CHAPTER SIX

ELECTION, SERVICE AND OTHER TOPICS

FRANCHISE AND ELECTION

6.1 Free and fair election is a basic requirement for the success of democracy. Part VII of the Constitution endeavours to provide for such free and fair election. In terms of art.122 elections to Parliament shall be on the basis of adult franchise. For the purpose of election to Parliament any citizen of Bangladesh of not less than eighteen years of age shall be entitled to be enrolled on the electoral roll for a constituency if he is or is deemed by law to be a resident of that constituency and does not stand declared by a competent court to be of unsound mind.[1] To accord equality in the matter of franchise, it is provided that there shall be one single electoral roll for each constituency and no special electoral roll shall be prepared so as to classify the electors according to religion, race, caste or sex.[2]

6.2 *Election of the President:* Art.123(1) provides that in the case of a vacancy in the office of the President by the expiration of his term of office an election shall be held within the period of 90 to 60 days prior to the date of expiration of the term, but if the term expires before the dissolution of the Parliament by the members of which he was elected, the election shall be held within 30 days of the first sitting of Parliament after the next general election. After the Thirteenth Amendment, often the term of the President may expire during the period a care-taker government is functioning. Though this situation is not dealt with in the Constitution, the proviso to art.123(1) has to be applied as there is no Parliament at the time of such expiration of the presidential term to hold the election. In the case of a vacancy in the office of President by reason of the death, resignation or removal of the President, an election to fill the vacancy shall be held within 90 days of the occurrence of the vacancy.[3]

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[1] *Ali Reza Khan v. Election Commission*, 50 DLR 58 (Permanent resident of Bangladesh reaching the age of 18 years, though temporarily residing in U.K. is entitled to be registered as voter)

[2] Art.121

[3] Art.123(2)

6.3 *Election of members of Parliament:* Originally art.123(3) provided that the general election in case of dissolution of Parliament on the expiration of the term should be held within the period of 90 days preceding such dissolution and in case of earlier dissolution, within 90 days after such dissolution and in the former case the members of Parliament elected would not assume office until the expiration of the term of the old Parliament. After the Constitution (Thirteenth Amendment) Act, 1996 was passed, the amended art.123(3) provides that a general election of members of Parliament shall be held within 90 days after Parliament is dissolved or stands dissolved on expiration of its term. In case of vacancy in the seat of a member of Parliament occurring not as a result of the dissolution of Parliament an election to fill the vacancy shall be held within 90 days of the occurrence of the vacancy. But if the Chief Election Commissioner is of the opinion that because of an act of God it is not possible to hold the election within the stipulated period of 90 days it shall be held within the next 90 days. Placement of the Proviso to art.123(4) clearly indicates that this discretion of the Chief Election Commissioner to defer the election because of act of God is available only in the case of a bye-election when the seat of a member of Parliament falls vacant otherwise than by dissolution of Parliament. The framers of the Constitution having act of God in their contemplation and consciously not making any provision to meet such contingency in case of the general election, it must be held that the holding of the general election cannot be deferred beyond the period stipulated in art.123(3).

6.4 Art.124 provides that subject to the provisions of the Constitution, Parliament may by law provide for all matters relating to or in connection with elections to Parliament including the delimitation of constituencies, the preparation of the electoral rolls and the holding of elections. Art.125(a) bars any action in any court challenging the validity of any law relating to the delimitation of constituencies, or the allotment of seats to such constituencies, made or purporting to be made under art.124, and art.125(b) bars any action in any court questioning the election to the office of President or to Parliament except by an election petition as may be provided by law by Parliament. Thus except in case of *coram non judice* (in case the law is passed without the requisite quorum which was pointed out) or violation of any provision of the Constitution, a law made under art.124 cannot be challenged in any court. The election process starts from the notification issued by the Election Commission declaring the election schedule and culminates in

the declaration of the result by gazette notification[1] and no step in the electoral process of the presidential or parliamentary election can be challenged in a suit or in the writ jurisdiction except on a very limited ground of *coram non judice* or malice in law and when an election is completed, that election can only be challenged by filing an election petition and not by filing a suit or a writ petition; but once the election tribunal decides an election petition, its decision can be challenged before the High Court Division in the writ jurisdiction.[2] The Appellate Division observed that the High Court Division should not entertain any writ petition against an interlocutory order passed by the election tribunal.[3] Indirect election for the reserved seats for women in Parliament was challenged as undemocratic and violative of art.121 and art.28 of the Constitution, but the Appellate Division rejected the contention.[4]

