THE DEVELOPMENT OF RIGHT TO FREEDOM OF ASSOCIATION IN PRE-INDEPENDENCE BANGLADESH (1919-1971): AN ANALYSIS OF LEGISLATION AND POLICY*

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In order to explore and understand the present character of right of association in Bangladesh one should begin with the state of right of association and the Government policy and legislation on the subject from the colonial period. This paper seeks to trace the Government policy and legislation affecting the right of association and labour relations since 1919, including the issues of controversy, the departures and modifications that have marked its evolution. For the convenience of the study, we propose to discuss the development in two periods i.e., the colonial period (1919-1947), and the Pakistan period (1947-1971).

THE COLONIAL PERIOD (1919-1947)

In outlining the development of right of association during the colonial period, we propose to begin our discussion by focusing on the status of right of association at the time of establishment of the ILO, followed by recounting the impetus of the creation of the All India Trade Union Congress and recognition of the right of association under a legislative framework.

Confusion over the Status of Right of Association

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After its establishment in 1919 when the International Labour Organisation adopted its first Convention on Freedom of Association i.e., the Right of Association (Agriculture), Convention 1921 (No. 11), it presupposed the existence of such a right among the industrial workers in member states. At this juncture we shall not proceed to debate the question how far the ILO was right in such a presumption but proceed to submit that so far as India was concerned, prior to the passing of the Trade Unions Act, 1926,[1] the legal position as regards workers' right of association was uncertain. The following passage from a speech delivered in the Indian Legislative Assembly by Mr. Joshi,[2] the mover of the resolution which led to the adoption of the Trade Unions Act, 1926, clearly illustrated this general uncertainty:

> What is important is that the status of the trade unionists and the trade union officials and trade union organisations must be determined and fixed in the eyes of the law. At present the position is very doubtful. In England some years back the trade union organisations were illegal. I do not know what the position in India is. I am not a lawyer; but I take it that here a trade union is a legal organisation.[3]

Mr. Joshi correctly observed that the position was doubtful but in the absence of any positive sanction behind the formation of associations it is debateable how far he was correct to assert that a "trade union is a legal organisation". There was no express legal provisions on the requirements and formalities in establishing an association but the definition of the term 'association' and 'unlawful association' were laid down in the Criminal Law Amendment Act, 1908. Section 15 of the Act provided:

(1) 'association' means any combination or body of persons, whether the same be known by any distinctive name or not; and
(2) 'unlawful association' means an association-
(a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or
(b) which has been declared to be unlawful by the State Government under the powers hereby conferred.

The term association as defined in the Act was very wide and could virtually cover any combination of even two or more persons acting in any capacity either formally or informally. Similarly, the definition of 'unlawful association' was also very wide which, *inter alia,* meant and

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1 Act No. XVI of 1926.
2 Member of the Legislative Assembly.
3 The Legislative Assembly Debates, Delhi, 1921, Vol. 1, Part 1, at p.487.

included any association which had been declared to be unlawful by the State Government under Section 16 of the Act. Section 16 of the Criminal Law Amendment Act, 1908 empowered the State Government to declare an association as unlawful in the following terms:

> If the State Government is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the State Government may, by notification in the official Gazette declare such association to be unlawful.

The above restrictive provision had four features, namely: a) it conferred arbitrary powers on the State Government to ban an association on its subjective satisfaction; b) no machinery had been provided for revision or any other mode of review of action taken by the Government; c) it provided no provision for hearing the association before taking the action; and d) there was no fixed period for the ban, the ban being virtually absolute and permanent.

An association apart from being declared unlawful as described above could also be subject to the charge of criminal conspiracy under Sections 120A and 120B of the Indian Penal Code, 1860. Section 120A defined criminal conspiracy as follows:

> When two or more persons agree to do, or cause to be done,-
> (1) an illegal act or
> (2) an act, which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

In view of the above provisions an agreement by any two members of an association to pursue other workmen to break their contract with their employer could be considered as a criminal conspiracy punishable with imprisonment under Section 120B of the Penal Code.[4]

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[4] Section 120B reads as follows:

Punishment for criminal conspiracy- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with

The question of civil liability of persons engaged in associations arose in 1920 out of a labour dispute in Madras. In October 1920, Mr. B. P. Wadia, who was the President of a Madras labour union was put under injunction by the court for his inducement of some workers of the Buckingham Mills to commit a breach of their contract.[5] The dispute, which will be discussed later, suggested that trade union activities were not free from civil liabilities.[6]

From the above it is apparent that at the time of the establishment of the ILO, the workers of India did not have any positive guarantee of the right of association but were subject to the restrictive provisions of criminal and civil law. Thus, it can be concluded that the state did not prevent any individual from establishing and joining an association provided the association and its members conformed to the ordinary law of the country. In other words, an association of persons was not illegal merely because it was an association. Apart from this, the position was not at all clearly defined. However, despite confusion and uncertainty as to legality of formation of association, the workers of India exercised their right of association, as will be evident in the discussion below.

Exercising the Right:
The Creation of the All India Trade Union Congress

From the Indian view point the establishment of the ILO was of special importance. Under the 1919 Treaty of Versailles (Article 389), the labour organisations in member countries were given the power to select their representatives on the ILO Conference, subject only to the confirmation of the Government of those countries. In the absence of such organisation, the Treaty of Versailles gave Governments the power to nominate labour representatives. Since at that juncture there was no central labour organisation in India, the Government nominated representatives of labour to the first International Labour Conference without consulting the workers.[7] This was much resented by the workers as unconstitutional.[8] The Government argued that it was justified in nominating the workers'

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fine or with both.

5 See, Lokanathan, P. S., Industrial Welfare in India, Madras, 1929, at pp.183-84; Das, R. K., History of Indian Labour Legislation, Calcutta, 1941, at p.245.

6 See below.

7 Giri, V. V., Labour Problems in Indian Industry, London, 1959, at p.496.

8 Id.

delegate without consulting any of the labour leaders, in as much as there did not exist at that time any organisation truly representative of the workers.[9]

However, the workers of India did not fail to realise the importance of the right that was bestowed upon them and the harm that would be done if they did not organise in order to exercise that right. Therefore, the immediate impetus for the formation of the All India Trade Union Congress came when the nomination of workers representatives to the ILO was disputed. Thus, it was in 1920 that India's first central organisation of labour, namely, the All India Trade Union Congress (AITUC) was formed to:

> Coordinate the activities of all labour organisations in all trades and in all the provinces in India, and generally further the interests of Indian labour in matters economic, social and political.[10]

Thus, the AITUC had, no doubt, a greater aim than sending representatives to the ILO. The creation of the AITUC was a hasty step in order to secure representation of the Indian labour at the ILO Conference at Geneva.[11] There was, however, nothing fundamentally wrong in a central organisation being started first and branch associations following under its inspiration.

However, some leaders believed that the establishment of an all-India organisation was premature and that the state of labour organisations did not warrant its creation. On this point, Mr. V.V. Giri, during the course of his presidential address to the sixth session of the AITUC, asserted:

> Our distinguished patriot and countrymen, L. Lajpat Raj as the President of the first session of the AITUC considered, perhaps with justification then, that the time was not ripe in the year 1920 to give an All-India name to this organisation and he further opined that it would take many more years of activity before one could possibly think of having anything like a Congress which can speak with any semblance of authority on behalf of all the workers in India.[12]

Similarly, commenting on the activities of the AITUC in 1929 Mr. Lokanathan observed:

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9 Revri, C., The Indian Trade Union Movement, New Delhi, 1972, at p.85.

10 Report of the All India Trade Union Congress, 5th Session, 1925, at p.59.

11 Sharma, G. K., Labour Movement in India: Its Past and Present, Delhi, 1963, at p.80.

12 Supra note 10, 6th Session, 1926, at p.8.

> Whatever be the justification for the early establishment of a central labour organisation in India, there is little doubt that it has revealed the defects of its quality. For the first four or five years the Trade Union Congress was a mere annual show and very few unions really cared to affiliate themselves to it. Its one purpose was to meet and recommend delegates to the International Labour Conference.[13]

Thus, the establishment of a permanent International Labour Organisation with its annual conferences, to which delegates from all member countries are sent and at which questions affecting the life of working class come up for discussion is one reason why labour organisation like the AITUC once formed did not die.[14] The increased status which the ILO has conferred on labour could only be maintained by keeping the association alive and the need for labour to recommend delegates annually to the Conference induced labour to organise itself and speak in a representative capacity.[15]

However, it may be right to conclude that the AITUC which was established in 1920 was not the result of a genuine demand on the part of the labour unions for a co-ordinated action but was prompted by the desire to recommend to the Government of India workers' delegate to the International Labour Conference.

