

THE ILO CONVENTIONS ON FREEDOM OF ASSOCIATION: REVIEW OF ITS IMPLICATIONS IN BANGLADESH

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INTRODUCTION

In the present study, the expression 'freedom of association' refers to the rights of workers and employers to organise for the defence of their occupational interests as are understood by the various Conventions on freedom of association adopted by the ILO.¹ In particular, it will be used to refer to the rights and freedoms that are guaranteed by the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Thus, the expression will be taken in its broad sense, which means it will not only include the right to set up associations but also a number of other rights without which the right to organise would lose much of its meaning e.g. the right of associations to organise their administration and activities freely.² It is not suggested that Conventions Nos. 87 and 98 are exhaustive of the concept of freedom of association. They quite clearly are not.³ The fact remains, however, that Conventions Nos. 87 and 98 have acquired a degree of

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¹ For a conceptual analysis of freedom of association, see, Von Prondzynski, F, *Freedom of Association and Industrial Relations: A Comparative Study*, London 1987, pp. 10-16 and 225-26.

² For the provisions of the right to freedom of association as laid down in various Conventions adopted by the ILO, see below.

³ They do not, for example, make any express reference to the right to strike. They are entirely silent on issues such as, right not to associate; protection of trade union funds; inviolability of trade union premises.

acceptance amongst the international community,⁴ rendering them uniquely authoritative in relation to freedom of association. We will therefore, consider these Conventions and the concomitant jurisprudence as the principal focus of our examination of international protection of freedom of association in the domestic arena of Bangladesh.

Association, like other concepts, is not an absolute concept. The state may have a number of valid reasons for wishing to regulate its exercise. To do so is not necessarily incompatible with the idea of freedom of association, provided the restriction chosen leave the basic substance of the right intact. However, Governments do sometimes succumb to the temptation to confuse justification with expediency, and the substance of fundamental rights cannot always be preserved by relying on the benevolence of state administrations. It is important therefore to inquire into the limits imposed by the ILO upon the discretion of a Government to restrict the exercise of freedom of association.

FREEDOM OF ASSOCIATION UNDER THE ILO CONSTITUTION AND OTHER INTERNATIONAL INSTRUMENTS

The Preamble to the Constitution of the International Labour Organisation (ILO) expressly declares recognition of the principle of freedom of association to be one of the means of improving the conditions of the workers and of securing peace. Article 41 paragraph 2 of the Constitution in its original form included among the principles of special and urgent importance “the right of association for all lawful purposes by the employed as well as by the employers”.⁵ When the aims and purposes of the ILO were restated in the Declaration of Philadelphia in 1944, the International Labour Conference reaffirmed as one of the fundamental principles on which the ILO is based that “freedom of association are essential to sustained progress”. Among the programmes, which it is the solemn obligation of the ILO to further, the

⁴ As at December 1999 Conventions Nos. 87 and 98 have been ratified by 127 and 145 states respectively. For lists of states that have ratified the Conventions, see, ILO, *Ratifications by Convention and By Country*, Report III (Part 2), Geneva 2000, pp. 98-99 and 112-113.

⁵ See, *The Constitution and Rules of the International Labour Organisation*, Montreal 1944, p. 9. The Constitution was amended in 1946. For details, see, Jenks, C.W., “The Revision of the Constitution of the International Labour Organisation”, in *British Year Book of International Law*, Vol. XXIII, 1946, pp. 402-428.

Declaration referred in Article III, paragraph (e) to “the effective recognition of the right of collective bargaining”. The terms of the Declaration of Philadelphia were incorporated in the Constitution of the ILO in 1994.⁶

The affirmation of Principle contained in the Constitution of the ILO have since been echoed in a number of international and regional instruments relating to human rights. Provisions on freedom of association are included in several UN instruments, i.e., the Universal Declaration of Human Rights, 1948 (Articles 20 and 23 paragraph 4); the International Covenant on Economic Social and Cultural Rights, 1966 (Article 8) and the International Covenant on Civil and Political Rights, 1966 (Article 22).

Among the regional instruments containing provisions on right to form association are the American Declaration of the Rights and Duties of Men, 1948, adopted at the Ninth International Conference of American states in Bogota (Article 22); the American Convention on Human Rights, 1967 (Article 16); the European Convention on Human Rights and Fundamental Freedoms, 1950 (Article 11); and the European Social Charter, 1961 (Part II, Article 5 and 6), both of which were adopted by the Council of Europe. A number of instruments mentioned above refer the right to strike (e.g. the International Covenant on Economic Social and Cultural Rights and the European Social Charter) or to other matters related to freedom of association such as collective bargaining (e.g. the European Social Charter). The most recent of regional human rights instruments i.e., the African Charter on Human and Peoples’ Rights also contains provisions on the right to form association (Article 10).⁷

While the terms of various instruments referred to above are by no means identical, they are all expressions of the same fundamental conviction expressed with memorable simplicity in the Declaration of Philadelphia, that “freedom of expression and of association are essential to sustained progress”.

⁶ See, Jenks, C. W., *The International Protection of Trade Union Freedom*, London 1957, at pp. 402-428.

⁷ Although the above mentioned international and regional instruments recognise the right to form association, they are less detailed than that of the ILO Conventions on freedom of association.

AN OVER VIEW OF THE ILO CONVENTIONS ON FREEDOM OF ASSOCIATION

The development of a system of international labour standards was the principal purpose behind the creation of the ILO.⁸ The significance of ILO standard-setting stems from the organisation's aims and purposes. The problem of freedom of association is vital to the very existence and functioning of the ILO and has been in the forefront of its activities ever since its foundation. The reasons, which have caused the ILO to concern itself from the very beginning with the problem of freedom of association, are fundamental to its very Constitution.⁹ The conventions on freedom of association are as follows:

The Right of Association (Agriculture) Convention, 1921 (No. 11)

The first international Convention specifically concerned with freedom of association was the Right of Association (Agriculture) Convention, 1921. The Convention in Article 1 provided:

Each member of the International Labour Organisation which ratifies this Convention undertakes to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers and to repeal any statutory provisions restricting such rights in the case of those engaged in agriculture.

While prohibiting discrimination against agricultural workers, as compared with industrial workers, it did not contain any substantive definition of the rights of association and combination of agricultural workers. The object of the Convention was obviously to remove an inequality, yet it can be said that the Convention did not by itself guarantee any basic freedom, since 'the same rights' might be no rights at all, or rights that were severely circumscribed.¹⁰ Put simply, if municipal law denied full freedom of association to industrial

⁸ ILO, *Report of the Director General*, ILC, 70th session, 1984, p. 3.

⁹ For the history of the establishment of the ILO and its functioning, see, Shotwell, J. T., (ed.), *The Origins of the International Labour Organisation*, (2 Vols.), New York 1934; Wilson, F. G., *Labour in the League System*, California 1934; ILO, *The International Labour Organisation: The First Decade*, London 1931; Alcock, A., *History of the International Labour Organisation*, London 1971.

¹⁰ ILO, *International Labour Standards: A Workers Education Manual*, Geneva 1990, p. 19.

workers, it would be perfectly compatible with the Convention also to deny such freedom to agricultural workers so long they were not placed in any worse position than their colleagues in industry.

However, this Convention proved in certain cases to be of considerable practical importance as it resulted in extending the workers in agriculture trade union rights, which were previously recognised only to those in industry.

The Right to Organize Convention, 1948 (No. 87)

The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) is the basic instrument for the international protection of the freedom of association. It deals, on the one hand, with the rights of employers and workers to establish trade organisations and, on the other, with rights and guarantees, which such organisations should enjoy. The Convention in Article 2 provides that the workers and employers without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. The scope of this provision is very wide, as it refers in particular to workers 'without distinction whatsoever'. The armed forces and the police are under Article 9 the only category in respect of which the Convention leaves countries free to determine the extent to which the Convention shall apply.

By virtue of Article 2 of the Convention, workers and employers have the right to establish organisations 'without previous authorisation'. The Convention thus guarantees to the founders of a trade union the right to establish their organisations without being required by the public authorities to obtain previous authorisation. It may be recalled that Article 2 of the Convention states that employers and workers have the right "to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing". When it refers to 'organisations of their own choosing' the Convention requires that there should be freedom of choice as to the organisations which workers, in particular, may wish to establish or which they may wish to join. Any legal provision, which would limit or refuse such freedom of choice at the plant or at the occupational or national level, would be at variance with the basic principle of the Convention.¹¹

¹¹ See, Valticos, N., *International Labour Law*, Deventer 1979, p. 82.

The reference to 'organisations of their own choosing' was intended to take account of the fact that in a number of countries where there are several organisations representative of workers and employers among which those concerned are able to choose on occupational or political grounds; it was not intended to express any view on the question whether trade union unity or a plurality of unions is preferable in the interests of workers and employers.¹² Although it is not the purpose of the Convention to make trade union diversity an obligation, the Convention requires this diversity to remain possible.¹³ The term 'organisation' in Article 2 is defined in Article 10 as meaning any organisation of workers and employers for furthering and defending the interests of workers and employers.

Having dealt with the rights of the workers and employers to establish organisations, the Convention defines the rights and guarantees which these organisations should enjoy and specifies in Article 3 (2) that "public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof". The Convention provides in Article 3 (1) that "workers' and employers' organisations shall have the right to draw up their Constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes".