6.4A In *Mahboobuddin Ahmed v. Bangladesh*[5] Dr. Ehtesham was the successful candidate in the parliamentary election from a constituency and the petitioner filed election petition. During the pendency of the election petition, Dr. Ehtesham died and the Election Commission published the election schedule for holding bye-election in terms of art.123(4) which requires holding of the election within 90 days from the date the seat falls vacant. The petitioner contended that until the election petition is disposed of there is no vacancy necessitating bye-election and that holding of the bye-election would prejudice his election petition. It was argued that art.125 starting with a *non-obstante* clause and providing for election petition for settlement of an election dispute, art. 123, which requires holding of bye-election within 90 days of the seat becoming vacant, cannot prejudice the election petition provided in art.125. The court rejected the contention that there is no vacancy in the seat as long as the election dispute is pending. The court held that the provision of art.123 is mandatory and the bye-election was to be held within the time stipulated. The provisions of art.123 and 125 operate in

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[1] *Mahmudul Haque v. Md. Hedayetullah*, 48 DLR (AD) 128; *Mayeedul Islam v. Election Commission*, 1996 BLD (AD) 204

[2] *Pannuswami v. Returning Officer*, AIR 1952 SC 64; *Durga Shankar v. Raghuraj*, AIR 1954 SC 520; *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233; *Indrajit Barua v. Election Commission*, AIR 1986 SC 103; *Election Commission v. Shivaji*, AIR 1988 SC 61; *Krisna Ballabh v. S.D.O.*, AIR 1985 SC 1746; see para 6.8

[3] *Nazemuddin v. Election Tribunal*, 53 DLR (AD) 17

[4] *Dr. Ahmed Hossain v. Bangladesh*, 44 DLR (AD) 109

[5] 50 DLR 417

different fields and *non-obstante* clause is not operative unless there is a conflict. The bye-election has to be held. There may be conflict between the two provisions only if the election petition is allowed and the petitioner is declared elected and in that event the declaration in the election petition will prevail over the result of the bye-election because of the *non-obstante* clause.

ELECTION COMMISSION

6.5 Art.118 provides for an Election Commission consisting of a Chief Election Commissioner and such number of Election Commissioners as the President may direct. When the Election Commission consists of more than one person, the Chief Election Commissioner shall act as the Chairman of the Commission. The Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in this regard, be appointed by the President for a term of five years from the date of entering the office. They are to take oath as prescribed in the Third Schedule before entering upon their office to preserve, protect and defend the Constitution.

6.6 To ensure free, fair and impartial elections, the Constitution declares that the Election Commission shall be independent in the exercise of its functions and be subject only to the Constitution and any other law. Though the conditions of service of the Election Commissioners are to be determined by the President, in order to maintain their independence and freedom from political and executive influence, it is provided that they can be removed only on the grounds and in the manner a Judge of the Supreme Court may be removed.[1] Their remuneration, privileges and other terms and conditions of service shall not be varied to their disadvantage during their term of office.[2] They are to take oath of office in terms of art.148. To ensure their independence and neutrality it has been further provided that a person holding the office of Chief Election Commissioner shall not be eligible for appointment in the service of the Republic and a person holding the office of Election Commissioner can be appointed as the Chief Election Commissioner, but shall not be eligible for appointment in the service of the Republic.[3]

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[1] Art.118(5)
[2] Art.147(2); see Para 6.59B
[3] Art.118(3)

6.7 *Functions of Election Commission:* The Constitution vests the superintendence, direction and control of the preparation of the electoral rolls for the presidential and parliamentary elections and conduct of such elections in the Election Commission. The Commission is required to hold the presidential and parliamentary elections, delimit the constituencies of parliamentary elections and to prepare electoral rolls for the presidential and parliamentary elections in accordance with the Constitution and any law passed by Parliament in this regard.[1] Election is a long, elaborate and complicated process which starts with the notification for holding the elections and ends with the declaration of the result of polling in the manner prescribed by law.[2] The Commission has to supervise, control and direct each and every step of the process to ensure free and fair election and the Commission must be deemed to have all the power and discretion to ensure free and fair election as that is the manifest intendment of the Constitution in providing for the Commission.[3] Parliament may by law regulate the exercise of the power by the Commission, but such a law has to be in conformity with the Constitution and it cannot in any way curtail or diminish the effectiveness of the Commission in holding free and fair elections. In exercise of the power the Commission has two limitations - it must act in conformity with the Constitution and the laws validly made by Parliament and like all other functionaries of the Republic it must not act arbitrarily.

