the position of interim Labour Policy of the country so far as the workers' right of association was concerned.

Following the declaration of the new labour policy on 25 July, 1980, the Government promulgated the Industrial Relations (Amendment) Act, 1980 to give effect to its policy. In order to do so, the Act of 1980 almost in identical terms re-enacted the provisions of the Industrial Relations (Regulation) Ordinance,1975, though apparently repealing the Ordinance.[95] Thus, following section 6 of the Ordinance, the Act of 1980 envisaged:

> ... a person shall not be entitled ... to be a member or officer of a trade union formed in any establishment or group of establishments if he is not actually employed or engaged in that establishment or group of establishments.[96]

The 'outsider'[97] participation in trade union leadership in the Indian sub-continent is not been a recent phenomenon. Rather, it dates back to the very origin of the trade union movement in the British period and also received statutory recognition.[98] Outsider participation at that time appeared as a matter of necessity.[99] This necessity did not cease to be significant during the Pakistani period. There is little evidence to suggest that the conditions under which outsiders' participation became inevitable in British India, changed at all during the Pakistani period.The inevitability of outsiders' role in organising trade union activities has been reinforced by various reasons of which the most important is the workers' or insiders' fear of being victimised by the management for their alleged involvement in trade union activities. For the first time the Labour Policy of 1969 recognised this fear:

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95 See, section 17 of the Industrial Relations (Amendment) Act,1980.

96 See, section 4, Industrial Relations (Amendment) Act, 1980.

97 Here the term 'outsider' is being used to mean a person who is actually not employed or engaged in any industry or establishment.

98 See, the Trade unions Act, 1926, section 22.

99 Supra note 16.

> The employers ... have been hostile to the development of trade unions. The fear of loss of employment and other punitive measures have made many workers afraid of joining trade unions ... By and large, leadership has not emerged from within the workers themselves and this has resulted in the creation of a permanent professional leadership.[100]

This fear of victimisation coupled with lack of education and other factors created conditions under which it became difficult to develop trade union leadership from the rank and file of workers.

This fact has also been supported by the ILO Committee of Experts on Labour Management Relations in Pakistan back in 1960 who observed that 'outsiders' were the only people who could bring a union into existence under the prevailing circumstances, taking into account factors such as unemployment, illiteracy, the attitude of employers and lack of trade union leadership".[101] Even to this day, the necessity for outsiders has not outlived in any way in the leadership of plant level unions, as Dr Mainul Islam observes:

> Outside leadership in union activities is also a necessity in the context of Bangladesh because they are in many cases not better qualified and equipped to deal with management .... any worker can be fired by the employer ... at any time and as soon as he is dismissed, a worker ceases to be a union executive. But the outsider leaders do not suffer from such a handicap and can bargain from a position of strength and security.[102]

The ban on outsiders' participation in the leadership of plant level unions may be viewed as a motivated act of Government in order to have a relatively easy hold over the affairs of the unions and the trade union movement as a whole. It was also aimed at clearing off any effective opposition from among the workers against the political party in power. To quote Islam:

> Real reason behind barring outsiders at the plant level unions, was, however, prompted by narrow political motive of the ruling parties of Bangladesh. ... one important reason behind barring outside leadership from the union was the weakness of the ruling political parties to have their own strong trade union organisation when they came to power. So when they get hold of the political power they want to capture the union power as well, if necessary by force through the help of police and management. But the tested veteran leaders with professional skill and strong record of service stood on their way to forcible occupation of the union leadership. So there arose the need for enacting a law banning the outsiders to become union executives.[103]

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100 See, Labour Policy, 1969.

101 ILO, Report to the Government of Pakistan on the Visit of a Joint Team of Experts on Labour-Management Relations, Sept-Oct. 1959, Geneva 1960, p. 20.