The right of organisations to function freely is stated in the Convention in very general terms; it makes no attempt to list the basic elements of such freedom in detail or to indicate the forms of interference by the public authorities which would restrict the right or impede the lawful exercise thereof. Among the questions not particularised in the Convention on which this general provision has an important bearing may be mentioned as the financial and administrative control of organisations, freedom of meeting and publication and freedom from arbitrary arrest and search.

The most difficult question to be dealt with in the Convention was that of the relationship between freedom of association and the obligation to respect the law of the land. The difficulty of the matter is apparent; on the one hand,

¹² See, Jenks, C. W., *The International Protection of Trade Union Freedom*, London 1957, p. 25.

¹³ See, ILO, *Report of the Committee of Experts*, 1973, (Vol. 4B), paras 68-78, pp. 29-33; and 1977, paras 63-64, p. 22.

no state could be expected to accept right of association which is not qualified by an obligation to respect the law of the land; on the other hand, there ceases to be any international obligation or guarantee of freedom of association if the extent of the right of association is determined by the national law. The difficulty was overcome by Article 8 (1) which provides that "in exercising the rights provided for in this Convention, workers and employers and their respective organisations, like other persons or organised activities, shall respect the law of the land" but at the same time Article 8 (2) lays down that "the law shall not be such as to impair, nor shall not be so applied as to impair the guarantees provided for in this Convention".

The Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

The Convention provides that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. Such protection, as Article 1 details, is to apply more particularly in respect of acts calculated to make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership, or to cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours. This provision aims at protecting workers and trade union leaders against victimisation by the employers both at the time of taking up employment and in the course of their employment relationship.

Another aim of the Convention is protection, primarily of trade unions, against acts of interference, although the matter is mentioned in respect of both workers' and employers' organisations. According to Article 2, "workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents as members in their establishment, functioning or administration". In particular, acts designed to promote the establishment of workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations are described as constituting such acts of interference.

To ensure respect for the above provisions, Article 3 provides that machinery appropriate to national conditions shall be established where necessary. Moreover, in order to create conditions for successful voluntary

negotiation between employers and workers, it is provided in Article 4 of the Convention, that "measures appropriate to national conditions shall be taken, when necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers and employers' organisations and workers' organisations, with a view to regulation of terms and conditions of employment by means of collective agreements".

Unlike Convention No. 87 which applies to workers in both the private and public sectors, without distinction, and also to public servants, Convention No. 98 does not deal with the position of public servants engaged in the administration of the state and specifies in Article 6 that it is not to be construed as prejudicing their rights or status in any way. At the time of adoption of Convention No. 98, it was agreed that this instrument should not be interpreted as authorising or prohibiting union security agreements, such questions being matters for regulations in accordance with national practice.¹⁴ In consequence, the legal systems which permit the conclusion of union security clauses are not to be deemed to be contrary to the Convention no. 98 and nor are those which prohibit such practices in pursuance of the principle of freedom of non-association.¹⁵ The Convention contains the same provisions as the 1948 Convention (No. 87), leaving it to national laws or regulations to determine the extent to which the guarantees provided by the Convention would apply to the armed forces and the police.¹⁶

The Workers' Representative Convention, 1971 (No. 135)

Freedom of Association can not be fully implemented if it is not recognised at the plant level as well as the national or occupational level. This explains the adoption in 1971, of this Convention which is supplementary to the terms of the Right to Organise and Collective Bargaining Convention, 1949. The Convention in Article 1 provides that workers' representative in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in

¹⁴ See, *Record of Proceedings*, ILC, 32nd Session, Geneva 1949, p. 468.

¹⁵ ILO, *ILO Principles, Standards and Procedures Concerning Freedom of Association*, Geneva 1989, p. 4.

¹⁶ See, Article 5 of Convention No. 98.

so far as they act in conformity with laws or collective agreements or other jointly agreed agreements.

The term workers' representatives is defined in Article 3 as meaning persons who are recognised as such under national law or practice, whether they are trade union representatives or elected representatives, and adds in Article 4 that national laws or regulations, collective agreements, arbitration awards or court decisions may determine the type and types of workers' representatives which shall be entitled to the protection and facilities provided for in this Convention.

The Rural Workers' Organisations Convention, 1975 (No. 141)

This Convention was adopted to take account of the difficulties experienced by rural workers in exercising their trade union rights. In principle, the workers should be able to join trade unions of their own choosing, but in practice this is not always the case; more or less overt restrictions are often imposed in case of rural workers. The Convention provides that the principles of freedom of association shall be fully respected and reaffirms the main principles of Convention No. 87. It adds that it shall be an objective of national policy concerning rural development to facilitate the establishment and growth, on a voluntary basis, of strong and independent organisations of rural workers as an effective means of ensuring the participation of rural workers, without discrimination, in economic and social development and in the benefits resulting therefrom.¹⁷ The main purpose of Convention No. 141 is to strengthen the role of rural workers' organisations in economic and social development.

The Convention further provides that in order to enable organisations of rural workers to play their role in economic and social development, each member which ratifies this Convention shall adopt and carry out a policy of active encouragement to these organisations, particularly with a view to eliminate obstacles to their establishment, their growth and the pursuit of their lawful activities, as well as such legislative and administrative discrimination against rural workers' organisations and their members as may exist.¹⁸

¹⁷ See, Article 4 of Convention No. 141.

¹⁸ See, Article 5 of Convention No. 141.

The Labour Relations (Public Service) Convention, 1978 (No. 151)

The right of association which is embodied in Article 2 of the Convention No. 87 is seldom refused; but is often subject to restrictions, especially to the detriment of public servants. This shortcoming led to the adoption of the Convention concerning protection of the right to organise and procedures for determining conditions of employment in the public service. The Convention contains provisions on the protection of public servants against acts of anti-union discrimination in matters of employment and measures by public authorities designed to place these categories of workers under their control. It thus dealt with the problem occasioned by the exclusion from the ambit of Convention No. 98 of public servants engaged in the administration of state.

The provisions of this Convention concerning anti-union discrimination are analogous to those of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The Convention in Article 4 provides in particular that such protection shall apply more particularly in respect of acts calculated to: a) make the employment of public employees subject to the condition that they shall not join or shall relinquish membership of public employees' organisation; b) cause the dismissal of or otherwise prejudice a public employee by reason of membership of a public employees' organisation or because of participation in the normal activities of such an organisation. The Convention further provides that public employees' organisations shall enjoy complete independence from public authorities and shall enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration.¹⁹

The Convention also deals with appropriate facilities which should be afforded to the representatives of recognised public employees' organisations to enable them to carry out their functions promptly and efficiently, both during and outside working hours. The granting of such facilities should not impair the efficient operation of the administration or service concerned.²⁰ The Convention also provides with procedures for determining terms and conditions of employment and with the settlement of disputes through negotiations between the parties, or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such

¹⁹ See, Article 5 of Convention No. 151.

²⁰ See, Article 6 of Convention No. 151.

a manner as to ensure the confidence of the parties involved.²¹ Finally it provides that public employees shall have, as other workers, the civil and political rights which are essential for the freedom of association, subject only to the obligations arising from their status and the nature of their functions.²²

The Collective Bargaining Convention, 1981 (No. 154)

The most recent instrument on the subject of collective bargaining is the Collective Bargaining Convention, 1981. The reasons for adoption of this Convention as the Preamble says is to make greater efforts to achieve the objectives of these standards and particularly the general principles set out in Article 4 of the Right to Organise and Collective Bargaining Convention, 1949. For the purpose of this Convention, the term 'collective bargaining', extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations on the other, for a) determining working conditions and terms of employment; b) regulating relations between employers and workers; c) regulating relations between employers or their organisations and the workers' organisation or workers organisations.²³

Article 5 of the Convention specifies that measures adapted to national conditions should be taken with a view to: a) making collective bargaining possible for all employers and all groups of workers in the branches of activity covered by the Convention; b) extending collective bargaining progressively to all matters relating to working conditions, terms of employment and relations between employers and workers or their organisations; c) encouraging the establishment of rules of procedure agreed between employers and workers organisations; d) not hampering collective bargaining by the absence of the rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules; e) ensuring that bodies and procedures for the settlement of labour disputes are so conceived as to contribute to the promotion of collective bargaining.

²¹ See, Article 8 of Convention No. 151.

²² See, Article 9 of Convention No. 151.

²³ See, Article 2 of Convention No. 154.

RATIFICATION OF THE CONVENTIONS BY BANGLADESH

Until now the government of Bangladesh has ratified three conventions on freedom of association. They are: The right of Association (Agriculture) Convention, 1921 (No. 11); the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No.87) and the Right to Organise and Collective Bargaining Convention, 1949 (No.98).

Implications of Ratification of the ILO Conventions

The adoption of international labour standards is not an academic exercise. Its object is to bring about effective and harmonised progress in the national law and practice.²⁴ One of the factors influencing the effectiveness of standards is the degree to which they are formally accepted by member states.

Whatever effect the unratified Conventions can have in the absence of binding obligations,²⁵ it is in connection with the formal act of ratification that their impact is likely to be tangible and lasting. This is due to the fact that ratification involves the formal commitment of states to give effect to the Conventions within their territory and it sets in motion the regular supervisory machinery of the ILO.²⁶

A state which ratifies a Convention gives an undertaking that it will make its provisions effective as from the date of its entry into force for the country concerned, which is twelve months after the registration of its formal ratification with the Director-General of the International Labour Office.²⁷

²⁴ Valticos, N., "The Future Prospects for International Labour Standards" in *International Labour Review*, Vol. 118, 1979, p. 690.