6.7A The Election Commission is a composite body and perform its functions as such. The Chief Election Commissioner, on his own, has only the discretion to postpone the holding of any bye-election under the proviso to art.123(4) of the Constitution if he is of the opinion that it is not possible to hold the election within the specified period of ninety days for reasons of an act of God. Art.4 of the Representation of the People Order, 1972 provides that the Commission may authorise its Chairman or any of its members or any of its officers to exercise and perform all or any of its powers and functions under the Order. Thus the Chief Election Commissioner or any Election Commissioner or any officer of the Election Commission cannot perform any of the functions of the Commission unless he is so authorised by the Commission. The

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[1] Art.119(1)

[2] *Shah Alam v. Mujibul Haq*, 41 DLR (AD) 68; *Mohinder Singh v. Chief Election Commissioner*, AIR 1978 SC 851

[3] *Afzal Hossain v. Chief Election Commr.*, 45 DLR 255

Chief Election Commissioner, being ill and going abroad, authorised an Election Commissioner to act as the Acting Chief Election Commissioner and the Election Commissioner decided a dispute relating to the allocation of election symbol. The Appellate Division held the decision to be *corum non judice* as in the absence of authorisation by the Commission, the Election Commissioner was not competent to decide the dispute.[1] There is no provision for an Acting Chief Election Commissioner either in the Constitution or in the Representation of the People Order, 1972. Question arises as to whether the decision of the Commission in any matter has to be unanimous. The Indian Supreme Court answered in the negative stating that unless otherwise required by law, the decision of a multi-member body may be a decision of the majority members.[2]

6.8 The language of art.324 of the Indian Constitution is substantially the same as the language of art.119(1) of the Constitution. In a parliamentary election because of disturbance in some polling stations towards the end of the counting the Commission ordered re-poll, and the candidate who was on a definite winning trail challenged the power of the Commission to order re-poll. The Indian Supreme Court upon consideration of art.324 of the constitution together with ss.58 and 64A of the Representation of the People Act found that the Commission had the responsibility of ensuring free and fair election and had the discretion to order re-poll.[3] The same question arose in the Union Parishad elections and the High Court Division denied that power to the Commission. Those cases came up before the Appellate Division which heard them analogously.[4] Rule 70 of the Union Parishad Election Rules was the same as art.91 of Representation of the People Order, 1972 (except where the context otherwise required) and it ran as follows -

> 70. Powers of the Election Commission to issue orders. - Save as otherwise provided, the election Commission may issue such instructions and exercise such powers, including the power to review an order passed by any officer under these rules and make such consequential orders as may, in its opinion, be necessary for ensuring

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[1] *Jatiya Party v. Election Commission*, 2001 BLD (AD) 10; *Anwar Hossain v. Election Commission*, 2001 BLD 546

[2] *T.N. Seshan v. India*, (1995) 4 SCC 611; *Election Commission v. Dr. Subramanian*, AIR 1996 SC 1810

[3] *Mohinder Singh v. Chief Election Commissioner*, AIR 1978 SC 851

[4] *Shah Alam v. Mujibul Haq*, 41 DLR (AD) 68

> that an election is conducted honestly, justly and fairly and in accordance with the provisions of the Ordinance and these rules.

The respondents contended that the Commission could not order re-poll where the Presiding Officer or the Returning Officer performing functions under the rules reported peaceful holding of the election. The Appellate Division reached the same conclusion as reached by the Indian Supreme Court holding that the Commission had the power to order re-poll. The jurisdiction under art.102 to challenge any step in the process of the election including any order of the Commission under rule 70 can be exercised only on the limited ground of *coram non judice* or malice in law.[1] By the parity of reasoning what has been decided in respect of the Union Parishad election is fully applicable in respect of the parliamentary election.[2]

6.9 The provisions of art.119(1) are confined to the election of the President and the members of Parliament. However, the Commission may be entrusted with the power and duty of conducting other elections by law made by Parliament in the exercise of power given under art.119(2). Even though art.119(2) does not speak of the supervisory power of the Commission, the Constitution does not envisage anything else than free and fair election and any law which stifles the hand of the Commission in ensuring free and fair election will not pass the test of constitutionality. It is for this reason that the Appellate Division conceded the inherent power of the Commission to ensure free and fair election in the local government bodies even when r.68 of the Upazila Parishad (Election Rules) (same as r.70 quoted above) was omitted.[3] Later in *Altaf Hossain v. Abul Kashem*[4] the Appellate Division took the view that the inherent power is to be exercised to supplement the statutory rules (and, of course, the Constitution and the law made by