The Right under the Legislative Framework

The need for legislation on trade unions became apparent in the aftermath of the Madras labour dispute which we have mentioned earlier.[16] The Madras case was not proceeded with because Mr. Wadia had privately settled the dispute.[17] But the interim injunction against Mr. Wadia for his trade union activities suggested that in the absence of legislation even legitimate trade union activity was attended by considerable peril. The interlocutory decision of the case rendered the position of workers and union officials insecure. It was generally felt that if the legitimate functions of the trade unions were to be carried on, immunity from certain civil and criminal liabilities should be conferred on unions and their officers. Accordingly, the issue of trade union legislation

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13 See, Lokanathan, supra note 5, at p.168.
14 Ibid., at p.162.
15 Id.
16 See above.
17 See, Loknathan, P. S., supra note 5, at p.184.

came up before the first session of the reformed legislature,[18] in consequence of a suit arising out of a trade dispute in Madras and prompted Mr. N. M. Joshi to move the following Resolution in the Legislative Assembly:

> This assembly recommends to the Governor-General in Council that he should take steps to introduce, at an early date, in the Indian legislature, such legislation as may be necessary for the registration of the trade unions and for the protection of trade unionists and trade union officials from civil and criminal liability for bona fide trade union activities.[19]

When discussion on the Resolution began, Sir Thomas Holland, the Minister of Industries, accepted that trade unions were inevitable and observed:

> Trades unions are not only inevitable but our treaty conditions with Germany and Austria demand that we shall recognise the right of association for all lawful purposes by the employed as well as by the employer. We can not go back on our obligations, obligations incurred by treaties that have been ratified on behalf of India as well as on behalf of other parts of British Empire.[20]

However, there were some who viewed the Resolution to be premature[21] and by accepting such a Resolution the Government was going to take responsibility of organising strikes against capitalists.[22] Mr. J. N. Mukherjea, a member of the Legislative Assembly, moved an amendment to the effect that the words "from civil and criminal liability for *bona fide* trade union activities" be omitted.[23] Since it asked for protection of trade unionists and trade union officials from civil and criminal liabilities for *bona fide* trade union activities, according to him, it meant the termination of all civil and criminal administration in the country.

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18 Since the introduction of the constitutional changes under the Montague-Chelmsford Reforms as incorporated in the Government of India (Amendment) Act, 1919, the central legislature had the power to legislate in respect of all labour subjects, while provincial legislatures had power to legislate only in respect of those labour subjects which were classified as provincial and that too only with the sanction of the Governor General.

19 Supra note 3, at p.486.

20 Ibid., at p.491.

21 Ibid., at p.496.

22 Ibid., at p.499.

23 Id.

Sir Thomas Holland went further and asserted that in the case of trade union activities, the so-called *bona fide* activities, were a source of very great danger. In support of his contention he gave an example which, though exaggerated as he admitted, was as follows:

> A trade union official who is protected in this manner because of his *bona fide* activities on behalf of the union might escape being charged with the murder of his employer if the trade union official was sincerely convinced that the murder would lead to a rise in wages or say, the conclusion of strike, and that he had no malice whatsoever against the employer.[24]

Accordingly, he suggested the following Resolution which was adopted by the House:

> This Assembly recommends to the Governor General in Council that he should take steps to introduce, as soon as practicable, in the Indian Legislature, such legislation as may be necessary for the registration of trade unions.[25]

The adoption of the Resolution was the first step towards recognising the right of association of Indian workers. Nevertheless, it was suggested by one of the members of the Legislative Assembly[26] that it was too early for encouraging the growth of trade unions, by means of legislation.[27]

The Resolution was adopted on March 1, but the Government of India did not publish tentative proposals for legislation until September 1921,[28] and thus provoked a large mass of opinions.[29] Discussing these later in the Legislative Assembly Sir Bhupendra Nath Mitra, who introduced a Bill to provide for the registration of trade unions and in certain respects to define the law relating to registered trade unions in British India, informed the House:

> The opinions expressed in response to our invitation are remarkable for their diversity. There are some who considered the proposed legislation to be premature and who would prefer that we should not proceed with it at all. There are some others who, while recognising the need for the proposed legislation, apparently considered trade unions to be dangerous and

24 Ibid., at p.505.
25 Ibid., at p.506.
26 Mr. Khan Bahadur Chaudhuri Wajid Hussain.
27 Supra note 3, at p.504.
28 ILO, Freedom of Association, Vol. 5, No. 32, Geneva, 1930, at p.330.
29 See, Report of the Indian Statutory Commission, Vol. 5, London, 1930, at p.1498.

> pernicious growths whose activities should be controlled rigidly so that they may not eventually overwhelm the Commonwealth.[30]

During the course of debate, one member of the Assembly[31] recalled India's obligation under the Treaty of Versailles, emphasising the need and importance for the proposed legislation. He observed:

> My contention is that you are pledged to the principle of this legislation. Under Article 427 of the Peace Treaty every subscribing nation is pledged to the recognition of the right of association. You cannot go back on that. That right is inherent and it is because that right is inherent that we are claiming that you should introduce this legislation.[32]

After lengthy debates in the Legislative Assembly, the Bill was passed in March 1926 as the Trade Unions Act, 1926 and came into effect from 1 June 1927. The Preamble of the Act provided that it was an Act to provide for the registration of trade unions and, in certain respects, define the law relating to registered trade unions. It appears that the Act presupposed the existence of such unions and intended to put them under a legal framework. Once a trade union was registered, then to define the law governing the course and conduct of the said registered union was the other object of the Act. This resulted in one inevitable conclusion, that all unregistered trade unions remained unaffected by the several restrictive and beneficial provisions of the Act.

Explaining the standpoint of the Government of India, Sir Thomas Holland, made a rather bold statement during the course of debate:

> However, it is clear to the Government that registration should be optional, it is equally clear to the Government that unregistered trade unions should not be allowed to participate in the protective provisions of the Bill, *for any other course would defeat the object of the Bill which is to foster the growth of trade unions on healthy lines.*[33]

This categorical statement leaves no doubt as to the uppermost concern of the Government which was to foster the development of the Indian Trade Union on 'proper lines', as understood by the Government.

The term 'trade union' was defined in Section 2 of the Act as meaning:

> Any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or

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30 The Legislative Assembly Debates, Vol 5, Part 1, Delhi, 1925, at p.78.

31 Mr. Chaman Lall.

32 Supra note 30, at p.755.

33 Ibid., at 473. *Italics* added.

between workmen and workmen, or between employers an employers, or of imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more trade unions.

An analysis of the above definition shows that in order to constitute a trade union, first, there should be a combination of workmen or of employers. Secondly, the purpose and object of combination should be either to regulate relations between the parties as specified or to impose restrictive conditions on the conduct of any trade or business. Ordinarily understood, trade unions are combinations of workmen only. But the definition as provided in the Act extended such meaning to employers' association as well.

Formation of trade unions under the Act was purely permissive in nature. Any seven or more members could apply for registration of a trade union (section 4). It did not provide for compulsory registration nor in any way declared that unregistered trade unions be illegal. One of its greatest lacuna was that it did not provide any clause by which employers' would remain bound to recognise a union which would be registered under the Act. In a Circular Letter dated 12 September, 1921 addressed to local Governments and administration in pursuance of the resolution adopted on 1 March, 1921, the Government of India, without giving any reasons expressed:

In the opinion of the Government of India it is neither desirable nor possible to compel employers to recognise all unions.34

Hence, employers could refuse recognition of a union even when registered under the Act. It is very interesting to note that during the course of debate on the Trade Union Bill, not a single member raised the question of recognition and it appears that they accepted Government's stand on the issue.

Considering the acute shortage of trade union leaders from the rank and file, the framers of the Act made a special provision enabling non-workers to take part in the organisation and management of trade unions. According to section 22 of the Act, 50% of the total office bearers of a union could consist of persons who were not actually employees or engaged in the industry with which the union was connected. Except for this clear-cut provision, no other rigid condition was imposed on outside leaders; they could be officers on a full time or on a part time basis; with or without remuneration from the union. It was at that time a good step

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[34] Supra note 28, at p.330.

indeed. Because a key requirement of efficient unionism is a sufficient supply of qualified leadership and the Indian movement was seriously deficient in this regard as many workers were illiterate and had low levels of education. Paradoxically, the qualifications needed for union leadership in India were unusually high since English was the principal language of unionism and labour relations. Labour laws, Government reports, adjudication proceeding, and employer-union correspondence were overwhelmingly in English, though it was not the vernacular used by the working people.

The most important immunity conferred by the Act[35] on the officers and members of a registered trade union was the immunity from punishment under Section 120-B of the Penal Code.[36] If this provision had not been incorporated in the Act there would have been no immunity for trade unionists and like others they would have been subject to the charge of criminal conspiracy punishable with six months imprisonment or with fine or with both. Section 18 provided that no suit or other legal proceeding shall be maintainable in any civil court against any registered trade union or any officer or member in respect of any act done in contemplation or furtherance of a trade dispute to which a member of a trade union was a party on the ground that such act induced some other persons to break a contract of employment. Hence, it is evident that there was protection for acts done in furtherance of an industrial dispute. An important type of action which this clause prevented was a suit arising out of the persuasion of others to join in a strike amounting to a breach of contract on the part of workmen.

