

## COMPARING THE TRANSFER OF PROPERTY LAW IN BANGLADESH AND ENGLAND: ANY LESSON FOR BANGLADESH FROM CONTEMPORARY ENGLISH LAW?

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### ABSTRACT

*The study aims to (i) compare the transfer of property law in Bangladesh and England; and (ii) question, if Bangladesh can take any lesson from contemporary English law. In so doing, the study after crystallization of certain terms revisited the major governing legislation of Bangladesh and England in the field of transfer of property. The study then looks at some selected topics within the periphery of the said Acts. This inclusively includes: sale, mortgage, gift and lease. Throughout the study a comparative research methodology is used which is more of a descriptive than analytical in nature. The study finds that: (i) being the followers of common law systems both jurisdictions share a myriad of analogous provisions but in some cases Bangladeshi laws have superseded the laws of England and in some cases they have failed in terms of ensuring the interests of the stake holders; and (ii) in the latter case Bangladesh may take some new lessons from English Law recently developed. Any such lesson may in turn not only secure the interest of the parties but also allow the courts of Bangladesh to explore the diversity of property forms, ethical values and normative commitments-in true common law fashion better compatible to property law jurisprudence.*

### I. Introduction

The Transfer of Property Act 1882<sup>1</sup> is not exhaustive. But, it encompasses important methods of transaction of property and is regarded as the principal source of law on *inter vivos* property transfers in Bangladesh. The original framework of the Act continues to influence the law and its interpretation, practice and structure of property transfers for more than hundred years. Although Bangladesh's structure is a common law jurisdiction, the Act is reflective of an immense influence that courts have had (and continue to have) on the basic structure and foundations of the law of property, both prior to and

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<sup>1</sup> Act No. IV of 1882.

after the country's independence in 1971.<sup>2</sup> While its endurance is ample testament to its drafters' ideals of producing a simplified and workable code of property rules for continental jurisdiction somewhat ironically the common law of property in Bangladesh is indelibly statutory in origin.<sup>3</sup>

In relation to property transfer law, codification assumed special importance to the British in their dominance to the Indian sub-continent. Indeed, the British government's use of: (i) land settlement rules, (ii) land revenue policies, and (iii) tenancy reform initiatives worked as an important device to consolidate their socio-political power over the country in the guise of various codifications. And for this, broadly the codifiers had to be certain that the continental courts of law- mostly operational in nature, showed extensive deference to the codifiers' intent and institutional supremacy. This emerged the codifiers' use of precise drafting and standardization as important mechanisms. This in turn served two other purposes: (a) to constrain judicial lawmaking; and (b) to restrain courts' incremental development of property law to meet the demands of a rapidly evolving society. However, ossifying the system, eliminating the most complicated forms, arrangements, and transfers, and restraining judicial receptivity to local customs and private arrangements remained the unarticulated motivations behind the codification of the Transfer of Property Act. The success of these strategies is well borne out in the continuing relevance of the said Act to the law of property in Bangladesh and the extent to which courts continue to see themselves as constrained by its text and framework to this day in innumerable contexts.

However, despite the questionable political authority of its colonial creators, the Act is seen as an embodiment of property law landmark for the country. Much of the Act consists of legal transplants that are externally dictated.<sup>4</sup> The relevance of the Act and the successes of these transplants are in large part due to the authority of the legal system as a whole, rather than anything specific to native property law.<sup>5</sup> Consequently, path dependence and the fear of upsetting settled expectations may well be the primary causes for the continuance of the

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<sup>2</sup> Balganes, Shyam K., "Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint", 63 (2015) *American Journal of Comparative Law*, at p. 33.

<sup>3</sup> This was hardly an unintended consequence; it was instead a design feature that the British deployed with great success to deal with the complexity of India's property rules and arrangements, especially as they existed prior to their administration of the Indian subcontinent. See, *ibid.*

<sup>4</sup> Miller, Jonathan M., "A Typology of Legal Transplant Process", 51 (2003) *American Journal of Comparative Law*, at p. 845.

<sup>5</sup> *ibid.*, at p. 861.

Act in Indian sub-continent<sup>6</sup> and post-independent Bangladesh today. This actually helps to have compliance with many common law principles throughout the Act.

In contrast to any such compliance, it is not an alien fact that there are some provisions- the interpretation of which is found either literal or otherwise different which is native to English principles. To be further mentioned that in some cases the interpretation of the court itself is not compatible to the common law principles and thus, get either a wider or restricted connotations if they are compared to the common law principles. This perhaps, in some cases if not all gives a contextual scope and room for actualization of the right to property.

The laws of England, on the other hand that deal with transfer of property and various aspects relating to transfer of property are Law of Property Act of 1925, the Law of Property (Miscellaneous Provision) 1989 and the Mental Capacity Act of 2005. In Bangladesh the main governing legislation is the Transfer of Property Act of 1882, as mentioned earlier. This was promulgated during the British Regime and remained almost unaltered except some minute changes till date. However, with the passage of time the property laws of England have taken many shifts and turns in order to ameliorate the existing discrepancy in the transfer of property law paradigm.

This study aims to (i) compare the transfer of property law in Bangladesh and England; and (ii) question, if Bangladesh can take any lesson from contemporary English law. In so doing, the study after crystallization of certain terms i.e., property law, transfer of property law and common law principles (since both jurisdictions are guided by common law principles) revisited the major governing legislation of Bangladesh and England in the field of transfer of property. The study then looks at some selected topics within the periphery of the said Acts. This inclusively includes: sale, mortgage, gift and lease. Throughout the study a comparative research methodology is used. It only focuses on the transfer of real property laws of England and thus the laws of three other different jurisdictions of UK (Scotland, Wales and Northern Ireland) have not been taken into account. The study finds that: (i) being the followers of common law systems both jurisdictions share a myriad of analogous provisions but in some cases Bangladeshi laws have superseded the laws of England and in some cases they have failed in terms of ensuring the interests of the stake holders; and (ii) in the latter case Bangladesh may take some new lessons from English Law recently developed. Any such lesson may

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<sup>6</sup> Ewald, W., "Comparative Jurisprudence (II): The Logic of Legal Transplants", 43 (1995) *American Journal of Comparative Law*, at p. 489.