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[1] Ibid; *Zaker Hossain v. Abdur Rahim*, 42 DLR (AD) 153 *Abdul Matin v. Election Commr.*, 45 DLR 220 (the Court will not interfere in interlocutory proceeding unless there is flagrant violation of the law or the Constitution); *Alhaj Jamshed Ali v. Abdullah*, 2000 BLD (AD) 189 (when the election process is still on the High Court Division ought not to have interfered with the matter on a disputed and controversial fact and resolved them on mere affidavits); *Mozibur Rahman Manzu v. Abdul Halim*, 2001 BLD (AD) 109

[2] *Mayeedul Islam v. Election Commission*, 1996 BLD (AD) 204; *Mahmudul Haque v. Md. Hedayetullah*, 48 DLR (AD) 128; *Jatiya Party v. Mutassim Billa*, 2000 BLD (AD) 69

[3] *Abdur Rouf v. Fazlur Rahman*, 43 DLR (AD) 23

[4] 45 DLR (AD) 53

Parliament) with the sole purpose of ensuring free and fair elections. The court observed -

> This power is to be exercised with utmost restraint, for frequent use of it is likely to render other statutory functionaries ineffective. It is rather difficult to draw a line of demarcation of the field where this should be exercised and where should not. But from the experience it is found that sometimes statutory functionaries on the spot do not make timely report as to any disturbance during poll or large-scale rigging at the time of counting of ballot papers either through coercion or from dishonest motive. So, the general rule that when the election has been held peacefully and no report has been made about any disturbance or rigging by the Presiding Officer or the Returning Officer, then the Election Commission has no power to interfere, cannot be taken for universal application.[1]

The Appellate Division rightly enunciated the principle, but can it be said that the principle has been correctly applied in the specific cases in *Altaf Hossain*? According to the decision in *Shah Alam* the High Court Division can interfere with the decision of the Commission when it is *coram non judice* or vitiated by malice in law. In judging whether a decision is vitiated by malice in law, the court does not consider the adequacy of the materials but examines whether it is arbitrary. In the first case the Commission acted on consideration of the allegation received, the inquiry report of the Nirbahi Officer and the fact that a high number of votes was cast in favour of only one candidate. It cannot be said to be a case of no materials. In the second case the Commission acted on several facts - 30 votes were cast in the name of dead persons, 58 votes were cast in the name of absentee voters, 98% votes were cast and 99% of the votes cast went in favour of one candidate. Any one of these facts considered in isolation may not raise any presumption of unfairness or rigging. But if the Commission acted on all these facts taken together, the Commission may not be held to have acted arbitrarily. It is submitted that the treatment of the specific cases in *Altaf Hossain* has watered down the principle laid down in *Shah Alam*. In *Abul Bashar v. Kamrul Hasan*[2], the Appellate Division upheld the interference of the Election Commission on the basis of the report of disturbance by the Deputy Election Commissioner even though the Returning Officer and the District Election Officer in separate inquiries

[1] *Followed in Abdul Quader Farazi v. Chief Election Commr.*, 50 DLR 636
[2] 3 BLC (AD) 229

reported that the election was peaceful. Finally, the Appellate Division came out with a clear statement about the inherent power of the Election Commission in *Noor Hossain v. Nazrul Islam*[1] -

> Time and again this Division held that it is the responsibility of the election Commission to see that the election is conducted justly, honestly and fairly and not to encourage demonstration of muscle power in the election. This Division also observed that post-election allegations are to be decided by the Election Tribunal and not by the Election Commission. We cannot but reiterate that if there was contemporaneous report of allegations about disturbance, rigging of ballot papers or election not being held justly, honestly and fairly then after being satisfied about the correctness of the report or allegations Election commission would be justified to cancel the result of the election and direct repoll. But it would not be justified to cancel the result of the election held peacefully on the basis of post-election allegations.

6.10 Under art.66(4) the Commission is to hear and decide a dispute as to whether a member of Parliament has, after his election, become subject to any of the disqualification mentioned in art.66(2), or as to whether a member should vacate his seat because he resigned from the party which nominated him as a candidate or he voted in Parliament against that party.