²⁵ On the influence of unratified Conventions, see, Landy, E. A., "The Influence of International Labour Standards: Possibilities and Performance", in *International Labour Review*, 1970. Vol. 101, pp. 561-570; ILO, *The Impact of International Labour Conventions and Recommendations*, Geneva 1976, pp. 11-26.

²⁶ For a detailed account of the supervisory machinery of the ILO, see, Valticos, N., *International Labour Law*, Deventer 1979, pp. 225-261; Tikriti, A., *Tripartism and the International Labour Organisation*, Stockholm 1982, pp. 274-333; Samson, K.T., "The Changing Pattern of ILO Supervision", in *International Labour Review*, Vol. 118, 1979, pp. 569-587.

²⁷ International Labour Office is the permanent secretariat of the ILO, and is expressly provided for in the Constitution of the ILO which in Article 2 stipulates: "the permanent organisation shall consist of ... an International Labour Office ...". For a

The assumption of obligations under a Convention will have noticeable repercussions at the national level whenever the law or practice of the country needs to be modified in order to ensure compliance with the terms of the instrument. Such modifications may occur in four circumstances: they may precede the decision to ratify; they may be concurrent with it; they may occur during the period between ratification and entry into force; or they may take place when the Convention is already binding. The last mentioned alternative, although unsatisfactory from a legal point of view, none the less represents a case of influence, and one where the effect of ILO standards is liable to be particularly clear-cut.

Status of ILO Conventions the Domestic Legal Regime

The Constitution of Bangladesh was adopted on 4 November 1972 and came into force on 16 December 1972. Human rights agenda had been in the forefront of the country's liberation struggle. The country's respect for human rights and fundamental freedom dates back from the Proclamation of Independence of 10 April 1971. The Proclamation, *inter alia* reads ". . . we undertake to observe . . . and to abide by the Charter of the United Nations".²⁸ The Constitution in its Preamble provides ". . . it shall be a fundamental aim of the state to realise . . . a society in which the rule of law, fundamental human rights and freedom, . . . will be secured for all citizens". Article 11 envisages that the republic shall be a democracy and in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed.²⁹ Article 25 delineates that the "state shall base its international relations on the principles of . . . respect for international Law and the principles enunciated in the United Nations Charter . . .".³⁰ Article 145A specifies that "all treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament".

detailed study on the structure of the ILO, see, Osieke, E., *Constitutional Law and Practice in the International Labour Organisation*, Dordercht 1985, pp. 79-141.

²⁸ See, 24 DLR, 1972.

²⁹ For details see, *Constitution of the People's Republic of Bangladesh 1972*.

³⁰ For details see, *Ibid*, Article 25.

From the above provisions, it is evident that the Constitution is silent on the status of International law upon the domestic legal regime, even though it does make reference to human rights and respect for international law. Accordingly, under the general principles of international law and the municipal legal regime, international treaties can become part of the domestic law in Bangladesh only if they are specifically incorporated in the law of the land. In other words, they are not self-operating in Bangladesh i.e. treaty obligations concluded by Bangladesh cannot *ipso facto* be put into effect unless an enabling legislation is passed or enacted.³¹ Further, the Constitution does not contain any specific provision, which obliges the State to enforce or implement international treaties and Conventions including implementation and enforcement of the ILO Conventions on Freedom of Association.

Constitutional Guarantee of the Right to Freedom of Association

Following the modern trend, the Constitution of Bangladesh contains in Part III a justiciable Bill of Rights.³² It may be recalled that in respect of the right to freedom of association, the Pakistan Constitution of 1956 guaranteed this right in Article 10 of part II, followed by right No. 7 of Part II of the Pakistan Constitution, 1962. Exactly the same provision has been incorporated in Article 38 of the Constitution of Bangladesh, which read as follows:

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

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

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

³¹ See, Rashid, H., *International Law*, Dhaka, 1998, p.23.

³² Article 44 of the Constitution guarantees the right to move to the Supreme Court in accordance with Article 102(1) for enforcement of the fundamental rights.

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

The principle of free choice of trade unions is an essential element of freedom of association, which has been denied by the proviso to Article 38. This is clearly incompatible with Article 2 of Convention No. 87.³³ The Committee on Freedom of Association has emphasised that it attaches importance to the fact that workers and employers should in practice be able to form and join organisations of their own choosing in full freedom.³⁴ The Committee also observed that workers should have the right, without distinction whatsoever-in particular without discrimination of any kind on the basis of political opinion - to join the organisation of their own choosing.³⁵

However, with the change of Government on 15 August, 1975,³⁶ the restrictive clause of the right to freedom of association, i.e., the proviso to Article 38 of the Constitution, was omitted by the Second Proclamation Order No. III of 1976. The restrictive clause being omitted, the constitutional guarantee of the right to freedom of association has been brought in conformity with the ILO Convention No. 87 as Article 8 of the Convention envisaged that in exercising the rights the workers and employers and their representatives shall respect the law of the land and the law of the land shall not be such as to impair the guarantees provided in the Convention.

The expression 'reasonable ' used in Article 38 implies intelligent care and deliberation, that is, the choice of a course, which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a balance between the freedom granted and the social control permitted by the Constitution, it must be held to be wanting in that quality. Reasonableness is itself a relative term. What is

³³ See, Freedom of Association and Protection of the Right to Organise Convention, 1948.

³⁴ ILO, *Committee on Freedom of Association*, 6th Report, Case No. 3, Para 1024; 157th Report, Case No. 827, Para 216.

³⁵ ILO, *Committee on Freedom of Association*, 126th Report, Case No. 636, Para 25; 187th Report, Case No. 857, Para 268.

³⁶ The constitutional Government under Bangabandhu Sheikh Mujibur Rahman was overthrown on 15 August, 1975 by a military *coup d'etat*.

reasonable in one given set of circumstances may well be unreasonable in another different set of circumstances. Thus, there can be no hard and fast rule for determining the matter, which may be considered for testing the reasonableness applicable to all cases. In the opinion of Justice Hamoodur Rahman:

It will certainly depend upon the nature and extent of the restrictions sought to be imposed, the nature of the circumstances in which the restriction is to be imposed, the evil to be prevented or remedied, the necessity of urgency of the action proposed to be taken and the nature of the safeguards, if any, provided to prevent possibilities of abuse of power.³⁷

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

By its very nature, the use of the word 'restriction' makes the extent of the encroachment a relevant factor in determining the reasonableness thereof. This again cannot be divorced from the nature of the right sought to be restricted and the nature of the restriction itself, for, under certain circumstances even the total provision, if it is for a limited period or to meet a specific well defined mischief, may be upheld as a reasonable restriction. Thus both the nature of the restriction imposed and its extent would be relevant for determining the validity of a law encroaching upon a fundamental right.³⁸

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

³⁷ Abul A'la Maudoodi V. Government of Pakistan, in *Pakistan Legal Decisions (SC)*, Vol. XVI, 1964, p. 788.

³⁸ *Ibid*, p. 787.

The right under Article 38 implies that several individuals having a community of interests can join together to form a voluntary association for the furtherance of a common lawful object. This right along with other rights, described as fundamental rights under Part III of the Constitution, have been guaranteed by declaring that the state shall not make any law inconsistent with any provision of part III of the Constitution, and any law so made shall to the extent of inconsistency be void.³⁹ Thus, it implies that so long as the purpose for which an association or union is formed is lawful, law imposes no restriction on the association or union. In this sense the right to form an association is a Constitutional right.

Regarding formation of an association the Supreme Court of Bangladesh in the case of *Asaduzzaman v. Bangladesh*⁴⁰ has emphasised that:

The word 'form' in Article 38 does not limit the exercise of that right to the formation of an association. The right to form an association must of necessity imply the right to continue and carry on the activities of the association as well.⁴¹

But at the same time the court clearly specified:

Article 38 cannot, however, be involved for support, sustenance or fulfillment of every object of an association.⁴²

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

The constitutional provisions do not guarantee the right of registration of *Trade Unions*⁴³ for the purpose of working as a bargaining agent under the labour laws which thus can be regulated as it is not so guaranteed under the provisions of Article 38 of the Constitution.⁴⁴

It must be emphasised that the Constitution does not give the unions any privileged position in the labour-employer relationship. A member of a union is on the same footing so far as the law is concerned as any other person seeking employment and there is no compulsion on the employer to treat a

³⁹ See, Article 26 of the Constitution of Bangladesh.

⁴⁰ See, 42 (1990) DLR (AD) 144.

⁴¹ Ibid, p. 151.

⁴² Id.

⁴³ Italics added.

⁴⁴ See, 45 (1993) DLR 196.

member of a union on a footing different from non-members of a union. It is for the union to protect the interests of its members, the Constitution does not give any direct protection to them.

RIGHT TO FREEDOM OF ASSOCIATION IN BANGLADESH: THE LEGAL REGIME

This section will focus on the aspect of freedom of association as enshrined in the labour laws of Bangladesh. I would like to begin the discussion, by briefly focusing on the status of right of association, at the time of establishment of the ILO in 1919.

The Status of Right of Association at the time of Establishment of the ILO

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, previous to the passing of the Trade Unions Act, 1926,⁴⁵ 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,⁴⁶ the mover of the resolution which eventuated in 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.⁴⁷

Mr. Joshi correctly observed that the position was doubtful. It can however, be concluded that the state at that time did not prevent any individual from establishing and joining an association provided the association and its

⁴⁵ Act No. XVI of 1926.

⁴⁶ Member of the Legislative Assembly.

⁴⁷ *The Legislative Assembly Debates*, Delhi 1921, Vol. 1, Part 1, p. 487.