The Trade Unions Act, 1926 did not contain any clause regarding or prohibiting strikes. As it made an important omission on the subject, so the position could be explained as that the workers of a registered trade union had the right to strike. Even during the discussion in the Legislative Assembly on the Resolution which led to the adoption of the Act, Sir Thomas Holland expressed:

> Workers have perfect right to strike. Whether they are under Government or under private employer, they have an absolute right to strike.[37]

However, in course of time the Government changed its notion and passed the Trade Disputes Act, 1929 which under Article 15(1) provided

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35 Section 17 of the Trade Unions Act, 1926.

36 See the Penal Code for provision of section 120-B.

37 Supra note 3, at p.493.

restrictions[38] for strikes in public utility services.[39] This in fact caused a serious handicap in the exercise of the right of association as 'public utility services' covered wide range of establishments. Even those leaders who were considered acceptable by the Government such as N. M. Joshi who was a member of the Royal Commission on Labour in India, characterised the Trade Disputes Act,1929 as "reactionary and mischievous" contending that it would "help the employers and not labourers."[40]

Immediately after the passing of the Trade Disputes Act, 1929 the Government of India on 24 May 1929 appointed a Royal Commission on Labour in India under the chairmanship of Rt. Honourable Mr. J. H. Whitley, known as Whitley Commission. The Commission submitted its Report in June 1931. Some considered the Report to be a Magna Carta of labour in India[41] and it formed the basis of the future labour policy of the Government in the years to come.[42]

The Commission made far reaching recommendations, any detailed analysis of which is beyond the scope of this article. However, following the publication of the Commission's Report there was a spate of legislation. Out of 24 labour enactments adopted by the Central and Provincial Legislatures during years 1932 to 1937 as many as 19 were in implementation of the Commission's suggestions.[43] However, though the

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[38] "Any person who, being employed in a public utility service, goes on strike in breach of contract without having given to his employer, within one month before so striking, not less than fourteen days previous notice in writing of his intention to go on strike before the expiry thereof, shall be punishable with imprisonment which may extend to one month, or with fine which may extend to fifty rupees, or with both."

[39] According to section 2(g) 'public utility service' meant: i) any railway service which the Governor-General-in-Council may by notification in Gazette of India, declare to be of a public utility service for the purpose of this Act; or ii) any postal, telegraph or telephone service; or iii) any industry, business or undertaking which supplies light or water to the public; or iv) any system of public conservancy or sanitation.

[40] Karnik, V. B. Strikes in India, Bombay, 1967, at p.176.

[41] Menon, V. K. R.,"The Influence of International Labour Convention on Indian Legislation," 73 (1956) International Labour Review, at p.556.

[42] Vidyarthi, R. D., Growth of Labour Legislation in India Since 1939 and Its Impact on Economic Development, Calcutta, 1961, at p.39.

[43] Supra note 41, at p.557.

Commission recommended recognition of unions by employers,[44] nothing was done to implement that recommendation.[45]

On the contrary, the situation was such that at the 1933 International Labour Conference in Geneva the Indian workers' delegate asserted that there was 'unmistakable evidence' that the authorities were willing to act in combination with employers in order to silence the workers, and deprive them of their legitimate means of protection, namely, the right of association and of strike.[46] However, at a Conference of Government representatives, employers and workers, held at New Delhi in August in 1942, it was decided to establish a permanent tripartite labour organisation in India, composed of an Annual Conference and Standing Committee, on the model of ILO.[47] This decision was an important step in the evolution of the machinery of industrial relations in India. No doubt it was a development which had been facilitated to no small extent by India's association with the ILO.

It was exactly in the same year, under pressure of increased production for the allies' war supplies in the Second World War and to ensure that relations between employers and workers did not get strained and thereby upset the machinery of production in industries engaged on war work, that the Government of India in January 1942 added Rule 81-A of the Defence of India Rules. This new Rule empowered the Central Government to prohibit strikes or lock-outs and to refer any dispute for conciliation and adjudication. Soon the Rule was modified by an order

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44 Report of the Royal Commission on Labour in India, London, 1931, at p.326.

45 However, the Trade Unions (Amendment) Act, 1947 provided recognition of unions by employers but it never came into force as it required Gazette Notification by the Government which was lacking.

46 "When the workers of the Madras and Southern Maharatta Railway workshops went on strike sometime ago, as a protest against the overriding by the chief executive of the Railway Company the terms of an agreement he had come with the Trade Union concerned as regards reduction of staff, the Government turned down the request and supported the Railway executive in its action. In the Indian Textile Industries the employers have started a war of attrition against the workers. The mill owners are making a joint and systematic attempt to reduce wages in mills individually, and the workers affected in each mill are prevented by police action from organising demonstrations or from combining with the workers in other means in a general strike." Extract from Proceedings of the International Labour Conference, Geneva, 1933, at p.203.

47 ILO, "The Institution of Tripartite Labour Organisation in India: The Influence of the ILO", 47 (1943) International Labour Review, p.1.

passed under the Rule in August 1942 which provided that 14 days notice should be given to the employer within one month before striking, and when a dispute is referred for conciliation and adjudication the workers would be prevented from going on strike until the expiry of two months after the conclusion of the proceeding upon such a reference.[48] Wartime experience, however, had led the Government to feel that Rule 81-A of the Defence of India Rules was extremely useful and that its incorporation in the permanent labour law of the country would do much to quell the industrial unrest which was gaining momentum owing to the stress of post-war industrial readjustments. The main provisions of the Rule in regard to the public utility services were, therefore, retained intact in the Industrial Disputes Act, 1947, which replaced the Trade Disputes Act, 1929.

The history of the development of labour legislation in India indicates that the enactment of various labour statutes was done as and when warranted by circumstances or under several pressures. A consistent and planned labour policy was conspicuous by its absence. Under stress of conditions created by the Second World War and more particularly the need for greater production, the Government of India realised that the problem of labour could be best tackled on the basis of a carefully drawn plan.[49] Accordingly, in 1946 the Central Ministry of Labour worked out a Five Year Programme for the amelioration of labour conditions through legislative and administrative measures.[50] This Five Year Programme can be said to have formed the basis of future labour legislation and reform. The Programme, however, could not be implemented as the year 1947 witnessed the split of British India. However, we will see in our discussion in the next Section whether the Programme had any influence on subsequent Pakistan Government's labour policy.

In order to determine the state of right to freedom of association in the closing years of the British rule in India, the report of Labour Investigation Committee may be quoted which submitted its report in 1946, observing :

> From such evidence as we were able to obtain during the course of our enquiries, we found that, barring a few honourable exceptions such as

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48 Government of India, Labour Investigation Committee, (Main Report), New Delhi, 1946, at p.68.

49 Vaid, K. N., State and Labour In India, Bombay, 1965, at p.218.

50 Government of India, The Indian Labour Year Book, Simla, 1947-48, at p.95.

> municipal and port trust administrations and a few individual employers, freedom of association exists only in name.[51]

The Committee further emphasised:

> It is not to say, however, that the workers in this country are not permitted to organise themselves into trade unions and, in point of fact, in the year 1943, there were in the country as many as 693 registered trade unions. Very few of these unions have, however, been recognised by the employers and even where they are, the relations between the two are far from cordial. Moreover, excepting a few enlightened employers, most others in the country are inclined to look upon trade unions as no better than necessary evils.[52]

From the above observations it is evident that the situation had not changed from that of 1927 when the Government claimed that there was full right of association enjoyed in India. Mr. V.V.Giri, the workers delegate to the International Labour Conference, declared:

> Speaking on the question of freedom of association, I might just mention that we have not much of it, and even organised association in India are practically suppressed and gagged when the real issues between employers and the employees arise.[53]

THE PAKISTAN PERIOD (1947-1971)

The decade that followed immediately after the second World War saw the independence of many Asian countries from colonial rule. In 1947, the British India was partitioned to form two sovereign states; India and Pakistan. After independence, the Government of Pakistan adopted the entire labour legislation as it existed at the time of partition under the Pakistan (Continuation of Existing Laws) Order, 1947. From the discussion of the preceding section it is apparent that when Pakistan became independent in 1947, it did not start with a clean slate in labour matters including the right of association. We shall now proceed to outline chronologically the course and character of right of association as evolved during the Pakistan period.

The Decade following Independence

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51 Supra note 48, at p.372.