6.11 Art.126 requires all executive authorities to assist the Election Commission in the discharge of its functions.

COMPTROLLER AND AUDITOR-GENERAL

6.12 The office of Comptroller and Auditor-General is a constitutional office of considerable importance. On him is cast the duty of maintaining, compiling and checking the accounts of the Republic and also of such public statutory bodies as may be prescribed by an Act of Parliament.[2] With the approval of the President he has to prescribe the form and the manner in which the public accounts shall be kept.[3]

6.13 Every year Parliament appropriates specific sums for specific works and services. It is the duty of the Comptroller and Auditor-

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[1] 2000 BLD (AD) 174, 180
[2] Art.128
[3] Art.131

General to examine and ensure that the administration does not exceed the approved sum and has spent the money for the works and services for which it was approved by Parliament. He is responsible for having all the receipts and expenditures audited and he is to examine whether the money spent were legally available for and applicable to the works and services for which it has been spent. He has to see that the expenditures have been made by the authorities competent under the law to make it and that all the legal rules and formalities governing such expenditures have been complied with. In the absence of all these checks parliamentary authorisation will lose its meaning and it will be impossible for Parliament to have effective control over the finance. The Comptroller and Auditor-General has to satisfy himself on behalf of Parliament as to the wisdom, faithfulness and economy of the expenditures. He thus performs the useful job of preventing waste of public fund. He can disallow any expenditure which is in violation of the Constitution and the laws and thereby he upholds the Constitution and the laws in the financial sector of the administration.

6.14 The nature of the job demands independence of the office and integrity of the holder of the office. Accordingly, he is appointed by the President and subject to the provisions of the Constitution and any law made by Parliament, the conditions of his service is determined by the President.[1] He has to take the prescribed oath before assuming his office.[2] In order to maintain his independence and immunity from interference of the executive, art.1473 provides that his remuneration, privileges and other terms and conditions of service cannot, during his term of office, be varied to his disadvantage. He cannot be removed from his office except in the manner a Judge of the Supreme Court may be removed. He may resign from his office. He is to retire on attaining the age of sixty years and on retirement he shall not be eligible for further office in the service of the Republic.[4] The administrative expenses of his office including all remuneration payable to him and to the persons serving in his office, are charged on the Consolidated Fund of the Republic.[5] He has to prepare annual report relating to public account which shall have to be submitted to the President and the

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[1] Art.127
[2] Art.148 read with Third Schedule
[3] See Para 6.59B
[4] Art.129
[5] Art.88

President shall cause such report to be laid before Parliament.[1] If at any time the office of the Auditor-general is vacant or the President is satisfied that the Auditor-General is unable to perform his functions due to absence, illness or any other cause, the President may appoint another person to act as the Auditor-General until another Auditor-General is appointed or, as the case may be, the Auditor-General resumes his office.[2]

SERVICES OF THE REPUBLIC

6.15 The political executives formulate the policies of the government and supervise the enforcement of the laws and the policies. They hold the constitutional posts. The actual work of enforcing the laws and the policies of the government is done by persons who are the members of the services of the Republic and give continuity to the executive government. Part IX of the Constitution deals with the services of the Republic. Art.152 defines "service of the Republic" to mean "any service, post or office whether in a civil or military capacity in respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic." The expression 'Government' does not refer to the executive government only. It has been used in the generic sense to cover all departments of the Government of Bangladesh and the judicial officers and magistrates exercising judicial functions fall within the definition of the service of the Republic.[3] However, judicial officers and magistrates exercising judicial functions have been given a distinct status under Chapter II of Part VI of the Constitution.[4]

6.16 In order to understand the nature of different services one has to understand the different tenures of service which can generally be classified into four types - (1) tenure during good behaviour, (2) tenure during pleasure, (3) tenure under contract and (4) tenure under statute. Holders of tenure during good behaviour cannot be removed from office during good behaviour and their dismissal can only be for cause and hence notice is to be given on a definite charge which has to be proved. The Constitution has provided such a tenure for the Judges of the

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[1] Art.132

[2] Art.130

[3] *Secy. Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104

[4] See the discussion on Subordinate Courts in para 5.233 to 5.234C

Supreme Court, the Comptroller and Auditor-General, the Chief Election Commissioner and the Election Commissioners, the Chairman and members of the Public Service Commission and their terms of office have been determined by the Constitution. The holders of tenure during pleasure are subject to dismissal at any time without any cause being assigned. Under the English common law all Crown servants hold their office during the pleasure of the Crown. "Except where statute provides otherwise, all civil servants hold office in law at the pleasure of the Crown. This means that a civil servant may in law be dismissed at pleasure and has no common law remedy for wrongful dismissal, even when he has been promised employment for a stated period of years."[1] The incidents of tenure of the holder of tenure under contract are as provided in the contract subject to the provisions of the Constitution and other legal limitations, if any, such as appointment by specific agreement as provided by art.135(4). The incidents of tenure of the holders of tenure under statutes such as the employees of Universities and statutory corporations are as provided in the statutes.