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 exercised their right of association.

The Right under Legislative Framework

The need for legislation on trade unions became apparent in the aftermath of the Madras labour dispute. The Madras case was not proceeded with because Mr. Wadia had privately settled the dispute.⁴⁸ But the interim injunction against Mr. Wadia for his trade union activities, suggested that in absence of legislation even legitimate trade union activity be attended by considerable peril. The interlocutory decision of the case rendered the position of workers and union officials highly 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 question of trade union legislation came up before the first session of the reformed legislature,⁴⁹ in consequence of a suit arising out of a trade dispute in Madras, which adopted the following Resolution:

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.⁵⁰

The adoption of the Resolution was the first step towards recognising the right of association, which was followed by a Bill. The Bill, after being debated at great length in the Legislative Assembly, was passed in March 1926 as the Trade Unions Act, 1926 and came into effect from 1 June 1927.

⁴⁸ See, Loknathan, P. S., *Industrial Welfare in India*, Madras, at p. 184.

⁴⁹ 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.

⁵⁰ *The Legislative Assembly Debates*, Delhi, 1921 Vol. I, Part I, at p. 506.

The Trade Unions Act, 1926

The preamble of the Act provided that it was an Act to provide for the registration of trade unions and in certain respects to 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 achieved by 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.

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 between workmen and workmen, or between employers and 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.

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 indeed. However, section 22 was amended in 1961, which brought down outsider participation from 50% to 25%.⁵¹

The Trade Union Act, 1965

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.⁵² A reading of the provisions of the Act show 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 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 strength of workers employed in the establishment or industry, or which ever was less.⁵³ On the contrary, under the repealed Act,⁵⁴ any seven or more members could apply for registration of a union.

The 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 avocation 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 avocation 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 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

⁵¹ See, Section 9 of the Trade Unions (Amendment) Ordinance, 1961.

⁵² For the Statement of Objects and Reasons of the Act, see, *Dhaka Gazette Extraordinary*, 26 July 1965, p. 1109.

⁵³ See, East Pakistan Trade Unions Act, 1965, Section, 6(2)(a).

⁵⁴ Trade Unions Act, 1926, Section 4.

or outside the country.⁵⁵ 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*⁵⁶ or impede the lawful exercise thereof". With regard to recognition of unions the present Act represented a retrograde step in the development of right of association.

The Industrial Relations Ordinance, 1969

The Industrial Relations Ordinance, 1969 was promulgated on November 3, 1969 repealing the Trade Unions Act, 1965. 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.⁵⁷

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, to join association 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 union and employers' association 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

⁵⁵ East Pakistan Trade Unions Act, 1965, Section 17.

⁵⁶ Italics added.

⁵⁷ See, Section 3 of the Ordinance.

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 affiliation. Hence, in order to form a federation or confederation or to affiliate themselves with international organisations, the workers' and employers' organisation had complete freedom. The Industrial Relations Ordinance, 1969, unlike Article 6 of Convention No. 87 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.⁵⁸ 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.

⁵⁸ 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).

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 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 according to 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 while 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 of the world vary greatly as regards the conclusion, the contents and the effects of collective bargaining, as well as the level at which they are concluded.⁵⁹

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".⁶⁰ 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.

⁵⁹ ILO, *Report of the ILO/SIDA Mission on Workers' Participation in Management in Bangladesh*, Geneva 1973, p. 53.

⁶⁰ Rizvi, S. A., *Industrial Relations and Development in Pakistan*, Bangkok 1979, p. 24.

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 laws⁶¹ it provided for registration of trade unions, which was optional.⁶² 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 Ordinance.⁶³ 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 laws⁶⁴ were not required to be full time paid trade union workers having trade unionism as their principle avocation. 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.

Another important guarantee as envisaged in Convention no. 98, has been outlined in Section 15(1) of the Ordinance. It has incorporated Article 1 of Convention No. 98, providing adequate safeguards for the workers against acts of anti-union discrimination in respect of their employment.

In summary, the IRO, 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 laudable journey towards compliance with the Conventions Nos. 87 and 98 that was overdue since the Conventions stood ratified.

Since independence of Bangladesh in the year 1971, the Industrial Relations Ordinance, 1969, which was promulgated during the closing years of Pakistani rule, continued to be the governing legislation of the workers' right to freedom of association and collective bargaining. Although its unfettered operation was

⁶¹ The Trade Unions Act, 1926 and the Trade Unions Act, 1965.

⁶² The Industrial Relations Ordinance, 1969, Section 5.

⁶³ Ibid, Sections 17 and 18.

⁶⁴ 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.

restricted and curtailed by other legislation,⁶⁵ it was not until the enactment by the Martial Law regime of the Industrial Relations (Amendment) Ordinance, 1977, that the provisions of the Industrial Relations Ordinance, 1969, were directly altered, imposing further restrictions on the workers' right to freedom of association. One of the crucial restrictions has been the ban on the functioning of unregistered unions. Section 5 of the Industrial Relations (Amendment) Ordinance, 1977, reads as follows: "No trade union which is unregistered or whose registration has been cancelled shall function as a trade union". Such a restriction had never existed nor was subsequently imposed by other legislation since the enactment of the first legislation on the subject i.e. the Trade Unions Act, 1926. The insertion of this new provision, "no trade union to function without registration", in other words, envisages that registration is not only a pre-requisite but mandatory for trade unions to function. Thus, it is apparent that any future establishment of unions would be subject to registration amounting to 'previous authorisation' within the meaning of Article 2 of Convention No. 87 as without such authorisation, i.e., registration, unions would not be able to function. This view is supported by the fact that the activities of unregistered unions were made punishable as Section 61A of the Industrial Relations Ordinance, 1969, as inserted by the Industrial Relations (Amendment) Ordinance, 1977⁶⁶ reads as follows:

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

But on the other hand the Committee on Freedom of Association observed: "the principle of freedom of association would remain a dead letter if workers are required to obtain any kind of previous authorisation to enable them to establish an organisation".⁶⁷ The requirements of registration as the

⁶⁵ See, for example, Bangladesh Nationalised Enterprises and Statutory Corporations (Prohibition of Strikes and Unfair Labour Practice) Order, 1972, in 24 (1972) DLR 146; State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Ordinance, 1973, in 26 (1974) DLR 161; Industrial Relations (Regulation) Ordinance, 1975, in 27 (1975) DLR 203.

⁶⁶ See, Section 20 of the Industrial Relations (Amendment) Ordinance, 1977, in 29 (1977) DLR 214.

⁶⁷ ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, Geneva 1985, p. 56.

Committee on Freedom of Association further observed "must not be such as to be equivalent in practice to previous authorisation, or as to constitute such an obstacle to the establishment of an organisation that they would amount in practice to outright prohibition".⁶⁸ Furthermore, the Committee on Freedom of Association while recognising that, in certain circumstances, it may be legitimate for registration to confer advantages on a trade union organisation in respect of such matters as to representation for the collective bargaining, consultation by the Governments, or the nomination of delegates to international bodies, it should not normally involve discrimination of such character as to render non-registered organisation subject to special measures of police supervision in such a way as to restrict the exercise of freedom of association.⁶⁹

The Industrial Relations (Amendment) Ordinance, 1977, not only prohibited the function of unregistered unions but also imposed restrictive conditions for the registration of unions. Section 4 provided that a trade union of workers shall not be entitled to registration under this Ordinance unless it has a minimum membership of thirty per cent of the establishment or group of establishments in which it is formed. It is apparent from the above provision that in one establishment no more than three unions could be established. Thus, the freedom of workers to establish a fourth organisation in their establishment being curtailed, they undoubtedly became subject to limited freedom in contradiction to the promise of full freedom to establish organisations of their own choosing as enshrined in Article 2 of the Right to Organise and Collective Bargaining Convention, 1948, (No. 87).

Another issue to be analysed here whether the minimum requirement of 30% workers to be entitled to registration as a trade union amounts to previous authorisation. It may be argued that the 30% requirement as such may not amount to 'previous authorisation' though by dictating the terms of establishing the unions and thereby depriving the workers of their authority to decide, this provision undoubtedly violated another basic guarantee of the workers right to freedom of association i.e., 'establish and join organisation of their own choosing'. Nevertheless, reading with the prohibitive clause as

⁶⁸ Ibid, p. 57.

⁶⁹ See, ILO, Committee on Freedom of Association, 74th Report, Case No. 298, Para. 45; 107th Report, Cases Nos. 251 and 414, Para 39.

specified in Section 5, i.e., 'no unions to function without registration', the 30% workers requirement clause amounts to 'previous authorisation' within the meaning of Convention No. 87 as even 29% workers organised together to form an union would not be able to function as they would be denied registration by the Registrar of Trade Unions and would also be punishable if functions.⁷⁰

Following the declaration of the new labour policy on 25 July, 1980, the Government promulgated the Industrial Relations (Amendment) Act, 1980 to give effect to its policy. In order to do so, the Act of 1980 almost in identical terms re-enacted the provisions of the Industrial Relations (Regulation) Ordinance, 1975, though apparently repealing the Ordinance.⁷¹ Thus, following Section 6 of the Ordinance, the Act of 1980 envisaged:

a person shall not be entitled ... to be a member or officer of a trade union formed in any establishment or group of establishments if he is not actually employed or engaged in that establishment or group of establishments.⁷²

The 'outsider'⁷³ participation in trade union leadership in the Indian sub-continent is not been a recent phenomenon. Rather, it dates back to the very origin of the trade union movement in the British period and also received statutory recognition.⁷⁴ Outsider participation at that time appeared as a matter of necessity. This necessity did not cease to be significant during the Pakistani period. There is little evidence to suggest that the conditions under which outsiders' participation became inevitable in British India, changed at all during the Pakistani period. The inevitability of outsiders' role in organising trade union activities has been reinforced by various reasons of which the most important is the workers' or insiders' fear of being victimised by the management for their alleged involvement in trade union activities. For the first time the Labour Policy of 1969 recognised this fear:

⁷⁰ See, Section 61A of the IRO, 1969 as amended by Section 20 of the Industrial Relations (Amendment) Ordinance, 1977.