102 Islam, M., "Industrial Relations in Bangladesh," 19 (1982) Indian Journal of Industrial Relations, p. 180.

103 Id.

It is beyond doubt that the Industrial Relations (Amendment) Act, 1980, by disqualifying persons not actually employed or engaged in the establishment concerned where the union is formed to become an officer or a member of trade union, clearly violated Article 3 of Convention No. 87 which guarantees workers the right to elect their representatives in full freedom. Further, according to the ILO Committee on Freedom of Association:

> If the national legislation provides that all trade union leaders must belong to the occupation in which the organisation functions there is a danger that the guarantees provided for Convention No. 87 may be jeopardised.[104]

The Committee also observed:

> The right of workers' organisations to elect their representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interest of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining conditions of eligibility of leaders or in the conduct of the elections themselves.[105]

The Industrial Relations Ordinance, 1969, recognised the right to strike as a means of collective bargaining subject to 21 days notice.[106] The Industrial Relations (Amendment) Act, 1980 imposed further restrictions by adding a proviso according to which no collective bargaining agents were to serve any notice of strike unless three-fourths of its members had given their consent to it through a secret ballot specifically held for the purpose.[107] Thus, the problem posed by the new Act was the requirement to hold election through secret ballot by the collective bargaining agents before deciding about a strike action. According to section 7(2) of the Industrial Relations Ordinance, 1969 as amended by section 4 of the Industrial Relations (Amendment) Ordinance, 1977, if a union can claim 30% membership in a place of work it can get registration. Thus if there exists more than one union in a single work place, collective bargaining agent is to be elected by the workers and a union needs 34% of the total votes for the purpose.

On 30 May, 1981, President Ziaur Rahman was assassinated and the Vice-President Justice Abdus Sattar assumed the charge as acting President under Article 55(1) of the Constitution of Bangladesh, and in view of the grave situation existing at that time, the acting President issued a Proclamation of Emergency throughout the country under Article 141A of the Constitution and thereby the people of the country were subject to a second declaration of

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104 ILO, Freedom of Association: Digest of Decisions and Principles of the Committee of the Governing Body of the ILO, Geneva 1985, at pp. 62-63.

105 Ibid., at p. 62.

106 See, Industrial Relations Ordinance, 1969, section 28.

107 Industrial Relations (Amendment) Act, 1980, section 8.

Emergency after achieving independence in 1971.[108] By a separate Order issued on the same date, the President, *inter alia*, suspended the enforcement of the right to freedom of association conferred under Article 38 of the Constitution. Unlike the first emergency period,[109] the suspension of constitutional guarantee of the right to freedom of association did not last long as the Proclamation of Emergency was revoked by a subsequent proclamation issued by the acting President on 21 September, 1981.

THE SECOND MARTIAL LAW PERIOD AND THE WORKERS' STRUGGLE

The constitutional guarantee of the right to freedom of association did not continue for long, because on 24 March, 1982, in a bloodless *coup d'etat*, the elected Government of President Sattar was overthrown and the armed forces took over power. The whole country was placed under Martial Law proclaimed by the Chief of Army Staff, Licutenant-General Hussain Muhammad Ershad who assumed full power as the Chief Martial Law Administrator and suspended the Constitution. Thereby the nation witnessed the second Martial Law regime after achieving independence.[110]

The second Martial Law regime, following the first Martial Law regime,[111] on 27 August, 1982, promulgated the Industrial Relations (Regulation) Ordinance, 1982. Like the first Martial Law Regime, the emergence of the second military regime of Mr. Ershad also caused a set-back to the workers' right of association. By promulgating the Industrial Relations (Regulation) Ordinance, 1982, the regime imposed restrictions on meetings of trade union. Section 7 of the Ordinance reads as follows:

> No meetings of any trade union including a meeting for election of executive committee, shall be held without the prior permission of the Government or of such authority as the Government may by notification in the official Gazette, specify.

It was also provided that whoever convenes any meeting in contravention of the above provision shall be punishable with imprisonment for a term which may extend up to two years, or with fine which may extend up to five

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108 For the text of the Proclamation of Emergency, see, 33 (1981) DLR Statutes. 119-20.