6.16A The services of the Republic do not include the constitutional posts[2], nor any service under any statutory corporation[3] and the provisions of Part IX are not applicable in respect of such posts and services. The most significant feature of the services of the Republic is that the members of those services hold office during the pleasure of the President and the members who hold civil posts enjoy the protection of art.135. An administrator of abandoned property appointed under P.O. 16 of 1972 is not a person in the service of the Republic.[4] The fact that certain service benefits enjoyed by the government servants have been made available to the bank employees does not confer upon them the status of government servants.[5]

6.17 The posts and offices in the services of the Republic may be

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[1] Wade & Bradley - Constitutional and Administrative Law, 10th Ed., p.275

[2] *Abu Bakr Siddiqui v. Mr. Justice Shahabuddin*, 49 DLR 1

[3] *B.S.I.C. v. Mahbub Hossain*, 29 DLR (SC) 41; *Jamuna Oil Co. v. S.K. Dey*, 44 DLR (AD) 104; *Bangladesh Bank v. Abdul Mannan*, 46 DLR (AD) 1; *Md. Lutful Kabir v. Senior Asstt. Secy*, 29 DLR 45; *Chowdhury Md. Yusuf v. Bangladesh Biman*, 31 DLR 199; *Hamidur Rahman v. E. Pakistan*, 21
DLR 866; *East Pakistan v. Md. Atiqullah*, 21 DLR 764 (School Board's employees do not become government servants because of supersession of the Board by the government)

[4] *Sheikh Abdur Rashid v. Bangladesh*, 29 DLR 362

[5] *Bangladesh v. Md. Alauddin*, 38 DLR (AD) 81

broadly classified as civil posts and military posts. Parliament shall by law provide for regulating, raising and maintaining the defence services and their reserves, the grant of commissions therein, the appointment of chiefs of staff and their salaries and allowances and the discipline and other matters relating those services and reserves.[1] The President may, however, by framing rules make provisions in Prespect of these matters if no provision has been made by law.[2] The appointments and conditions of service of persons holding military posts are principally regulated by law[3]. The terms and conditions of service of the holders of the civil posts, except those for which specific provisions have been made in the Constitution, are to be regulated by the provisions of art.133.

6.18 ***Doctrine of pleasure:*** Art.134 provides that every person in the services of the Republic shall hold office during the pleasure of the President and thus recognises the English common law rule which means that the tenure of office of a servant of the Republic can be terminated at any time without assigning any reason and any clause or condition in a contract of employment which purports to take away or fetter the doctrine of pleasure would be void. In England Parliament may by law curtail the pleasure of the Crown. Art.133 enables Parliament to make laws providing the terms and conditions of the services of the Republic and the President to make rules therefor in the absence of a law made by Parliament. But this power being subject to the provisions of the Constitution and the doctrine of pleasure having been incorporated by art.134, no law or rule under art.133 can be made curtailing or fettering the pleasure of the President.[4] Yet art.134 starts with the qualifying expression "Except as otherwise provided by this Constitution". So far as the holders of civil posts are concerned art.135 limits the operation of the doctrine of pleasure. Hence the English doctrine has been enlarged in one direction and restricted in another; while Parliament has no power to deprive the President of his pleasure, the said pleasure is made subject to two limitations embodied in art.135.[5] The pleasure of the President is still there, but it has to be exercised in accordance with the requirement of art.135[6] and subject to

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[1] Art.62 Art.62

[2] Art.62(2)

[3] Army Act, 1952, Navy Ordinance, 1962 and Air Force Act, 1953.

[4] *India v. Tulsiram*, AIR 1985 SC 1416; *Satyavir v. India*, AIR 1986 SC 555

[5] *Moti Ram v. N.E.F. Railways*, AIR 1964 SC 600,

[6] *Bangladesh v. A.K.M. Zahangir*, 34 DLR (AD) 173; *Dr. Nurul Islam v. Bangladesh*, 33 DLR (AD) 201; *Serajul Islam Thakur v. Bangladesh*, 46 DLR 318

fundamental rights.[1] Art.135 is not applicable in respect of the holders of military posts[2] who have restricted fundamental rights[3] and the doctrine of pleasure is applicable in their case with greater force. Unlike the civil servants, the military servant's tenure (continuance in service) depends on the pleasure of the President and he does not have any legal remedy against removal from service.[4] However, the writ jurisdiction may be attracted if the exercise of pleasure by the President is found to be *mala fide.*[5]