⁷¹ See, Section 17 of the Industrial Relations (Amendment) Act, 1980.

⁷² See, Section 4, Industrial Relations (Amendment) Act, 1980.

⁷³ Here the term 'outsider' is being used to mean a person who is actually not employed or engaged in any industry or establishment.

⁷⁴ See, the Trade Unions Act, 1926, Section 22.

The employers ... have been hostile to the development of trade unions. The fear of loss of employment and other punitive measures have made many workers afraid of joining trade unions ... By and large, leadership has not emerged from within the workers themselves and this has resulted in the creation of a permanent professional leadership.⁷⁵

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

This fact has also been supported by the ILO Committee of Experts on Labour Management Relations in Pakistan back in 1960 who observed that 'outsiders' were the only people who could bring a union into existence under the prevailing circumstances, taking into account factors such as unemployment, illiteracy, the attitude of employers and lack of trade union leadership".⁷⁶ Even to this day, the necessity for outsiders has not outlived in any way in the leadership of plant level unions, as Dr Mainul Islam observes:

Outside leadership in union activities is also a necessity in the context of Bangladesh because they are in many cases not better qualified and equipped to deal with management . . . any worker can be fired by the employer . . . at any time and as soon as he is dismissed, a worker ceases to be a union executive. But the outsider leaders do not suffer from such a handicap and can bargain from a position of strength and security.⁷⁷

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

Real reason behind barring outsiders at the plant level unions, was, however, prompted by narrow political motive of the ruling parties of Bangladesh. . . . one important reason behind barring outside leadership from the union was the weakness of the ruling political parties to have their own strong trade union organisation when they came to power. So when they get hold of the political

⁷⁵ See, Labour Policy, 1969.

⁷⁶ ILO, *Report to the Government of Pakistan on the Visit of a Joint Team of Experts on Labour-Management Relations*, Sept-Oct. 1959, Geneva 1960, p. 20.

⁷⁷ Islam, M., "Industrial Relations in Bangladesh", in *Indian Journal of Industrial Relations*, Vol. 19, 1982, p. 180.

power they want to capture the union power as well, if necessary by force through the help of police and management. But the tested veteran leaders with professional skill and strong record of service stood on their way to forcible occupation of the union leadership. So there arose the need for enacting a law banning the outsiders to become union executives.⁷⁸

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

If the national legislation provides that all trade union leaders must belong to the occupation in which the organisation functions there is a danger that the guarantees provided for Convention No. 87 may be jeopardised.⁷⁹

The Committee also observed:

The right of workers' organisations to elect their representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interest of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining conditions of eligibility of leaders or in the conduct of the elections themselves.⁸⁰

The Government on 13 March, 1985, promulgated the Industrial Relations (Amendment) Ordinance, 1985. Under this amendment, in some relaxation of the previous restriction on outsiders becoming trade union members or officials,⁸¹ an ex-worker of the establishment became entitled to be a member or officer of a trade union in that establishment.⁸² It may be recalled that this was not any new concession given to the workers who already had been enjoying this right since 1926 when the Trade Union Act, 1926 was enacted. The restriction of its kind was first imposed by the Industrial Relations

⁷⁸ Id.

⁷⁹ ILO, *Freedom of Association: Digest of Decisions and Principles of the Committee of the Governing Body of the ILO*, Geneva 1985, pp. 62-63.

⁸⁰ Ibid, p. 62.

⁸¹ See, Section 4 of the Industrial Relations (Amendment) Ordinance, 1980.

⁸² See, Section 2, Industrial Relations (Amendment) Ordinance, 1985.

(Regulation) Ordinance, 1975 and subsequently by the Industrial Relations (Amendment) Ordinance, 1980.

It was not until 1 February, 1990, that any further law was promulgated amending the IRO, 1969 relating to workers' right of association. The Industrial Relations (Amendment) Act, 1990 restricted the scope of the Industrial Relations (Amendment) Ordinance, 1985, as it envisaged that a person who has been dismissed from the service would not be entitled to be a member or officer of a trade union of that establishment.⁸³ Further by Section 2 thereof two provisions were added to sub-Section (2) of Section 7 of the IRO, 1969 so that the entire sub Section (2) of Section 7 now read as follows:

A Trade Union of workers shall not be entitled to registration under this Ordinance unless it has a minimum membership of thirty percent of the total number of workers employed in the establishment in which it is formed.

Provided that more than one establishment under the same employer, which are allied to and connected with one another for the purpose of carrying on the same industry irrespective of their place of situation, shall be deemed to be one establishment for the purpose of this sub-section.

Provided further that where any doubt or dispute arises as to whether any two or more establishments are under the same employer or whether they are allied to or connected with one another for the purpose of carrying on the industry, the decision of the Registrar shall be final.

If an employer had more than one establishment under the unamended IRO, 1969, the workers, without any distinction whatsoever, had the right to form trade unions in each establishment. The proviso added by the Amendment Act has introduced a scheme of 'one employer, one establishment'. Thus the new Trade Unions have to be organised 'establishment-wise'.⁸⁴ If a trade union, thus constituted 'establishment-wise', seeks registration, then it will be entitled to registration, only if it has a minimum membership of thirty percent of the total number of workers employed in that establishment or group of establishments in which it is

⁸³ See, Section 3 of the Industrial Relations (Amendment) Act, 1990.

⁸⁴ Under Section 2(iv) of the IRO, 1969 "establishment means any office, firm, industrial unit, undertaking, shop or premises in which workmen are employed for the purpose of carrying on any industry". Under Section 2(xiv) "industry means any business, trade, manufacture, calling, service, employment or occupation".

formed. Thus, irrespective of number of establishments under one employer there can not be at a given time, more than three registered Trade Unions.

The vires of the two provisos to sub-section (2) of Section 7 was challenged before the Supreme Court of Bangladesh in the case of *Aircraft Engineers v Registrar, Trade Unions*⁸⁵ on the ground that the amended legislation is violative of the fundamental right guaranteed by Article 38 of the Constitution. In this case after the promulgation of the Industrial Relations (Amendment) Act 1990 the existing seven registered Trade Unions of Bangladesh Biman Corporation⁸⁶ were served with an order of the Registrar dated 2.5.90⁸⁷ stating therein that in pursuance of an enquiry made under Section 2 of the 1990 Act it had been found that none of the seven existing Trade Unions were constituted in accordance with the newly introduced provisos to sub Section (2) of Section 7 of the IRO, 1969. The Registrar then caused a Notification to be published in the Bangladesh Gazette on 17 May 1990 listing therein the names of the existing seven registered Trade Unions of Bangladesh Biman Corporation, whose registrations were liable to be cancelled.

The appellants submitted *inter alia* that the impugned legislation has brought the inevitable effect of bringing to an end and extinguishing the appellant-unions, particularly in view of Section 11A of IRO, 1969 which provides that "no trade union which is unregistered and whose registration has been cancelled shall function as a trade union".

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

⁸⁵ See, 45 (1993) DLR (AD) 122.

⁸⁶ Prior to the enactment of Industrial Relations (Amendment) Act, 1990 the Registrar of Trade Unions had registered seven unions on the basis of more establishments than one under the same employer.

⁸⁷ See, Memo No. RTU/CBA(3)78C-40 dated 2.5.1990.

This new legislation contains no restriction upon the workers' right to form a trade union and consequently there is no necessity to show that there is a nexus between the new legislation and public order or morality.⁸⁸

The Court based its argument on the following basis:

The workers of more than one establishment under the same employer are free to form trade unions, as before. No doubt the existing trade unions lose their registrations in the process and are unable to continue in their old form, but ... the organisational structure of trade unions is a legitimate domain of legislative exercise and no worker has a fundamental right to a particular form of organisational set-up.⁸⁹

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

To hold other wise will tantamount to holding that once trade unions are formed along particular pattern and registration given, there can be no further changes in the organisational set-up and that the trade union structure will remain frozen as long as fundamental rights exist, howsoever desirable or necessary it may be for a change to meet the changing needs of times or situations.⁹⁰

The argument of 'changing needs of times and situations' raises few questions: was the promulgation of the impugned legislation a necessity to meet the changing needs of times or situations? If so, why was it necessary and whose purpose it intended to serve? Surprisingly, the Court did not deal with these issues. However, in the course of proceeding the respondent did not submit in any manner that the legislation was a necessity to suit the changing needs nor was it established that it was beneficial to workers. In the absence of any such indication, it can be argued that the legislation may have intended to benefit the employers and not workers as it was detrimental to workers' interest resulting the extinction of unions. A clear example is the present case where under the unamended provisions, seven trade unions were registered and five of them were acting as collective bargaining agents but in view of the amended provisos they could no longer function. Thus, it is apparent that the new legislative framework aimed at nothing but curtailing the exercise of the right which workers were already enjoying. Therefore, the argument of his lordship is hardly convincing that:

⁸⁸ See 45 DLR (AD), at p. 128

⁸⁹ Id.

⁹⁰ Id.