109 The first Emergency in the country was declared on 28 December, 1974, and was withdrawn on 27 November, 1979.

110 For the text of the Proclamation of Martial Law, see, Bangladesh Gazette, Extraordinary, dated March, 24, 1982.

111 The first Martial Law was declared on 15 August, 1975 and was withdrawn on 6 April, 1979.

thousand taka, or with both.[112] But on the other hand the Committee on Freedom of Association observed:

> The right of trade unions to hold meetings freely in their own premises for discussion of trade union matters, without the need for previous authorisation and without interference by the public authorities, is a fundamental aspect of freedom of association.[113]

Thus, the imposition of restrictions on meetings of trade unions was against the principle of freedom of association. Without the unfettered right to hold meetings, trade unions can hardly function as for the purpose of formulating their activities and programmes the union executives need to get together whenever there is a necessity. Accordingly, freedom from Government interference in holding of trade union meetings constitutes an essential aspect of trade union rights, and the public authorities should refrain from any interference which would restrict or impede the lawful exercise of these rights thereof, on condition that the exercise of these rights does not disturb public order or cause a serious and imminent threat thereto.[114]

Through the promulgation of the Ordinance,[115] the second Martial Law authority, like the first Martial Law authority, prohibited elections for determining collective bargaining agents.[116] Industrial disputes were to be settled by negotiation and conciliation.[117] Strikes were declared illegal.[118] Thus, the whole concept of collective bargaining became a hollow pronouncement. The workers having lost their right of collective bargaining and lawful trade union activities at the plant level, had been looking for an alternative to collective bargaining in order to articulate their demands at the enterprise concerned and at national level. An alliance of eleven national federations of trade unions[119] emerged by the end of 1982. On November, 1982 they submitted '5-point' demands to the Chief Martial Law Administrator which,

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112 See, Industrial Relations (Regulation) Ordinance, 1982, section 8(2).

113 ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva 1985, p. 33.

114 See, ILO, Committee on Freedom of Association, 58th Report, Case No. 253, Para 639; Case No. 261, Para 175; 70th Report, Case No. 288, Para 79.

115 Industrial Relations (Regulation) Ordinance, 1982.

116 Ibid., section 4(2)-4(4).

117 Ibid., sections 5 and 6.

118 Ibid., section 8.

119 The eleven national federation of trade unions included: (1) Jatiyo Sramik Federation, (2) Jatio Sramik Jote, (3) Jatio Sramik League, (4) Ganatantrik Sramik Andolon, (5) Bangla Sramik Federation, (6) Bangladesh Workers Federation, (7) Sanjucta Sramic Federation, (8) Bangladesh Federation of Labour, (9) Bangladesh Sramik Federation, (10) Samajtantric Sramik Federation, and (11) Trade Union Kendra. See, The Ittefaq, Dhaka , 18 October, 1982.

inter alia, included restoration of unfettered rights of trade unionism to workers. The leaders of this trade union alliance started holding indoor meetings and exchanged ideas in order to evolve a plan for a shake-up. But it was not until the May Day of 1983 that they could succeed in organising rallies, meetings and processions of workers as their first move towards establishing contact among workers and also as a demonstration of working class unity. Some eminent trade union leaders of the country addressed the rally and called to observe demand-day on 3 June, 1983. The rally also resolved, among others, to launch a movement to realise the '5-point' charter of demands as submitted to the Chief Martial Law Administrator.[120]

This set the tone of massive awakening among the urban industrial workers' of the country. The leaders of the eleven federations also started contacting the major unions at the plant level and mobilised workers mass support for an all-out movement against the regime. The trade union alliance was further strengthened by the joining of Bangladesh Jatiotabadi Sramic Dal, on 29 March, 1984, and on that very day the formation of the Sramik Karmachari Oikya Parisad (hereinafter referred to as SKOP) of twelve national trade union federations was officially announced.[121] The leaders of the SKOP urged the Government to concede to their '5-point' demands by 12 April, 1984, failing which they emphasised, the Government would have to face the consequences of a 'direct-action' programme to be announced at the national convention of the SKOP on the day following the dateline (i.e., 13 April, 1984).[122] This threat of the SKOP seemed to have softened the Government's position. It agreed to meet the SKOP leaders on 12 April. The meeting ended in failure and consequently a 24-hour strike call was given for 28 April by SKOP at its convention held on April 13, 1984 which was decided to be observed in all the mills, factories and offices of the country.[123]

Meanwhile, the opposition political parties and Student Action Committee expressed solidarity with the strike of SKOP for 28 April, 1984.[124] According to Dr Abdul Awal Khan, as a result of successful completion of the strike of April 28, 1984, the working class of the country emerged and was acknowledged as the most powerful united force in the land one had ever seen within the constraints of Martial Law in the country.[125] Immediately after the strike and before the rally of May-Day, 1984 two other

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120 Khan, A. A., "Strikes and Military Rule in Bangladesh," 5 (1988) Chittagong University Studies (Commerce), p. 37.