6.18A The language 'hold office' as also the marginal note "tenure of office" in art.134 leave no doubt that the doctrine of pleasure is applicable only in respect of tenure of service and does not relate to everything connected with the service.[6] The doctrine of pleasure has no application in respect of those terms and conditions of service which do not relate to tenure of, or continuance in, service. In *Major (Retd) Hafizur Rahman v. Bangladesh*[7] the writ petitioner challenged an order which denied his vested right to the status and financial benefits of an officiating Judge Advocate General. The High Court Division dismissed the writ petition upon a view that the writ petitioner being a military servant was within the mischief of the doctrine of pleasure and had no right in respect of his service which could be enforced by a court. It is submitted that the High Court Division was wrong in applying the doctrine in respect of the terms and conditions which had nothing to do with the tenure of service. A military servant cannot complain about the curtailment of the tenure of service, but so long he is in the service of the Republic he can enforce the terms and conditions of service which do not relate to his tenure of service. While remaining in service, the terms and conditions of service of a military servant are governed by the laws enacted pursuant to art.62 of the Constitution. The view taken in *Hafizur Rahman* has been upheld by the Appellate Division in *S.M. Reza v.*

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[1] *Dinesh Chandra v. Assam*, AIR 1978 SC 17;

[2] *Rear Admiral Mustafa v. Bangladesh*, 45 DLR 395 (affirmed by the Appellate Division in 46 DLR (AD) 43); *Major Hafizur Rahman v. Bangladesh*, 29 DLR 34

[3] Art.45

[4] *Rear Admiral Mustafa v. Bangladesh*, 46 DLR (AD) 43 affirming High Court Division's decision reported in 46 DLR 395; *Abu Saleh Md. Nasim v. Bangladesh*, 1998 BLD (AD) 251; *Maj. Gen. Moinul Hossain v. Bangladesh*, 3 BLC 136

[5] *Rear Admiral A A Mustafa v. Bangladesh*, 51 DLR (AD) 146

[6] *Malleshappa Hanamappa v. Mysore*, AIR 1961 Mys 88

[7] 29 DLR 34; *Serajul Islam Thakur v. Bangladesh*, 46 DLR 318

Secy. Mistry of Defence[1]. It is submitted that the Appellate Division endorsed the view in *Hafizur Rahman* without properly examining the expanse of art.134.

6.18B The relationship of the civil servants with the government is one more of status than of contract and the hall-mark of status is the attachment to a legal relationship of rights and duties imposed by public law.[2] The government may unilaterally alter the terms and conditions of service by making rules and the power of making rules cannot be affected by any agreement.[3]

6.19 ***Law or rule to regulate conditions of service:*** Art.133 provides that Parliament may by law regulate the appointment and conditions of service of the persons in the service of the Republic and until provisions are made by such law, the President may make rules in this regard and such rules shall have effect subject to any such law. Under art.136 provisions may be made by law for reorganisation of the services of the Republic by creation, amalgamation or unification of the services and such a law may vary or revoke any condition of service of any person in the service of the Republic.[4] In exercising the power under art.136, however, neither Parliament nor the government can amalgamate the subordinate judiciary with other services of the Republic.[5] Art.133 starts with the expression 'Subject to the provisions of the Constitution' which, when properly construed, means that art.133 will have application subject to any specific provision made in the Constitution. Arts.62, 79, 113, and 115 incorporate those specific provisions. Cases covered by these articles fall outside the purview of art.133. Art.62 relates to defence services.[6] Under art.79 Parliament may by law and, in the absence of any such law, the President, in consultation with the Speaker, may by rules regulate the terms and conditions of service of persons appointed to the secretariat of Parliament. Under art.113 appointments to the staff of the Supreme Court shall be made by the

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[1] 3 BLC (AD) 80

[2] *Dr. Nurul Islam v. Bangladesh*, 1981 BLD (AD) 140; *Roshan Lal v. India*, AIR 1967 SC 1889

[3] *Sankaranarayana v. Kerala*, AIR 1971 SC 1997

[4] *Bangladesh v. Md. Azizur Rahman*, 1982 BLD (AD) 176 (Notification introducing New National Grade cannot be questioned on the ground of variation or revocation of the terms of service as it was made under an Act passed pursuant to art.136)