The whole purpose of the legislative exercise is not to restrict the right to form associations or unions, but to give the trade unions a shape and to chart out a well-ordered territory for their operation.⁹¹

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

The amended legislation has nothing to do with restrictions on the right of association or union or restrictions on its continence. It is a re-organisational statute and no one has a fundamental right to a particular form of trade union.⁹²

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

Thus, it is apparent from the above discussion that the various Governments succeeding one after another in the post independence period and the various legislative measures adopted by them have been directed mainly towards curbing the right of association. Instead of widening the horizon of exercise of the right to freedom of association in conformity with the ILO Conventions, all successive Governments adopted repressive measures in contradiction to their professed faith in the right to freedom of association and solemn declaration to abide by the ILO Conventions which the state has ratified. Hence, it may be concluded that the legislative framework on the right to freedom of association which is prevalent in post independence Bangladesh have fallen much short of what existed immediately before independence.

GOVERNMENT'S RESPONSE AND THE OBSERVATIONS OF THE ILO COMMITTEE OF EXPERTS

It has been evident from our earlier discussion that since independence in 1971, the IRO, 1969 has undergone several amendments restricting the exercise of

⁹¹ Ibid, at p. 126.

⁹² Ibid, p. 129.

right of association.⁹³ The discussion below will highlight the various aspects of incompatibility of the legislation vis-a-vis Conventions Nos. 87 and 98 which the Committee has been indicating over the years but has failed to evoke any positive action on the part of the Government to fulfil its international obligations by bringing the legislation into conformity with the Conventions which it has ratified.

Restrictions on the Range of Persons who can Hold Office in Trade Unions

Soon after the promulgation of the Industrial Relations (Regulation) Ordinance, 1975, which in Section 6 provided that only persons working in the undertaking concerned may be members of a Trade Union, the Committee of Experts in 1977 by a 'direct request'⁹⁴ notified the Government that the enactment of the said provision restricted trade union rights guaranteed by Articles 2 and 3 of Convention No. 87. The Committee also requested the Government to re-examine the legislation with a view to giving effect to the guarantees contained in the Convention.⁹⁵ But the Government, instead of re-examining the provisions in the light of the suggestions made, re-enacted the provisions by the Industrial Relations (Amendment) Act, 1980, which repealed the Industrial Relations (Regulation) Ordinance, 1975. Section 7A1(a)(ii) of the IRO, 1969, as amended by the Act of 1980 contained in identical terms the provisions of the repealed Regulation of 1975. This prompted the Committee to point out that Section 7A1(a)(ii) of the IRO, 1969 limited the right to be a member or officer of a Trade Union to persons actually engaged in an establishment or group of establishments concerned. Thus, the Committee considered the provisions to be violative of Articles 2 and 3 of Convention No. 87.⁹⁶ The observation of the Committee was followed by asking the Government to re-examine and re-consider the provisions in question.⁹⁷ Although the Committee noted

⁹³ The Industrial Relations (Regulation) Ordinances of 1975 and 1982 and the State-Owned Manufacturing Industries Workers (Terms and Conditions of Service) Act, 1974, were passed to override the provisions of the IRO, 1969.

⁹⁴ See, ILO Official Records, File No. ACD 8-2-309-87.

⁹⁵ Id.

⁹⁶ See, ILO, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 69th Session, Geneva 1983, pp. 115-16.

⁹⁷ Id.

incompatibility of the legislation in 1977 and requested the Government to take necessary measures, the Government did not take any positive action nor pass any comment on the issue until 1984 when it reported:

The Government has since re-considered the provisions under Section 7A(1)(a)(ii) and (b) of Act No. XXIX of 1980 and measures of relaxation is under consideration.⁹⁸

The Committee's response on the above communication was as follows:

It notes with interest the Government's statement that it is prepared to examine these provisions and that measures to ease them are under study.⁹⁹

The Government's indication of 'under consideration' was followed by the promulgation of Industrial Relations (Amendment) Ordinance, 1985, which brought some amendments to the provisions in question. The Committee noted the abolition of the requirement contained in clause (b) of the Section in question that an officer or member of a Trade Union must cease to be an officer or member of the said Trade Union on the coming into force of the 1980 amendment if he was not employed in the establishment in which the union had been formed and observed that the clause has been abolished because it has ceased to be necessary by reason of the effluxion of time.¹⁰⁰ It further observed: "the basic requirement contained in Section 7A(1)(a)(ii) remains in force".¹⁰¹ The Committee's above observation evoked Government's response as it was considered by the Government that the new amendment brought the provisions in question in conformity with the Convention. Thus, in its report for the period ending 30 June 1988 the Government communicated:

The provisions of Section 7A(1)(a)(ii) and (b) have already been amended in 1985 into Section 7A(1)(a)(b). The Government therefore *does not agree to the interpretation of the ILO*¹⁰² in this regard.¹⁰³

⁹⁸ See, ILO Official Records, File No. ACD 8-2-309-87 .

⁹⁹ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 71st Session, Geneva 1985, at p. 121.

¹⁰⁰ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 73rd Session, Geneva 1987, at p. 142.

¹⁰¹ Id. and also see, 74th Session, Geneva 1988, at p. 142.

¹⁰² Italics for emphasis.

¹⁰³ See, ILO Official Records, File no ACD 8-2-309-87.

Actually, the stipulation formerly embodied in Section 7A(a)(ii) is to be found in the new Section 7A(1)(b), but with an important qualification that former employees at an establishment or group of establishments could be members or officers of Trade Unions formed at that establishment. The omission by the Committee in its observation of this 'qualification' may have led the Government to hold the contrary view. Nevertheless, the Committee subsequently pointed out the fact.¹⁰⁴ It may be pointed out that further restriction on the holding of the office of a union has been imposed by section 3 of the Industrial Relations (Amendment) Act, 1990 which provides that a dismissed worker shall not be entitled to become an officer of a trade union.

Committee has consistently taken the view that provisions of this kind do restrict the right of workers to establish and join organisation of their own choosing (Article 2 of Convention No. 87), to elect their representatives in full freedom and to organise their administration and activities (Article 3). The Committee therefore has been requesting the Government to adopt measures with a view to making the present provisions more flexible by exempting from the occupational requirement a reasonable proportion of the officers of an organisation so as to allow the candidature of persons who are outside the profession.¹⁰⁵

The "30 per cent" Requirement

On the issue of 30 per cent requirement for initial or continued registration as a trade union as provided in Sections 7(2) and 10(1)(f) of the IRO, 1969, the Committee of Experts in its various observations¹⁰⁶ has requested the Government to review them in order to bring the provisions into conformity with Article 2 of Convention No. 87. The first of these provisions is to the effect

¹⁰⁴ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 76th Session, Geneva 1989, at p. 128.

¹⁰⁵ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 78th Session, Geneva 1991, at p. 148; 81st Session, Geneva 1994, at pp. 197-98; 82nd Session, Geneva 1995, at p. 152..

¹⁰⁶ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 71st Session, Geneva 1985, at p. 123; 73rd Session, Geneva 1987, at p. 150; 75th Session, Geneva 1988, at p. 144; 76th Session, Geneva 1989, at p. 130; 78th Session, Geneva 1991, at p. 149; 81st session, Geneva 1994, at p. 198; 82nd Session, Geneva 1995, at p. 153.

that no Trade Union may be registered unless it has a minimum membership of 30 per cent of the total number of workers employed in the establishments in which it is formed. The second gives the Registrar of Trade Unions the power to cancel the registration of a union where its membership has fallen below the 30 per cent threshold. In reply, the Government in one of its reports indicated:

The provisions of Section 10(f) of the IRO, 1969, as amended by Section 5 of Act movement in the country. Multiplicity of Trade Unions with nominal membership weakens the cause of workers and leads to unhealthy conflict and hampers industrial peace. The principle of 30% was adopted after due consideration of the national conditions.¹⁰⁷

The Government by another report¹⁰⁸ expressed its inability to review the provisions of law in the following terms:

The said requirement has attained its objectives of reducing mushroom growth of Trade Unions and it is not considered by the workers as an obstacle to establishment of organisations.¹⁰⁹

On the other hand, in the opinion of the Committee of Experts, the figure of 30 per cent, applied generally both to small and to large establishments, is excessive and may be an obstacle to the establishment of organisations and thus violative of Article 2 of Convention No. 98.

External Supervision of the Internal Affairs of Trade Unions

Rule 10 of Industrial Relations Rules, 1977 introduced the provisions of supervision by the Registrar or any other person authorised by him of the internal affairs of Trade Unions. The power of supervision as per the rule which allows the Registrar to enter the premises of a Trade Union or federation of Trade Unions and inspect and seize any record, register or other documents attracted Committee's attention. The Committee has repeatedly considered that the procedure under which an administrative authority has wide power of supervision over the internal affairs of a Trade Union, is incompatible with

¹⁰⁷ See, ILO Official Records, File no. ACD 8-2-309-87, Report of the Government for the year ending 30 June 1986.

¹⁰⁸ See, ILO Official Records, File no. ACD 8-2-309-87, Report of the Government for the year ending 30 June 1988.

¹⁰⁹ See, ILO Official Records, File no. ACD 8-2-309-87, Report for the year ending 30 June 1989.