121 See, The Bangladesh Observer, Dhaka, 1984, March 30.

122 Supra note 122, at p. 38.

123 Id.

124 The Holiday, Dhaka, 27 April, 1984.

125 Supra note 122, at p. 39.

national trade union federations[126] officially joined forces with the SKOP, further strengthening the inner bonds of the working class. On May-Day of 1984, the huge rally of workers threatened and urged the Government to either concede to the '5-point' demands of SKOP by 21 May, 1984 or prepare for an all-out nation-wide strike of 48 hours on 22 and 23 May, 1984.[127]

In fact the success of the strike of 28 April, 1984, not only weakened the bargaining position of the Government but it also shook the strength and confidence of employers. They were left in a helpless position in the face of the 48 hour long strike that became immanent. Thus although the President asserted on 19 May, 1984 that the attempts of the SKOP would be resisted at all cost, his Government had to soften up and abandon its position in order to save itself within a day of making this assertion.[128] The Government was thus brought to sign an agreement with SKOP on 21 May 1984 through which some vital trade union rights were revived. Thus following the agreement, on 22 May 1984, the Industrial Relations (Regulation) Ordinance, 1982, was repealed.[129] As a result, trade unions were no longer required to obtain permission from the Martial Law Authority before holding trade union meetings and election of union executive could take place in accordance with the provisions of the Industrial Relations Ordinance, 1969.

Further, having repealed the Industrial Relations (Regulation) Ordinance, 1982, the Martial Law Government on 13 March, 1985, promulgated the Industrial Relations (Amendment) Ordinance, 1985. Under this amendment, in some relaxation of the previous restriction on outsiders becoming trade union members or officials,[130] an ex-worker of the establishment became entitled to be a member or officer of a trade union in that establishment.[131] It may be recalled that this was not any new concession given to the workers who already had been enjoying this right since 1926 when the Trade Union Act, 1926 was enacted.[132] The restriction of its kind was first imposed by the Industrial Relations (Regulation) Ordinance, 1975 and subsequently by the Industrial Relations (Amendment) Ordinance, 1980.

In order to ensure that trade union activities are not hampered because of transfer of union executives from one place to another the Industrial Relations (Amendment) Ordinance, 1985 further provided that no officer of any trade

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126 The two national federations were: (a) Samajtantrik Sramik Front and (b) Jatiya Sarmik League (Hasina group of Awami League).

127 For details see, The Holiday, Dhaka, 3 May, 1984.

128 For details see, The *Sangbad*, Dhaka, 20 May, 1984.

129 See, the Industrial Relations (Regulation) (Repeal) Ordinance, 1984.

130 See, section 4 of the Industrial Relations (Amendment) Ordinance, 1980.

131 See, section 2, Industrial Relations (Amendment) Ordinance, 1985.

132 Supra note 16.

union shall be transferred from one place to another without his consent.[133] The Ordinance also safeguarded prospective union executives by laying down that no employer shall while an application under section 5 of the Industrial Relations Ordinance, 1969 for registration of a trade union is pending alter, without prior permission of the Registrar, to the disadvantage of any workman who is an officer of such trade union, the conditions of service applicable to him before the receipt of the application by the Registrar.[134] It is apparent that the above provisions did not evolve either as a good will gesture of the Government in promoting trade unions activities or due to the Government's respect for the ILO Conventions but as the outcome of the SKOP movement.