52 Id.

53 ILO, Record of Proceedings, ILC, 10th Session, Geneva, 1927, at p.99.

We have noted earlier that during the days of colonial rule there was no formal declared policy with regard to labour. The newly independent Government of Pakistan carried the colonial legacy for almost a decade. It was only on 15 August, 1955 that there was a formal declaration of labour policy by the Government of Pakistan. It must, however, be emphasised that in the intervening period the attitude of the Government was not one of non-interference in labour matters. In February 1949, the first Pakistan Labour Conference, composed of the representatives of the Government, employers and workers was convened and the Five Year Programme of work inherited from India[54] was laid before it to decide as to what extent and in which direction the Programme "should be taken up in the light of the labour conditions prevailing in Pakistan."[55] The Conference approved the Five Year Programme of work.[56] Thus, in the intervening period the labour policy of the Government comprised the Five Year Programme of work in the field of labour drawn up by the Indian Government before the partition, in October 1946. This can be said to have formed the labour policy of the Government without a formal declaration.

It appears that the first Conference took some positive decisions for the development of right of association. The Conference, *inter alia*, decided that the Trade Union (Amendment) Bill, 1947 which was pending from the Indian Legislative Assembly should be proceeded with and enacted as soon as possible,[57] taking into consideration any suggestions which workers and employers might put forward.[58] It was also decided in the Conference that the ILO Convention No. 87 which was adopted by the ILO in 1948 should be ratified by the Government of Pakistan and the proposed Convention on Right to Organise and to Bargain Collectively should be supported by Pakistan at the next session of the Conference.[59]

Hence, it can be asserted that after independence the first Tripartite Labour Conference genuinely took a positive stance towards the

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[54] The Programme *inter alia* contained suggestions for suitable amendment of the Trade Unions Act, 1926.

[55] Shafi, M., Eleven Years of Labour Policy, Karachi, 1959, at p.1.

[56] Id.

[57] The Bill *inter alia* provided for compulsory recognition of union by the employers and the elimination of unfair labour practice on the part of the employers.

[58] 2 (March, 1949) Eastern Pakistan Labour Journal, , at p.5.

[59] Ibid., pp.5-6.

protection of the right of association. The Government of Pakistan also acted positively in accordance with the decision of the Conference, supported the adoption of the Right to Organise and Collective Bargaining Convention (No. 98) at the next session of the International Labour Conference and subsequently ratified Convention No. 87 on 14 February, 1951, and Convention No. 98 on 26 May, 1952.

The Government by ratifying the Conventions undertook to abide by the provisions of the Conventions. But this raises the question whether the existing legislation was in harmony with the Conventions. From our discussion in the previous section, it is apparent that the Trade Unions Act, 1926 contained some provisions which could not be said to be compatible with the provisions of the Conventions. However, it was perfectly valid for the Government to take necessary steps subsequent to the ratification. Thus, we need to examine the intention and action of the Government and determine whether the Government was really keen to implement the provisions of the Conventions at the national level.

It was only two months after the adoption of the ILO Convention No. 87 that the Cabinet Secretariat of the Government of Pakistan issued a Notification on 30 August 1948 dealing with associations of employees of the Central Government.[60] The Notification provided instructions for the recognition of association of employees of the Central Government, other than associations of industrial employees. In clause 2 of the Notification it was stated that the Government would recognise association of its employees, provided that each such association consisted of a distinct "class"[61] of Government employees. As to the membership of association, clause 3 of the Notification provided:

> Every Government employee of the same class actually in service shall be eligible for membership of the association representing that class and only members of that class actually in service shall be so eligible.

The Notification as described above was in clear contradiction of Article 2 of the Freedom of Association and Protection of the Right to

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60 See, Establishment Division Notification No. 6/1/48-Ests. (S. E.) of 30 August 1948.

61 According to clause 2 of the Notification: "class means either one of the classes into which the Government servants may be broadly classified: i.e., class I, Class II, Class III and Class IV, or any association of Government servants within one class whose special position may warrant the formation of a separate association and which the Government is prepared to recognise."

Organise Convention, 1948, (No. 87) which provides right to "join organisation of their own choosing" — a right which had been curtailed by the Notification.[62] Actually, the restrictions applied only to those associations which tried to seek official recognition by the Government. Hence, the Government employees were at liberty to establish and join unrecognised organisations of their own choosing, without being compelled to belong to associations representing their category.

Soon after the ratification of Convention Nos. 87 and 98 the Government, in 1952, promulgated the Security of Pakistan Act.[63] The Act provided that an organisation could be disbanded and wound up under section 10, if it acted in a manner prejudicial to the defence and security of Pakistan or to the maintenance of supplies and services essential to the community or maintenance of public order. The Act did not provide any clause by which an organisation so charged could be asked to show cause against such action before disbanding nor was there any provision for appeal against such a decision. Further, there was no provision in the Act for the revival of the dissolved organisation. The Government could take possession of any property or documents of the dissolved organisation. clause 6 of section 10 provided that contravention of any of the provisions would be punishable by imprisonment for a term which may extend to 3 years or with fine, or with both. This leads us to the conclusion that the immunities to trade unionists granted under the Trade Unions Act, 1926 were no more than a formality that meant little in practice. If the Government decided to arrest a trade unionist, he could be arrested and charged without difficulty under the vague terms of the Security of Pakistan Act, 1952.

The Five Year Programme adopted by the first Pakistan labour Conference in February 1949 was to be completed by February 1954. But having done nothing in respect of the Programme, after numerous representations and strong protests by labour including the possibility of a general strike in the whole country, the Government made a formal announcement of its first labour policy on 15 August 1955.[64] If one carefully compares this policy with the Five Year Programme of labour approved in 1949, one would find almost no difference in fundamentals;

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62 For the ILO Committee of Experts opinion on the Notification, see below, chapter 5, pp.199-202.

63 The Gazette of Pakistan, Extraordinary, 1952, at p.553.

64 Supra note 55, at p.4.

in fact almost all the items were common though there had been some difference in the phraseology and minor detail. The main contents, objectives and even legislative and administrative measures proposed to achieve were almost identical.

It can be argued that there was no compulsion on the Government to adopt the Five Year Programme in 1949. It undertook this obligation of its own decision. It could well refuse to be party to it. In the state of affairs that followed it would have been much easier if no Five Year Programme had been adopted. It would have spared the Government from criticism. But having publicly announced a programme and subsequently failing to implement it in the five year period, the Government landed itself in a position almost impossible to defend.

The new policy began with the statement:

> It is the policy of Government to encourage growth of genuine and healthy trade unions in order to promote healthy collective bargaining on the part of labour and to enable it to conduct negotiations with the appreciation of the country's economy.[65]

The policy further provided that "the system of collective bargaining should be encouraged and developed."[66] The policy seems to have suffered from a contradiction since from the Government's point of view, conciliation and arbitration provided a superior basis for industrial negotiations than free collective bargaining because of the strikes and work stoppage which the latter process necessarily entailed. The Preamble of the policy made this quite clear:

> In this country where industrialisation is in its early stages, Government is anxious that, while labour should get its just rights, industry should not be hampered by unnecessary upheavals and strikes. Government, therefore, believes in promoting the settlement of disputes between employees in the interest of industrial peace through constitutional means.[67]

Actually, the Government of Pakistan had little doubt, from the outset, concerning its priorities when presented with the choice between identifying "rapid economic development" with the interest of employers, and "social justice" identified with the interest of the workers, which was

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65 See, Labour Policy 1955 in Shafi, M., Labour Policy of the Government of Pakistan, Karachi, 1961, at p.35.

66 Id.

67 Id.

assumed to militate against rapid economic development. The subordinate role of labour in the hierarchy of interests of the Government was stated with appropriate rhetorical ambivalence by the Prime Minister in his address to the first Tripartite Labour Conference in 1949 where he said:

> We must create conditions which are favourable to labour. My Government will take all necessary steps to see that labour gets its due share in all enterprises ... . Labour must remember that the interest of Pakistan comes before the interest of any individual or class of individuals and must not do anything which in any way weakens Pakistan. If Pakistan endures and prospers the problem that Pakistan labour has can be solved.[68]

The policy provided that "provision should be made in the Trade Unions Act for determination of recognition or non-recognition of a trade union by a judicial authority."[69] Thus, on recognition of trade unions the Policy departed from the Trade Unions (Amendment) Act, 1947 and the earlier Five Year Programme which provided for compulsory recognition of unions by the employers. It may be pointed out that the Trade Union (Amendment) Act, 1947 which was passed by the Indian Legislature[70] and subsequently discussed in various Tripartite Labour Conferences provided for recognition of unions by employers.

Although, at the time of declaring the policy the Government of Pakistan had ratified ILO Convention Nos. 87 and 98, yet it is unfortunate that the Government did not show its intention to abide by its international obligation as it was expressed in the policy that "non industrial employees of the Government may be allowed to form Service Associations and follow the instructions of the Cabinet Secretariat concerning their recognition."[71] Further, with regard to civil servants the policy stated:

> Since civil servants can form their own associations, they should not be allowed to form trade unions and since their conditions of service are different from other workers, they should not be allowed to affiliate their associations with associations of trade unions.[72]

Hence, it is apparent that ratification of those Conventions had no influence on the policy makers who, ignoring Article 2 of Convention No. 87, reaffirmed its old stand on the issue.[73]

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[68] Supra note 58, at pp.13-14.