Article 3 of the Convention No. 87¹¹⁰ which provides that workers' and employers' organisation have the right to organise their administration and activities and to formulate their programmes and that public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof. The Committee therefore asked the Government to reconsider the provisions in question. But the Government instead of reconsidering the provisions in the light of the suggestions, adopted a defensive stand as it communicated to the ILO:

As regards empowering the Registrar of Trade Unions to inspect and seize any record of Trade Unions and federations, it may be stated that this has been done to ensure proper maintenance of accounts and safeguarding against tampering of documents, misappropriation and misuse of union funds, raised mainly through subscriptions and donations from its members. Hence, it would be evident that the existing provision of law is not to interfere or restrict the right to freedom of association of workers or of employers.¹¹¹

It appears from the above statement that Government considers the issue in question as a facilitating provision whereby the Registrar of Trade Unions would help the unions and federations to meet the expectations of their members. At this juncture it may be recalled that in its General Survey in 1983, the Committee of Experts has emphasised that in order to avoid interference by the authorities in Trade Union matters, "supervision of union funds should not normally go beyond a requirement for the organisation to submit periodic financial returns" and that "investigatory measures should be restricted to exceptional cases, when they are justified by special circumstances, such as presumed irregularities that are apparent from annual financial statements or complaints reported by members of the Trade Unions" and "furthermore, ... these controls should be conducted subject to review by the competent judicial authority".¹¹²

¹¹⁰ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 69th Session, Geneva 1983, p. at 116; 71st Session, Geneva 1985, p. at 123; 73rd Session, Geneva 1987, at p. 150; 75th Session, Geneva 1988, at p. 141; 76th Session, Geneva 1989, at p. 129; 78th Session, Geneva 1991, at p. 148.

¹¹¹ See, ILO Official Records, File No. ACD 8-2-309-87. Report of the Government for the year ending 30 June 1986.

¹¹² ILO, *Freedom of Association and Collective Bargaining: General Survey*, Geneva 1983, pp. 59-60.

In the absence of any express indication in the provisions of the Rule, Government's explanation that "as per provision of the law the supervision exercised is limited to inspection of account books and calling for clarification relating to maintenance of accounts"¹¹³ can not be considered to provide sufficient guarantee of the provisions of the Convention. Thus, the Committee has been rightly observing for some years that investing an administrative authority such as the Registrar of Trade Unions, with broad discretionary powers to examine the papers of an organisation would create grave danger of interference with the guarantees provided by the Convention.¹¹⁴

The Right of Association of Public Servants

Rule 29 of the Government Servants (Conduct) Rules, 1979, *inter alia* provide for 'class wise' organisations. The promulgation of this rule clearly indicates that the earlier observations of the Committee¹¹⁵ was simply not taken into consideration. On the contrary the Government in one of its reports to the ILO asserted:

The Government considers the present position regarding the association of public servants as in conformity with the principles set forth by the Convention.¹¹⁶

It needs to be emphasised that Rule 29(a) provides membership of the associations to be confined class wise and under rule 29(b) they must not be affiliated to another association¹¹⁷. The Committee accordingly observed:

these aspects of legislation are not in accordance with the right of workers to establish and join organisation of their own choosing laid down by Article 2 of the Convention ... and to the right that every Trade Union should have to exercise its

¹¹³ See, ILO Official Records, File No. ACD 8-2-309-87. Report for the year ending 30 June 1988.

¹¹⁴ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 76th Session, Geneva 1989, at p. 129; 78th Session, Geneva 1991, at pp.148-49; 81st Session, Geneva 1995, at p. 56.

¹¹⁵ During pre-independence period, the right of association of public servants was governed by the Secretariat's Notification No. 6/1/48/ Ests. (S.E.) of 1948, which provided for establishing 'class wise' association.

¹¹⁶ See, ILO Official Records, File No. ACD 8-2-309-87. Report for the year ending 30 June 1988.

¹¹⁷ See, Government Servants (Conduct) Rules, 1979.

activities, to formulate its programmes and to organise its administration without interference from the public authorities, in accordance with Article 3.¹¹⁸

The Committee's above observation was not confined to mere pointing out the incompatibility but followed by requests to reconsider the situation in the light of the above comments with a view to giving full effect to Articles 2 and 3 of the Convention in respect of public servants.¹¹⁹ In its various reports the Government merely indicated that it has noted the observation of the Committee on this point,¹²⁰ but provided no indication that it proposes to introduce the changes as requested by the Committee. This led the Committee to note with 'regret' about the continued failure of the Government to give effect to the requirements of the Convention.¹²¹

Voluntary Bargaining in Public Sectors

Currently, under Section 3 of the State-Owned Manufacturing Industries Workers (Terms and Conditions Service) Ordinance, 1993 the Government may determine wages and other fringe benefits for any worker employed in a state-owned manufacturing industry and that no condition more favourable than those fixed could be granted to the workers concerned. The Committee as early as in 1977 and 1979 reviewed the provisions of the Act and indicated them to be not in conformity with Article 4 of Convention No. 98.¹²²

In its reply for the period ending 30 June 1980, the Government explained that the legislation was designed to achieve uniform wage structure for the public sector and to safeguard the interest of workers in less viable industries and therefore did not counteract Article 4 of Convention No. 98.¹²³ So far as the safeguarding of workers' interest in less viable industries is concerned, the

¹¹⁸ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 71st Session, Geneva 1985, at p. 122; 73rd Session, Geneva 1987, at p. 149; 75th Session, Geneva 1988, at p. 143.

¹¹⁹ Id.

¹²⁰ See, ILO Official Records, File No. ACD 8-2-309-87. Reports of the Government for the years 1989 and 1990.

¹²¹ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 78th Session, Geneva 1991, at p. 148; 81st Session, Geneva 1994, at p. 198; 82nd Session, Geneva 1995, at p. 152.

¹²² See, ILO Official Records, File No. ACD 2-8-309-98.

¹²³ Id.

Committee indicated that though it might be normal for a Government to issue direction and guidelines as to wages, the final decision on the matter should rest with the parties to the agreement.¹²⁴ Accordingly, the Committee has expressed its concern for a number of years, in relation to the development of collective bargaining in the public sector and has drawn Government's attention to Article 4 of the Convention requesting to take steps to encourage and promote the development and utilisation of machinery for the voluntary negotiation of collective agreements.¹²⁵

Protection against Interference in Unions

Following Government's first report after independence in 1974, the Committee on several occasions requested the Government to indicate in what manner the protection of workers' organisations against acts of interference was being assured under Article 2 of Convention No. 98.¹²⁶ In response, the Government in its report for the year ending 30 June 1978 admitted:

There is no protection in our law against any acts which are designed to promote the establishment of workers organisations under the domination of an employer or employers' organisation as to support workers' organisations by financial or other means, with the object of placing such organisations under the control of an employer or an employers' organisation. Generally, such efforts are not made by the employers in this country.¹²⁷

The Government further assured:

If the circumstances demand the Government will not hesitate to protect workers' organisation against acts of interference whatsoever.¹²⁸

The Committee of Experts noted Government's statement and relying on preventive rather than curative approach requested the Government to consider

¹²⁴ See, ILO Official Records, File No. ACD 2-8-309-98. Direct request addressed to the Government in 1981 by the Committee of Experts.

¹²⁵ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 71st Session, Geneva 1985, at pp. 214-15; 73rd Session, Geneva 1987, at p. 262; 76th Session, Geneva 1989, at p. 262; 78th Session, Geneva 1991, at p. 250-51; 81st Session, Geneva 1994, at p. 251.

¹²⁶ See, ILO Official Records, File No. ACD 2-8-309-98. Direct request addressed to the Government by the Committee of Experts.

¹²⁷ See, ILO Official Records, File No. ACD 2-8-309-98.

¹²⁸ Id.

the possibility of adopting specific provisions guaranteeing legal protection against the acts of interference covered by Article 2 of the Convention.¹²⁹ Further, the Committee took the view that by virtue of Article 2 special measures must be taken, in particular through legislation, accompanied by appropriate civil and penal sanctions.¹³⁰

However, the Government instead of adopting any legislative measure subsequently changed its stand and pointed out that Sections 15 and 16 of the IRO, 1969, provide legislative protection with respect to interference in trade union activities.¹³¹ This attracted Committee's attention, which observed:

The Committee noted that Sections 15 and 16 of the Ordinance, taken together with Section 53 do appear to provide an appropriate form of legislative protection against anti-union discrimination as envisaged by Article 1 of the Convention. However, the Committee is not satisfied that these provisions constitute an adequate response to the requirements of Article 2.¹³²

The Committee therefore has been requesting the Government to review its legislation with a view to the adoption of an appropriate measure of protection against any interference for purposes of Article 2 of Convention No. 98.¹³³

Restriction on the Right to Strike

The Committee of Experts on a number of occasions expressed its concern¹³⁴ with respect to several provisions of the IRO, 1969, which limit strikes and other forms of industrial action in a manner, which is not in conformity with the principles of freedom of association. In particular: (i) the

¹²⁹ See, File No. ACD 2-8-309-98. Direct request addressed to the Government by the Committee of Experts.

¹³⁰ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 73rd Session, Geneva 1987, at p. 263.

¹³¹ See, File No. ACD 2-8-309-98. Report of the Government for the year ending 30 June 1989.

¹³² See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 76th Session, Geneva 1989, at p. 263.

¹³³ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 78th Session, Geneva 1991, at p. 251; 81st Session, Geneva 1994, at p. 251.