THE RIGHT IN THE AFTERMATH OF SECOND MARTIAL LAW

On 10 November, 1986, Martial Law was withdrawn restoring the Constitution of the People's Republic of Bangladesh.[135] Thus, the constitutional guarantee of the right to freedom of association which was suspended on 24 March,1982 again came into operation. However, it was not until 1 February, 1990, that any further law was promulgated amending the Industrial Relations Ordinance, 1969 relating to workers' right of association. The Industrial Relations (Amendment) Act, 1990 restricted the scope of the Industrial Relations (Amendment) Ordinance, 1985, as it envisaged that a person who has been dismissed from the service would not be entitled to be a member or officer of a trade union of that establishment[136] Further by section 2 thereof two provisions were added to sub-Section (2) of section 7 of the IRO, 1969 so that the entire sub section (2) of section 7 now read as follows:

> A Trade Union of workers shall not be entitled to registration under this Ordinance unless it has a minimum membership of thirty percent of the total number of workers employed in the establishment in which it is formed.
>
> Provided that more than one establishment under the same employer, which are allied to and connected with one another for the purpose of carrying on the same industry irrespective of their place of situation, shall be deemed to be one establishment for the purpose of this sub-section.
>
> Provided further that where any doubt or dispute arises as to whether any two or more establishments are under the same employer or whether they are allied to or connected with one another for the purpose of carrying on the industry, the decision of the Registrar shall be final.

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133 See, section 5 of the Industrial Relations (Amendment) Ordinance, 1985.

134 Ibid., section 5.

135 See, The Constitution (Final Revival) Order, 1986, Chief Martial Law Administrator's Order No. VIII of 1986.

136 See, section 3 of the Industrial Relations (Amendment) Act, 1990.

If an employer had more than one establishment under the unamended Industrial Relations Ordinance, 1969, the workers, without any distinction whatsoever, had the right to form trade unions in each establishment. The proviso added by the Amendment Act has introduced a scheme of 'one employer, one establishment'. Thus the new Trade Unions have to be organised 'establishment-wise'.[137] If a trade union, thus constituted 'establishment-wise', seeks registration, then it will be entitled to registration, only if it has a minimum membership of thirty percent of the total number of workers employed in that establishment or group of establishments in which it is formed. Thus, irrespective of number of establishments under one employer there can not be at a given time, more than three registered Trade Unions.

The vires of the two provisos to sub-section (2) of section 7 was challenged before the Supreme Court of Bangladesh in the case of *Aircraft Engineers vs Registrar, Trade Unions*[138] on the ground that the amended legislation is violative of the fundamental right guaranteed by Article 38 of the Constitution.

In this case after the promulgation of the Industrial Relations (Amendment) Act, 1990 the existing seven registered Trade Unions of Bangladesh Biman Corporation[139] were served with an order of the Registrar dated 2.5.90[140] stating therein that in pursuance of an enquiry made under section 2 of the 1990 Act it had been found that none of the seven existing Trade Unions were constituted in accordance with the newly introduced provisos to sub section (2) of section 7 of the Industrial Relations Ordinance, 1969. The Registrar then caused a Notification to be published in the Bangladesh Gazette on 17 May 1990 listing therein the names of the existing seven registered Trade Unions of Bangladesh Biman Corporation, whose registrations were liable to be cancelled.

The appellants submitted *inter alia* that the impugned legislation has brought the inevitable effect of bringing to an end and extinguishing the appellant-unions, particularly in view of section 11A of Industrial Relations

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137 Under section 2(iv) of the IRO, 1969 "establishment means any office, firm, industrial unit, undertaking, shop or premises in which workmen are employed for the purpose of carrying on any industry." Under section 2(xiv) "industry means any business, trade, manufacture, calling, service, employment or occupation."

138 45 (1993) DLR (AD) 122.

139 Prior to the enactment of Industrial Relations (Amendment) Act, 1990 the Registrar of Trade Unions had registered seven unions on the basis of more establishments than one under the same employer.