[69] Supra note 65, at p.36.

[70] Supra note 45, p.87.

[71] Supra note 65, at p.37.

[72] Ibid., at p.38.

[73] See, discussion above and also the Establishment Division Notification No.

It was not until 1956 that the Government of Pakistan adopted its first Constitution. According to the Indian Independence Act, 1947, the Government of India Act, 1935 was its interim Constitution which did not provide any Bill of Rights. The 1956 Constitution of Pakistan made a significant departure in this regard by providing a Bill of Rights. Article 10 provided:

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

The insertion of this right in the Constitution was the first constitutional recognition of the right to freedom of association in independent Pakistan.[74]

Under Article 102 of the Constitution, the provincial Governments could promulgate labour legislation. Accordingly, the Governor of East Pakistan promulgated the East Pakistan Trade Unions (Recognition) Ordinance, 1958.[75] Instead of providing for compulsory recognition of trade unions by employers, the Ordinance laid down recognition by agreement of registered unions.[76] Having failed to obtain such recognition, trade unions could apply to the Registrar. Surprisingly such recognition, be it by agreement or by order of the Registrar, was only for a period of one year and on the expiry of the period, the unions could again apply for recognition.[77] By providing for a limited period of recognition and requiring unions to apply again, the Government expressed its intent to intervene regularly and directly in industrial relations. Nevertheless, it was the first piece of legislation which provided some form of recognition of unions. Further, the Ordinance, without using the term `collective bargaining' provided that the executive of a recognised union shall be entitled to negotiate with employers in respect of matters connected with employment or non employment or the conditions of labour of all or any of its members.[78] This provision for the first time elevated the position of workers in respect of bargaining with their employers, since workers'

6/1/48-Ests. (S.E) of 30 August, 1948.

74 For discussion on the constitutional perspectives of the right of association, see below.

75 Dhaka Gazette Extraordinary, 27 January 1958, pp.561-565.

76 See section 3 of the East Pakistan Trade Unions (Recognition) Ordinance, 1958.

77 Ibid., section 4.

78 Ibid., section 3.

representatives could enter into negotiation with employers on issues as stated above. Thus it appears that after ratification of Convention No. 98, it was the first legislative step by the provincial Government to incorporate provisions on the right to bargaining. It needs to be mentioned that the legislation was supplementary to the Trade Unions Act, 1926 and did not amend any provisions of the Act. However, this was the gift of Provincial Legislature of East Pakistan and applied to East Pakistan. Now the obvious question arises, what was the role of the Central Legislature?

It is apparent from our discussion that since independence, the Central Government failed to promulgate any positive legislation in respect of workers' right of association and the proposed amendment of the Trade Unions Act, 1926 suffered from bureaucratic statements of "under consideration" and "being revised".[79] Hence, nothing was achieved during this period. It is most surprising that the Tripartite National Labour Conference which was held every year never bothered to inquire from the Government as to what action the Government took on the discussions of the previous session. This suited the employers, but what about the workers? It seems that the Government was never serious about the outcome of its discussions. It had implicitly decided to take no action over a period of years and the Conference was treated merely as a debating club. By ratifying Convention Nos. 87 and 98 on 14 February 1951 and on 26 May, respectively, the Government of Pakistan entered into an international commitment to implement its provisions. But since ratification, more than six years passed without any positive action from the Central Government of Pakistan to incorporate the provisions of the Conventions in domestic legislation.

The First Martial Law Period

In 1958, against the background of nation-wide political upsurge and demands for a general election,[80] General Iskander Mirza, the President of Pakistan, with the collaboration of General Ayub Khan, the commander in chief of the army, proclaimed Martial Law,[81] dismantling the paraphernalia

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79 Supra note 55, at pp.22-24.

80 See, Shaheed, Z. A., The Organisation and Leadership of Industrial Labour in Karachi (Pakistan), Unpublished Ph.D Thesis, 1977, University of Leeds, UK., at p.158.

81 For, the Proclamation of Martial Law, see, Pakistan Legal Decision, (Central Statutes), 1958, at p.577.

of parliamentary Government and abrogating the Constitution of 1956. The declaration of Martial law was a serious setback for the development of the right of association since the constitutional guarantee ceased to exist.[82] The labour laws of the country remained in force after the declaration of Martial Law on 7 October, 1958.

The failure to implement the Labour Policy of 1955 led the Martial Law Government to announce its revised policy in 1959. The new policy made a significant departure from the earlier one in respect of Government's international commitment as the policy began with the statement:

> The policy of the Government of Pakistan in the field of labour shall be based on the ILO Conventions and Recommendations ratified by Pakistan.[83]

It is of interest to note that the 1955 policy did not contain any clause referring to the ILO. From the ILO point of view, in matters of collective bargaining the policy was very optimistic and encouraging as it was declared:

> The employers and workers should negotiate with each other the terms and conditions of employment and conclude collective agreements in fulfilling the commitment made by Government in ratifying the ILO Convention (No. 98) concerning Right to Organise and to Bargain Collectively.[84]

The above declaration was indeed a landmark in the annals of industrial relations, as it was for the first time that the Government in principle recognised the concept of collective bargaining. Though the term collective bargaining had not been used, but "collective agreement" as referred to above essentially indicated the essence of the meaning of collective bargaining within the meaning of Convention No. 98. Further, by declaring as above, the Government expressed its intention to abide by and fulfil its international obligations arising out of ratification.

Like the Five Year Programme and the earlier labour policy of 1955, the new policy emphasised on recognition of trade unions in the following terms:

> In order that there is compulsory recognition of trade unions by the employers, steps shall be taken immediately to set-up a machinery which can decide which union is worthy of recognition. The trade union having

82 Article 10 of the Constitution guaranteed the right of association.

83 Supra note 65, at p.1.

84 Ibid., at p.7.

support of the majority of the workers in an establishment and a membership of at least 10 percent of the total numbers in that establishment should be recognised.[85]

Following the declaration of labour policy, on 24 April, 1960, the Martial Law Government promulgated the Trade unions (Amendment) Ordinance, 1960. This Ordinance, *inter alia*, introduced provisions for recognition of trade unions by employers. Such recognition was not unconditional but subject to fulfilment of conditions laid down under section 28-B(1). Section 28-B(1) made it obligatory for an employer to recognise a trade union within three months of its application if the union fulfilled the conditions (a) to (f) specified in that section.[86] An employer was bound to recognise if all six conditions were fulfilled. If not, there was no obligation on him to recognise. Even after fulfilling the conditions, if an employer refused to recognise, the unions could apply to Industrial Court for such recognition (section, 28-C). Section 32-A provided that if an employer did not recognise a trade union after the Industrial Court had by order directed such recognition then the employer was punishable with a fine up to two thousand rupees. There was no other penalty. Thus, the price to an employer of refusal to recognise a trade union was a maximum of two thousand rupees. On setting aside this sum, he could successfully defeat all the provisions of the Ordinance concerning recognition. Thus, if the employers did not change their attitude towards workers' organisations,

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85 Id.

86 Section 28 B(1) reads as follows:
An employer shall recognise a Trade Union, if it fulfils the following conditions, namely:
(a) that it is a registered Trade Union and has complied with all the provisions of this Act;
(b) that all its ordinary members are workmen employed in the same industry or in industries allied to or connected with one another;
(c) that, where there are more than one trade union, the number of its members is not less than ten per cent of the total number of workmen employed in such industry or industries, and exceeds the number of members of every other Trade Union in such industry or industries;
(d) that its rules provide for the procedure for declaring a strike;
(e) that its rules provide for the holding of a meeting of the executive at least once in every six months and for holding a general meeting of the Trade Union once in every year; and
(f) that its rules do not provide for the exclusion of any class of workmen referred to in clause (b) from the membership of the Trade Union.

the Ordinance was of little importance as they could frustrate the object of the Ordinance.

Whatever criticism may be articulated against the provisions of recognition as provided in the Ordinance, there is no denying the fact that a law providing for recognition of trade unions was long overdue and had been 'under consideration' in the hands of central Government for the previous twelve years. In fact a Bill to this effect had been introduced in the Legislature of undivided India before partition and the central Government of Pakistan was committed to continue the proceedings in respect to that Bill in its Legislature. Unfortunately, the Bill never came up before the legislature, although it was discussed about a dozen times in the Pakistan Labour Conference and the Standing Labour Committee.[87] It was a story of delay resulting in nothing. The Parliamentary Government having failed to do anything, left the job to be done by the Martial law Government with one stroke.

If the employers in general had acted wisely and shown due respect and recognition of workers' organisations, there probably would have been no occasion for incorporating the provisions of recognition in the Ordinance. The promulgation of the Ordinance indicated that the record of the employers had not been encouraging as it was the Ordinance which aimed to satisfy the needs of the situation.