¹³⁴ For example see, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part 4A), 82nd Session, Geneva 1995, at p.153.

necessity for the three-quarters of the members of a workers' organisation to consent to strike (section 28); (ii) the possibility of strikes which last more than 30 days [Section 32(2)] and of prohibiting a strike at any time if it is considered prejudicial to the national interest [section 32(4)] or involve a 'public utility service' [Section 33(1)]; and (iii) the nature of penalties which may be imposed in respect of participation in unlawful industrial action (Sections 57, 58 and 59), including possibility of imprisonment. But the government in its report simply indicates that the economic condition of the country does not permit workers to go on frequent strike, as this would pose a threat to maintaining their livelihood and cripple the economy.¹³⁵

Right to Organise and to Bargain Collectively in the Export Processing Zones

The provisions of the IRO, 1969, are not operative in the export processing zones by virtue of section 11A of the Export Processing Zones Authority Act, 1980. As such the workers in such zones do not have any legal right to organise and to bargain collectively. The government in its report indicated that the restriction on the formation of trade unions in the export processing zones "are temporary measures necessitated by the national situation, the level of development and the specific circumstances within Bangladesh".¹³⁶ The Committee noted that such a fundamental right as the right to organise should not be denied to workers, even temporarily, and this would constitute a violation of article 2 of Convention 87. However, the Committee has expressed the view that the Export Processing Zones Authority Act, which provides for the exemption of the zones from the operation of the IRO, cannot be considered a temporary measure, in view of the fact that it was adopted in 1980.¹³⁷

CASES CONCERNING BANGLADESH BEFORE THE COMMITTEE ON FREEDOM OF ASSOCIATION

Complaints to the Committee on Freedom of Association (hereinafter referred to as CFA) may be submitted by Governments or by organisations of workers or employers. There are three categories of workers' and employers' organisations which may file complaints : (a) national organisations directly interested in the

¹³⁵ Id.

¹³⁶ See, *Report of the Committee of Experts on the Application of Convention and Recommendation*, Report III (Part A1), 87th Session, Geneva 1999, at p. 213.

¹³⁷ Id.

matter; (b) international organisations of workers, employers or employers having consultative status with the ILO¹³⁸ and (c) other international organisations of workers and employers where the allegations relate to matters directly affecting their affiliated organisations. So far Bangladesh is concerned, all the above three categories of workers' organisations have lodged complaints before the CFA. Since independence in 1971, the CFA has considered 10 cases from Bangladesh. These cases are : (i) Case No. 729 : Complaint presented by Bangladesh workers federation,¹³⁹ (ii) Case No. 816: Complaint presented by the National Workers Federation (Jatiya Sramik Federation);¹⁴⁰ (iii) Case No. 861 : Complaint presented by the World Federation of Trade Unions (WFTU);¹⁴¹ (iv) Case No. 955 : Complaint presented by the World Federation of Trade Unions;¹⁴² (v) Case No. 1214 : Complaint presented by eleven National Trade Union Federation;¹⁴³ (vi) Case No. 1246 : Complaint presented by World Federation of Teachers Unions;¹⁴⁴ (vii) Case No. 1259 : Complaint presented by the Trade Unions International of Transport Workers;¹⁴⁵ (viii) Case No. 1326 : Complaint presented by the World Federation of Teachers' Unions and the Sramik

¹³⁸ The international organisations of workers and employers which presently have consultative status with the ILO are the following : International Confederation of Free Trade Unions, World Confederation of Labour, World Federation of Trade Unions, World Confederation of Labour, World Federation of Trade Unions, International Organisation of Employers.

¹³⁹ For details of the case, see, ILO, *Official Bulletin*, Vol. LVII, Series B, No. 1, (Supplement) 1974, pp. 288-90.

¹⁴⁰ For details of the case see, ILO, *Official Bulletin*, Series B, Vol. LIX, No. 1, 2 (1976) Vol. No. LXI, No. 1, 2 (1972) Vol. No. LXI, No. 2, 1978, pp. 6-8.

¹⁴¹ For details of the case see, ILO, *Official Bulletin*, Series B, Vol. LX, No. 3, 1977, pp. 57-61; Vol. LXI, No. 3, 1978, pp. 108-13; Vol. LXII, No. 2, 1979, pp. 49-52; Vol. LXIII, No. 1, 1980, pp. 45-47; Vol. LXIII, No. 3, 1980, pp. 71-73; Vol. XLIV, No. 3, 1981, pp. 7-8.

¹⁴² For details of the case see, ILO, *Official Bulletin*, Series B, Vol. LXII, No. 3, 1980, pp. 12-13.

¹⁴³ For details of the case see, ILO, *Official Bulletin*, Series B, Vol. LXVI, No. 3, 1983, pp. 89-93.

¹⁴⁴ For details of the case see, ILO, *Official Bulletin*, Series B, Vol. LXVII, No. 2, 1984, pp. 22-23.

¹⁴⁵ For details of the case see, ILO, *Official Bulletin*, Series B, Vol. LXII, No. 3, 1984, pp. 18-20.

Karmachari Okkya Parishad;¹⁴⁶ (xi) Case No. 1862: Complaint presented by the International Confederation of free Trade Unions (ICFTU) and the International Textile, Garment and Leather Workers' Federation (ITGLWF) (x) Case No.1998: Complaint presented by Bangladesh Jatiyabadi Sramik Dal (BJSJ) and Public Service International (PSI).

From study of the above cases it has been evident that the allegations in the various complaints concerned the arrests and detention of trade unionists and the infringement of trade union rights imposed by legislative enactments. In cases Nos. 955 and 1246 the Government furnished the information that the detainees were not arrested for their trade union activities but for political activities and misappropriation of funds respectively. In case No. 1259 the Government released the detainee before reporting to the CFA. So did the Government in case No. 955. The consideration of case No. 729 by the CFA was of no practical value as the Presidential Order No. 55 of 1972 prohibiting strikes in public sector was withdrawn before the case came up for consideration and the Government having deferred the implementation of its labour policy of 1973. Case No. 816, although concerned serious allegations such as arrest and killing of many trade unionists, was not examined on merits by the CFA as the complainant subsequently did not wish the case to be examined. In case No. 861 the CFA continued the examination of the case until was satisfied that all information have been provided and insisted that the Government should furnish details of the grounds of arrests and detention of the detainees. The CFA in all the cases pursued till the Government released the detainees. Thus, in the cases discussed above, the Government released all the detainees at some point during the pendency of the case and informed the CFA accordingly.

The question now arises, how far the CFA can be credited for this? Actually, there is no way of summarising the success of the procedure in quantitative terms as neither the Government nor the CFA make any public announcement on the issue. The conclusion is to be inferred from the context. Thus, the communication of complaints followed by subsequent release of arrested persons as mentioned in various complaints, whatever be the time gap, may be considered to have had some bearing on the decision of the Government. The procedure has been of significance as it has shown the awareness and concern of

¹⁴⁶ For details of the case see, ILO, *Official Bulletin*, Series B, Vol. LXVIII, No. 3, 1985, pp. 308-312; Vol. LXIX, 1986, No. 1, 1986, pp. 34-40.

the working class of their rights and on the other hand caused the Government to explain its position in an international forum. Also, it must be emphasised that the procedure has been utilized by some national and world Trade Union federations and the more and more use of it in the event of violation of Trade Union rights may result in making the procedure more effective.

But at the same time it may be argued that the release of various detained alleged trade unionists resulted not because of the CFA procedures but because the purposes for which they were arrested by the Government in power were achieved. Regarding allegations concerning legislative incompatibility with the ILO Conventions, the CFA in cases Nos. 1214, 1246 and 1326 requested the Government to amend the legislation. The Committee of Experts indeed has repeatedly pointed out the various legislative incompatibilities in the domestic law vis-à-vis ILO Conventions which we have detailed earlier in our discussion. But in its attempts, the CFA failed to evoke any positive response from the Government. There is hardly any indication that the attempts by the CFA influenced Government's decisions or policy making. Accordingly, so far as Bangladesh is concerned, from the cases discussed above, no positive conclusion can be reached as to the success of the CFA procedure.

CONCLUSION

It is apparent from the above discussion that the various Governments succeeding one after another in the post independence period and the various legislative measures adopted by them have been directed mainly towards curbing the right of association. Instead of widening the horizon of exercise of the right to freedom of association in conformity with the ILO Conventions, all successive Governments adopted repressive measures in contradiction to their professed faith in the right to freedom of association and solemn declaration to abide by the ILO Conventions which the state has ratified. Hence, it may be concluded that the legislative framework on the right to freedom of association which is prevalent in post independence Bangladesh have fallen much short of what existed immediately before independence.

Our investigation into the Committee of Experts role in the supervisory process has revealed that in the most recent period of the Committee's history, its reports have been ever more detailed, its observations ever more pointed, and its suggestions for remedial actions more specific. This has resulted due to Government's introduction of various restrictive provisions on trade union rights

in the post independence period. It must be pointed out that the Committee's persistence in demanding full implementation of ratified Conventions has been commendable. In the case of certain recurring non-compliance, the Committee has continued to exert pressure with a view to bringing the legislation in conformity with the provisions of the Conventions at some point.

It must however, be emphasised that a state cannot be impelled by the ILO to bring about changes in domestic law in harmony with the ratified Conventions or to act upon the views of its supervisory bodies. From international viewpoint, it is not satisfactory either for the ILO or for the state concerned to leave the unresolved issues resulting delay in the implementation of ratified Conventions. It can be said of the ILO procedure, that it subsists with the issues for too long in an effort to secure compliance of the Conventions. But this is perhaps the only way of handling an intractable situation and does in fact result in keeping the situation open for reconsideration. The law's delays have been a legitimate grievance throughout history, but justice delayed is less justice denied than the hurried rough justice. It appears that only by taking this kind of long view can we hope to make a lasting reality of international action for the protection of the right to freedom of association at national level.