140 See, Memo No. RTU/CBA(3)78C-40 dated 2.5.1990.

Ordinance, 1969 which provides that "no trade union which is unregistered and whose registration has been cancelled shall function as a trade union".[141]

It was argued by the appellants that the right to form an association as union, guaranteed by Article 38 of the of the Constitution included the right to its continuance which was now being denied by the impugned legislation. the threatened cancellation of registration was tantamount to negating the effective existence of the fundamental right and as such it was violative of the constitutional guarantee which can not be extinguished by law and on which reasonable restrictions may be imposed only in the interest of public order or morality. But the Court rejected the above contention in the following terms:

> This new legislation contains no restriction upon the workers' right to form a trade union and consequently there is no necessity to show that there is a nexus between the new legislation and public order or morality.[142]

The Court based its argument on the following basis:

> The workers of more than one establishment under the same employer are free to form trade unions, as before. No doubt the existing trade unions lose their registrations in the process and are unable to continue in their old form, but ... the organisational structure of trade unions is a legitimate domain of legislative exercise and no worker has a fundamental right to a particular form of organisational set-up.[143]

In order to emphasise the above contention the Court further elaborated:

> To hold other wise will tantamount to holding that once trade unions are formed along particular pattern and registration given, there can be no further changes in the organisational set-up and that the trade union structure will remain frozen as long as fundamental rights exist, howsoever desirable or necessary it may be for a change to meet the changing needs of times or situations.[144]

The argument of 'changing needs of times and situations' raises few questions: was the promulgation of the impugned legislation a necessity to meet the changing needs of times or situations? If so, why was it necessary and whose purpose it intended to serve? Surprisingly, the Court did not deal with these issues. However, in the course of proceeding the respondent did not submit in any manner that the legislation was a necessity to suit the changing needs nor was it established that it was beneficial to workers. In the absence of any such indication, it can be argued that the legislation may have intended to benefit the employers and not workers as it was detrimental to workers' interest resulting the extinction of unions. A clear example is the present case where under the unamended provisions, seven trade unions were registered

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141 Supra note 138, at pp. 156-7.
142 Ibid., at p. 128
143 Id.
144 Id.

and five of them were acting as collective bargaining agents but in view of the amended provisos they could no longer function. Thus, it is apparent that the new legislative framework aimed at nothing but curtailing the exercise of the right which workers were already enjoying. Therefore, the argument of his lordship is hardly convincing that:

> The whole purpose of the legislative exercise is not to restrict the right to form associations or unions, but to give the trade unions a shape and to chart out a well-ordered territory for their operation.[145]

Further, in a situation where due to the amendment of law, the existing unions were to defunct, we can not agree to the interpretation of his lordship that:

> The amended legislation has nothing to do with restrictions on the right of association or union or restrictions on its continence. It is a re-organisational statute and no one has a fundamental right to a particular form of trade union.[146]

The question involved in this case was not one of a particular form of trade union but the very existence of the unions and therefore the denial of the right by the Court is a serious set-back in the exercise of right of association.

The present Government which took office on 20 March, 1991 has not brought any change in the existing law on the right to freedom of association. However, on 29 June 1992 the Government by an executive order formed a National Labour Laws Reforms Commission consisting of 35 members.[147] The Commission has submitted its report in March 1994, tabling a Bill named the Labour Code 1994 for legislative enactment. It appears from the report, that the Commission basically performed the task of unifying all the labour laws of the country. The laws relating to trade unions and industrial relations i.e., the provisions of the Industrial Relations Ordinance, 1969 have found placed in chapter XIII of the Code. But in the proposed new Code the various restrictive and prohibitive provisions of the IRO, 1969 which we have highlighted in our discussion have been incorporated in identical terms. Thus, the comments of the ILO Committee of Experts on the various restrictive provisions of the Industrial Relations Ordinance, 1969 vis-a-vis ILO Conventions which we will discuss in the next chapter received no consideration by the Commission as no step has been taken to comply with the Committee's opinion.

Thus, it is apparent from the above discussion that the various Governments succeeding one after another in the post independence period and the various legislative measures adopted by them have been directed mainly towards curbing the right of association. Instead of widening the

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145 Ibid., at p. 126.

146 Ibid., at p. 129.

147 Among these members, 12 were Government representatives, 8 employers', 8 workers' and 7 legal experts.

horizon of exercise of the right to freedom of association in conformity with the ILO Conventions, all successive Governments adopted repressive measures in contradiction to their professed faith in the right to freedom of association and solemn declaration to abide by the ILO Conventions which the state has ratified. Hence, it may be concluded that the legislative framework on the right to freedom of association which is prevalent in post independence Bangladesh have fallen much short of what existed immediately before independence.