Under the Ordinance, recognised unions had been given the right to bargain with the management, the terms and conditions of employment — a right for which the workers were struggling for several decades. The rights of the recognised trade unions were provided in section 28-D in the following terms:

> The executives of a recognised Trade Union shall be entitled to negotiate with the employer in respect of matters connected with employment, unemployment, the terms of employment, and the conditions of work of all or any its members, and the employer shall receive and reply letters of, and grant interviews to, the executive in connection with any such matters except on issues on which as a result of previous discussion or correspondence with the executive the employer has arrived at a conclusion.

The above provision placed the employer under an obligation to negotiate, correspond and discuss issues with recognised trade unions except those issues "on which as a result of previous discussion or

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[87] See, Shafi, M., "Recognition of Trade Unions," 1:9 (1960) Eastern Worker,. p.78.

correspondence the employer had arrived at a conclusion." Hence, if there had been correspondence in respect of increase in wage and the employer had informed the union executive that he had concluded not to offer any increase in wages, then thereafter he could refuse to bargain collectively. Thus, the above provision fell short of Article 4 of the Convention No. 98 which provides for voluntary negotiation between employers' and workers' organisations but, nevertheless, recognised the workers' right of bargaining with their employers.

However, in order to protect and promote workers right of association, section 28-I specified what actions were to constitute unfair labour practice on the part of employers. It provided:

> For the purposes of this Act, it shall be an unfair practice on the part of an employer:
>
> (a) to interfere with, restrain, or coerce his workmen in the exercise of their rights to organise, form, join, or assist a Trade Union of their choice to engage in concerted activities for the purpose of mutual aid or protection;
>
> (b) to interfere with the formation or administration of any Trade Union or to contribute financial or other support to it;
>
> (c) to discharge, or otherwise discriminate against, any officer of a recognised Trade Union because of his being such officer.

It appears that the above provisions gave effect to Article 1 paragraph (2)(b) and Article 2 of Convention No. 98 but not Article 1 paragraph (2)(a). Thus, the Martial Law Government at least began the process of incorporation of the provisions of the Convention. But at the same time the Government, contrary to its obligation to ensure workers' right to elect representatives in full freedom as envisaged in Article 3 of Convention No. 87, restricted the right by amending section 22 of the Trade Unions Act, 1926 which allowed 50% of the union officers to be outsiders. Section 22 as amended by section 9 of the Trade Unions (Amendment) Ordinance, 1960 provided:

> A registered Trade Union shall not elect more than twenty five percent of the total number of its officers from amongst the persons who are not actually employed or engaged in the industry with which the Trade Union is connected.

Section 3 of the Trade Unions (Amendment) Ordinance, 1961 brought further restrictions on the 'outsider' leadership by introducing a provision that in order to be union executive these category of persons must be paid as full time workers. Actually, the appointment of 'outsiders'

as union executives was viewed by Government to be contrary to the interest of the workers. As such in its labour policy of 1959 the Government expressly declared:

> In order that trade unionism develops in the country on healthy lines, steps shall be taken to ensure that the workers are not exploited by 'outsiders' for their personal and political ends. The Trade Unions Act, 1926 should be suitably amended in this regard.[88]

Similarly, the 1955 labour policy clearly indicated:

> The percentage of representation of 'outsiders' in the union executive should be reduced from 50% to 25% under the Trade Unions Act.[89]

From the above policy statements of successive Governments and the subsequent promulgation of legislation, it is clear that ratification of Convention No. 87 had very little influence on the policy makers and the Government did not intend to abide by its international obligation of allowing the workers to elect their representatives in full freedom.

However, from our above discussion it is apparent that apart from imposing restriction on election of representatives, the Martial Law Government, by amending the Trade Unions Act, 1926 for the first time gave partial effect to Convention No. 98.

The Post Martial Law Period

The Martial Law declared on 7 October 1958 was withdrawn on 8 June 1962 with the adoption of the Constitution of Pakistan of 1962. When President Ayub Khan decided to restore constitutional Government and a new Constitution was in the process of being framed, the demand for incorporation of a Bill of Rights was almost unanimous. The Constitution Commission found that preponderance of opinion (98.39%) was in favour of a Bill of Rights being incorporated in the new Constitution and being made enforceable by the courts as in the previous Constitution.[90] When the Report of the Commission was examined by the Cabinet Sub-Committee, a suggestion was made that the substance of fundamental rights should be laid down within the Constitution as 'principles of law-making', but they should not be enforceable by the Courts. Ultimately this suggestion was approved by those who finally drafted the Constitution.

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88 Supra note 65, at p.6.

89 Ibid., at p.37.

90 Choudhury, G. W., Constitutional Development in Pakistan, London, 1969, at p.240.

The 'principles of law-making' sought to maintain most of the fundamental rights guaranteed under the 1956 Constitution including freedom of association.[91]

These 'principles of law-making' were merely pious declarations and there was no remedy provided, should these principles be violated. It was perhaps meaningless to formulate and declare a long list of rights without providing a machinery to enforce those. The framers of the Constitution tried to justify the new method by citing the case of Britain where Parliament is the custodian of these rights. But in the absence of an English tradition the people could not safely rely on the English method for protecting the basic rights of the citizens.[92] As soon as the Constitution was published there was vehement criticism of the curtailment of the powers of the court in protecting the fundamental rights of the citizen. The issue created a storm of controversy and insistent demands were made on behalf of the people to make these 'principles of law-making' enforceable by the law courts. President Ayub Khan had to respond to the demands of the people and a Bill was introduced by the central Government in the National Assembly during its Dhaka session in March, 1963 and the Bill was assented to by the President in January 1964 and came into force as the Constitution (First Amendment) Act, 1963. It brought an important change in the very concept of the Constitution by making fundamental rights justiciable. It conferred substantially the same terms as in the previous Constitution of 1956, a broad range of rights of individuals and groups, subject in most cases to reasonable restriction in the public interest. Thus, paragraph 7 of chapter I part II of the Constitution guaranteed freedom of association in the identical terms of Article 10 of the 1956 Constitution restoring the right which was abrogated by the proclamation of Martial Law on 7 October 1958.

The Constitution having come into force, the Supreme Court of Pakistan was called upon to uphold the constitutional guarantee of the right in the case of *Abu A'la Maudoodi vs Government of Pakistan.*[93] The matter came before the Court after two petitions being moved on behalf of the Jamat-e-Islami of Pakistan under Article 98 of the Constitution, one in West Pakistan High Court at Lahore[94] and the other in the High Court of

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91 See, Paragraph 4 of Chapter I, Part II of the 1962 Constitution.

92 Supra note 90, at p.241.

93 See, XVI (1964) PLD (SC), p.673.

94 See, XVI (1964) PLD (Karachi), at p.472.

Dhaka[95] — calling in question the Notifications issued by the two provincial Governments on 6 January 1964[96] extending the Criminal Law Amendment Act, 1908 to the two provinces, declaring the Jamat-e-Islami to be unlawful association under section 16 of the said Act.[97] The petition filed at the High Court of Lahore was dismissed but that presented to the High Court at Dhaka succeeded and it was declared that the Notification issued under section 16 of the Criminal Law Amendment Act, 1908, had no longer any binding effect and the provincial Government was directed to rescind, cancel or withdraw the Notification. In the appeal before the Supreme Court, the most important question that fell for determination was whether Section 16 of the Criminal Law Act, 1908 was in conflict with the exercise of fundamental right No. 7 guaranteed by the Constitution.[98] Further, the point that arose for consideration was whether the Act imposed reasonable restrictions on the right to form an association, possessed by every citizen, in the interest of morality or public order.[99]

The virus of the Act were attacked on the ground that it conferred unguided discretion on the Provincial Government to declare an association as unlawful, on the opinion formed subjectively with regard to objective facts and which opinion was not open to judicial review. Secondly, it was urged that this involved condemning an association unheard. There was no provision in that Act for hearing the persons concerned either before or after the declaration of an association as unlawful, so that at no stage the point of view of the persons affected could be presented to relevant authorities. Thirdly, there was no provision for appeal from the order of the Provincial Government, whether of an executive or judicial kind. Fourthly, it was urged that the Notification

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95 See, XVI (1964) PLD (Dacca), at p.795.

96 The notification issued by the Governor of East Pakistan was as follows:
"Whereas the Governor of East Pakistan is of opinion that the association known as Jamat-e-Islami has for its object interference of law and order, and that its activities are such as to constitute a danger to the public peace.
Now, therefore, in exercise of the powers conferred by sub Section (i) of Section 16 of the Criminal Law Amendment Act, 1908 (Act XIV 1908), the Governor is pleased to declare the Jamat-e-Islami to be an unlawful Association within the meaning of Part II of the said Act."

97 For the provisions of section 16 of the Criminal Law Amendment Act, 1908, see above.

98 Supra note 93, at p.729.

99 Ibid., at p.730.

issued was to last indefinitely. These aspects of the impugned Act, it was argued by the appellants, were enough to condemn it as imposing unreasonable restrictions on fundamental right of citizens to form an association.[100]

The Supreme Court was in agreement with the above submission and accordingly the decision of East Pakistan High Court was upheld. To quote Justice S. A. Rahman:

> After considering the matter in all its aspects I have reached to the conclusion that the impugned Act of 1908 imposes restrictions on the exercise of the fundamental right of forming associations which can not be described as reasonable.[101]

His lordship further emphasised:

> I am therefore, firmly of the opinion that the provisions of Act XIV of 1908 violative as they are, of the exercise of the fundamental right of forming associations, must be condemned as imposing unreasonable restrictions on that right. The Act must consequently be declared to be void to the extent of its inconsistency with fundamental right No. 7.

The above decision was indeed a landmark in the annals of exercise of right of association which curtailed the powers of Provincial Government to declare an association as unlawful under section 16 of the of the Act. The impugned Act conferred an arbitrary power on the Provincial Government to put an end of the existence of an association. This unguided discretion was subject to no check, judicial or otherwise, and could become an engine of suppression and oppression of functioning any association at the hands of the Government.

In 1965, the Government of East Pakistan enacted the East Pakistan Trade Unions Act, 1965 repealing the Trade Unions Act, 1926. The object was to re-enact the Trade Unions Act, 1926 with certain amendments to provide for a more realistic manner of registration and recognition of trade unions in the province.[102]

A reading of the provisions of the Act shows the other side of the coin. It was far from being 'more realistic' and did not intend to facilitate healthy growth of trade unions and was more restrictive than the repealed Act. The registration of trade unions was made more difficult by imposing

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100 Ibid., at p.730.
101 Ibid., at p.734.
102 For the Statement of Objects and Reasons of the Act, see, Dhaka Gazette Extraordinary, 26 July 1965, at p.1109.

new and additional conditions. For example, in order to be registered and recognised, a trade union needed to have a minimum membership of one hundred workers or ten per cent of the total of workers employed in the establishment or industry, or whichever was less.[103] On the contrary, under the repealed Act,[104] any seven or more members could apply for registration of a union.

The new Act further limited the scope of 'outsider' participation in the union executive as in section 24 (1) (c) it was provided that such category of persons must be from amongst those "whose principal advocation is trade unionism." Thus, there was an absolute bar on the election of 'outsiders' as officers of trade unions. Only those persons who were employed in the industry or those whose principal advocation was trade unionism (not exceeding 25%) could be elected as officers of the union. The enactment of this provision was in clear violation of Article 3 of Convention No. 87 which advocates for election of representatives in full freedom.

The present Act provided that a union could be required to disclose any financial or other assistance received by it from any source whatsoever either from inside or outside the country.[105] This provision was in clear contradiction to Article 3(2) of Convention No. 87 which provided "public authorities shall refrain from any interference which would restrict this right *of association* or impede the lawful exercise thereof."[106] With regard to recognition of unions the Act represented a retrograde step in the development of right of association since unlike the repealed Act (Trade Unions Act, 1926) as amended by the Trade Union (Amendment) Ordinance, 1960, it did not provide any sanction for non-recognition of unions by employers.[107]

Immediately after the promulgation of the East Pakistan Trade Unions Act, 1965, the conflict between India and Pakistan began and on 6 September 1965 President Ayub Khan, in exercise of the powers conferred by Article 30(1) of the Constitution of Pakistan, 1962, issued a Proclamation of Emergency throughout Pakistan on the plea that a grave emergency existed in which Pakistan was in imminent danger of being

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103 See, East Pakistan Trade Unions Act,1965, section, 6(2)(a).
104 Trade Unions Act,1926, section 4.
105 East Pakistan Trade Unions Act, 1965, section 17.
106 Italics added.
107 See above.

threatened by war.[108] With reference to this Proclamation of Emergency and in exercise of power conferred by Article 30(1) of the Constitution the President promulgated an Order which, *inter alia*, provided that the right to move the Courts for fundamental rights provided for in Chapter I of Part II of the Constitution dealing with the right to freedom of association and all proceeding in Courts for the enforcement of the said right were to remain suspended for the period during which the Proclamation of Emergency was in force.[109] The Emergency was not lifted even after the Tashkent Agreement of January, 1966, which had formally terminated the conflict with India. Hence, the suspension of enforcement of the right of association continued under the Proclamation of Emergency. Thus, the constitutional guarantee of the right as upheld by the Supreme Court in the case of *Abul A'la Maudoodi* was of little practical value and importance.

Further, from the above discussion it is apparent that the Government while promulgating the Trade Unions Act, 1965, did not take into consideration of its obligations under the ratified Conventions on freedom of association. It is also apparent that during this period the workers' right of association fell short of trade union legislation that existed under the Trade Unions Act, 1926.

The Second Martial Law Period

Immediately after the India - Pakistan War in 1965, the political situation of the country took a different direction and an anti-Ayub movement was being concretised under the leadership of Sheikh Mujibur Rahman and Z.A. Bhutto in East and West Pakistan, respectively. Under their leadership and in the face of a nation-wide popular upsurge, the Emergency was lifted on 17 February, 1969 and ultimately President Ayub Khan had to resign and hand over power to General Yahya Khan, Chief of Army Staff, who proclaimed Martial Law on 25 March, 1969. The direct impact was that the Constitution of 1962 was abrogated.[110] On 4 April, 1969 the Provisional Constitution Order was passed which revived the Constitution but *inter alia* abrogated paragraph 7 of chapter I

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[108] Gazette of Pakistan, Extraordinary, 6 September, 1965.

[109] For the Order under Article 30 of the Constitution of Pakistan,1962, see, Gazette of Pakistan, Extraordinary, 6 September, 1965.

[110] For the Proclamation of Martial Law, 25 March, See, Pakistan Legal Decisions (Central Statutes) ,1969, p.42.

of Part II of the Constitution dealing with freedom of association.[111] Further, a Martial Law Regulation[112] prohibited strikes, lockouts and agitation in educational institutions, public utility works and installations, services and industrial concerns.

The imposition of Martial Law was the response to a profound political crisis which was rooted in a deep economic and social crisis as well as political discontent. According to Shaheed:

> None of the established political leaders opposed its imposition. In fact, they welcomed it at a time when the political situation had rapidly moved beyond their control with the masses, though leaderless, making a shattering impact on the Pakistan political scene.[113]

The turbulent period preceding the imposition of Martial Law had brought an unprecedented degree of working class militancy to the surface of the labour movement which prompted the Government to offer a new organisational framework to contain this militancy.[114]

In view of the above situation, a Labour Conference was convened by the Martial Law regime on 4 May 1969 and as a result of its deliberations a new labour policy was announced on 5 July, 1969 by Air Marshal M. Nur Khan.[115] The policy[116] made a bold admission that the previous policies had failed due to the lack of adequate machinery for their implementation and promised that the policy would be supported by the necessary machinery for its implementation. It also recognised that it was only through his membership of a trade union that a worker could safeguard his rights and further his interests. The main reasons for the slow growth of trade unions had been enumerated by the policy. They were, first, the acceptance of a mode of tenant-landlord relationship in industrial life by the workers. Secondly, the attitude of the employer in looking upon the trade unions as instruments for extortion rather than as institutions for peaceful resolution of conflicts and ensuring higher productivity. Thirdly, the attitude of the Government in discouraging and prohibiting expression of industrial conflict rather than trying to solve it

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111 Ibid., at p.41.

112 Ibid., at p.48, Regulation No. 18.

113 Supra note 80, at p.433.

114 Ibid., at p.433.

115 Amjad, R. and Mahmood, K., Industrial Relations and Political Process in Pakistan 1947-77, Geneva, 1982, at p.19.

116 See, Labour Policy 1969, in Shafi, M., Labour Policy of Pakistan, Karachi, 1969.

and its failure to realise that conflict could not be dissolved by suppression, but only through a process of mutual give and take which was possible through strong trade union institution. While emphasising the need for trade unions the policy stated:

> The objective of an Industrial Relations system is to provide a framework within which the conflicts inherent in a worker-employer relationship may be peacefully resolved. The key to a successful system of industrial relations, particularly in a country with large surplus labour force, lies in the growth and functioning of a strong and representative trade union movement.[117]

It was further emphasised in the policy:

> If a successful system of industrial relations is to operate in Pakistan, it will be necessary to give every encouragement to the growth of a strong trade union movement. To do so, it will be necessary to make our laws, particularly those relating to the formation and working of trade unions far less restrictive than they are at present.[118]

Thus, the Government admitted that the existing laws were restrictive. It is, however, important to note that the policy did not specify that the Government was going to remove the restrictions but only make 'less restrictive'.

Like the policy of 1959, the new policy did not make any reference to the ILO Conventions and Recommendations, though frankly admitted the retarded position of right of association and the failure of earlier Governments in this regard. Now the question arises — what was the motive behind the declaration of such 'radical' policy immediately after promulgation of Martial Law? According to G. W. Choudhury, the explanation lies in the ambitions of Nur Khan within the ruling junta. He "wanted to create an image as against Yahya, by introducing 'radical' reforms."[119] As a result of that Nur Khan was soon divested of his position of Deputy Chief Martial Law Administrator.[120] According to Amjad and Mahmood, "the aim of the Martial Law Government had been mainly to blunt the militant stance of the workers and to try to placate them."[121]

However, once the policy was announced, the demand for its immediate implementation became widespread and led to unrest and

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117 Ibid., at pp.2-3.

118 Ibid., at p.4.

119 Choudhury, G.W., The Last Days of United Pakistan, London, 1974, at p.51.

120 Supra note 80, at p.439.

121 Supra note 115, at p.22.

agitation amongst workers. As a result, the Industrial Relations Ordinance, 1969 was promulgated on November 3, 1969 repealing the laws on trade unions and industrial disputes. It is remarkable to note that in the realm of labour law, the term freedom of association was used for the first time in this Ordinance.[122] In framing workers' right of association, the framers of the Ordinance theoretically relied heavily on the ILO Convention concerning Freedom of Association and Protection of the Right to Convention, 1948 (No. 87), as almost all the provisions of the Convention were incorporated in the Ordinance. Below, we will see how it had been reflected.

Following Article 2 of Convention No. 87, section 3(a) and (b) provided that workers and employers, without distinction whatsoever, shall have the right to establish, and, subject only to the rules of the organisation concerned, join associations of their own choosing without previous authorisation. This provision did not make any departure from Article 2 of the Convention, except using the words 'join associations' instead of using the Convention words 'join organisations'. This virtually made no difference in guaranteeing the right.

Following Article 3 of the Convention, section 3(c) provided that trade unions and employers' associations shall have the right to draw up their Constitution and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. It is of interest to note that unlike Article 3(2) of the ILO Convention, it did not contain any clause that public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof. Further, it did not contain any clause following Article 4 of Convention No. 87 that workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Following Article 5 of Convention No. 87, section 3(d) provided that workers' and employers' organisation shall have the right to establish and join federations and confederations and any such organisation, shall have the right to affiliate with international organisations and confederations of workers' and employers' organisations. However, no legal provisions or regulations were provided in the Ordinance for such an affiliation. Hence, in order to form a federation or confederation or to affiliate themselves

[122] See, section 3 of the Ordinance.

with international organisations, the workers' and employers' organisation had complete freedom. The Industrial Relations Ordinance, 1969, unlike Article 6 of Convention No. 87 which did not make it clear whether the above provisions granting freedom of association would apply to federation or confederation of workers' and employers' organisations.

Like Article 8 of Convention No. 87, Section 4 of the Ordinance stated that the rights provided in Section 3 concerning freedom of association were subject to the condition that workers and employers must respect the law of the land in exercising the right. But the framers of the Ordinance did not take into consideration that clause 2 of Article 8 of Convention No. 87 provided that the law of the land shall not be such as to impair nor shall it be applied as to impair, the guarantees provided for in this Convention.

For the first time, in the Industrial Relations Ordinance, 1969, the concept of recognition of trade union was changed to a concept of collective bargaining agent.[123] Section 2(v) of the Ordinance defined collective bargaining agent as follows:

> Collective bargaining agent, in relation to an establishment or industry, means the trade union of workmen which, under section 22, is the agent of the workmen in the establishment or, as the case may be, industry in the matter of collective bargaining.

Under section 22, two methods were described for forming collective bargaining agents. In the first case, where there was only one trade union (registered) in an establishment, then that union was to be deemed to be the collective bargaining agent for that establishment. In the second case, if there were more than one union (registered) then there was to be a secret ballot, and the union obtaining highest number of votes was to be declared collective bargaining agent by the registrar. Section 22(6)(b) of the Ordinance laid down rights of the collective bargaining agent in the following manner:

> The executive of a trade union ... which is a collective bargaining agent ... shall be entitled to undertake collective bargaining with the employer or

[123] It may be recalled that the Provincial Government of East Pakistan enacted the Trade Unions (Recognition), Ordinance, 1958 making provision for recognition of registered trade unions by employers (section 3). The Central Government in the year amending the Trade Unions Act of 1926 incorporated with modification these principles of recognition of trade unions in Section 28-B. Further, the East Pakistan Government, in the Trade Unions Act of 1965 with little modification, introduced the same provision for recognition of trade unions (section 33).

employers on matters connected with employment, non-employment, the terms of employment or conditions of work of any person.

Thus, it appears that the above provisions of the Ordinance, following Article 4 of Convention No. 98, introduced machinery for voluntary negotiation between employers and workers organisations. While the ILO advocates collective bargaining as a general principle and Governments which have ratified Convention No. 98 are under the 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. No set pattern has been fixed in this regard and the methods and practices followed in the various countries vary greatly as regards the conclusion, the contents and the effects of collective bargaining, as well as the level at which they are concluded.[124]

In the realm of industrial relations the real concept of institutionalised collective bargaining was introduced in Pakistan in 1969, which according to Rizvi was "as a direct offspring of labour unrest and a general demand for ameliorating the lot of workers."[125] It was also a manifestation of the Government's policy aimed at giving a new momentum to the relationship of workers' and employers. The pre-requisite of a successful system of collective bargaining included a strong and representative trade union movement, responsible and responsive organisations of employers and a clear definition of the Government's role in the operation of the system of industrial relations. Collective bargaining in its new form and content conferred a large measure of industrial freedom and democracy and demanded maturity and increased responsibility on the part of trade union, employers and Government.

Like the earlier laws[126] it provided for registration of trade unions which was optional.[127] However, the serious set back was that following the earlier laws it also accorded rights and privileges only to registered unions, so if a union decided not to register it would not be immune from criminal and civil liability which registered unions would enjoy under the

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[124] ILO, Report of the ILO/SIDA Mission on Workers' Participation in Management in Bangladesh, Geneva, 1973, at p.53.

[125] Rizvi, S. A., Industrial Relations and Development in Pakistan, Bangkok, 1979, at p.24.

[126] The Trade Unions Act,1926 and the Trade Unions Act, 1965.

[127] The Industrial Relations Ordinance, 1969, Section 5.

Ordinance.[128] Regarding 'outsider' participation in the union executive, following the repealed Act, the new Ordinance under section 7 allowed 25%, but persons in this category, as in the earlier laws,[129] were not required to be full time paid trade union workers with trade unionism as their principle advocation. Though, it was less restrictive than the earlier laws, yet it was contrary to the requirements of Article 3 of the ILO Convention No. 87 as full freedom to elect the representatives of unions was not provided.

However, an important guarantee of the workers' right of association was outlined in Section 15(1) of the Ordinance. It provided:

> No employer or trade union of employers and no persons acting on behalf of either shall:
>
> (a) impose any condition in a contract of employment seeking to restrain the right of a person who is a party to such contract to join a trade union or continue his membership of a trade union; or
>
> (b) refuse to employ or refuse to continue to employ any person on the ground that such person is, or is not, a member or officer of a trade union; or
>
> (c) discriminate against any person in regard to any employment, promotion, condition of employment or working condition on the ground that such person is, or is not, a member or officer of a trade union; or
>
> (d) dismiss, discharge, remove from employment or threaten to dismiss, discharge or remove from employment a workman or injure or threaten to injure him in respect of his employment by reason that the workman-
>
> (i) is or proposes to become, or seeks to persuade any other person to become, a member or officer of a trade union; or
>
> (ii) participates in the promotion, formation or activities of a trade union;
>
> (e) induce any person to refrain from becoming, or cease to be a member or officer of a trade union, by offering to confer any advantage on, or by procuring or offering to procure any advantage for such person or any other person.

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128 Ibid., sections 17 and 18.

129 See, section 22 of the Trade Unions Act, 1926 as amended by section 3 of the Trade Unions (Amendment) Ordinance, 1961 and Section 24 of the Trade Unions Act, 1965.

The above provision has its source in Article 1 of Convention No. 98. Unlike earlier legislative efforts,[130] the present provision completed the task of incorporating the essence of Article 1 of Convention No. 98, providing adequate safeguards for the workers against acts of anti-union discrimination in respect of their employment.

To conclude, the Industrial Relations Ordinance, 1969 passed by the second military regime of Pakistan which came to power not through armed rebellion but as a result of political unrest, on the whole offered a progressive piece of legislation in the spectrum of exercise of the right of association. This legislative gesture may be said to have embarked on a journey towards compliance with the Conventions Nos. 87 and 98 which was overdue since the Conventions stood ratified.

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[130] See, section 28-I of the Trade Unions Act, 1926 as amended by section 11 of the Trade Unions (Amendment) Ordinance, 1960 and Section 40 of the Trade Unions Act, 1965.