[5] See Para 5.233

[6] See para 6.17

Chief Justice, or any Judge or officer of that court as the Chief Justice may direct, in accordance with rules made by the Supreme Court with the prior approval of the President, and subject to the provisions of any Act of Parliament the conditions of their service shall be such as prescribed by the rules made by the Supreme Court. Art.115 provides that the President shall by rules regulate the appoint of the members of judicial service and magistrates exercising judicial functions. This power of the President is plenary and is not conditional upon the absence of any Act of Parliament and Parliament cannot legislate on the subjects covered by art.115.[1] The Appellate Division ruled that art.115 covers not only pre-appointment matters but also suspension and dismissal of the judicial officers and magistrates exercising judicial functions. Thus the matters relating to recruitment of the members of the judicial service and magistrates exercising judicial functions and their suspension and dismissal are outside the purview of art.133. However, once the members of judicial service and the magistrates exercising judicial functions are appointed, other terms and conditions of their service are to be governed by law or rules made pursuant to art.133, but any law or rules made by Parliament or the President under art.133 must be consistent with the provisions of arts.116 and 116A of the Constitution.[2]

6.19A Paragraph 10(1) of the Fourth Schedule provides that any person who immediately before the commencement of the Constitution was in the service of the Republic shall continue in that service on the same terms and conditions as were applicable to him before such commencement and paragraph 10(2) provides that the provisions of paragraph 10(1) shall not prevent the making of any law varying or revoking the conditions of service of persons continuing in the service of the Republic under paragraph 10(1). In *Zainul Abedin v. Bangladesh*[3] it was observed in the majority judgment that any law made under paragraph 10(2) may be prospective and retrospective. It is submitted that the observation is not correct in that paragraph 10(2) does not confer any separate power to make law. As the provisions of the Fourth Schedule are to take effect notwithstanding any of the provisions of the Constitution[4] and as paragraph 10(1) continued the service of persons who were in the service of the Republic prior to the commencement of

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[1] *Secy. Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104
[2] Ibid; see para 5.233 to 5.234C
[3] 1981 BLD 453 = 34 DLR 77
[4] See art.150

the Constitution on the same terms and conditions, it could have been contended that the terms and conditions of service of those persons were not subject to variation or revocation. The provision of paragraph 10(2)(b) has been made not to confer any power of making law but to forestall any such contention. In *Dr. Nurul Islam v. Bangladesh*[1] Munim J made certain observations from which it may appear that paragraph 10(2)(b) of the Fourth Schedule conferred a power to make law in respect of persons whose services were continued under paragraph 10(1), but it can be found on a close reading that his lordship was not considering the source of power, but was repelling the argument of the government that because of the provisions of art.150 variation of terms and conditions of service of persons covered by paragraph 10 of the Fourth Schedule were not subject to the provisions of Part III relating to fundamental rights.

6.20 The question arises whether the law or rules made under art.133 can retrospectively operate to vary the terms and conditions of the service. Art.309 of the Indian Constitution is substantially the same as art.133. The Indian Supreme Court held that any rule made under art.309 can be both prospective and retrospective[2], but the rules must not be inconsistent with the fundamental rights guaranteed by the Constitution and if a rule with retrospective operation purports to take away the vested rights and are arbitrary and not reasonable, it will be subject to scrutiny under art.14 and 16.[3] Art.136 provides that law for the re-organisation of the services of the Republic may vary or revoke any condition of service of a person employed in the service of the Republic. But no such provision has been made in art.133. The above provision of art.136 would be unnecessary if the law or rules made under art.133 could operate retrospectively to vary or revoke the conditions of service of employees already employed. Properly construed, variation or revocation of the conditions of service of the existing employees is permissible only by a law made under art.136.

6.21 Art.133 is an enabling provision and it does not make it obligatory for Parliament to make laws or for the President to make rules[4] and it cannot be said that no person can be appointed to a post so

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[1] 33 DLR (AD) 201

[2] *B.S. Bhadera v. India*, AIR 1969 SC 118; *J & K v. T.N. Khosa*, AIR 1974 SC 1; *Mustain Billah v. Bangladesh*, 2000 BLD (AD) 1

[3] *P.D. Aggarwal v. U.P.*, AIR 1987 SC 1676

[4] *Bangladesh v.. Shafiuddin Ahmed*, 50 DLR (AD) 27

long rules in that behalf are not made.[1] Art.133 conferring legislative power, the court cannot direct Parliament or the President to make any law or rules under art.133.[2] However, if in making law or rules, Parliament or the executive makes any constitutional deviation, the higher judiciary is within its jurisdiction to give directions to bring back Parliament or the executive from constitutional derailment.[3] Once laws or rules are made they cannot be changed by administrative order made in exercise of the executive power and an administrative order contrary to the rules shall be void.[4] It may, however, be seen that administrative instructions issued by an authority competent to make or amend rules are sometimes treated as rules.[5] Administrative instructions which have the precision of rules and are general in nature in their application to any particular service or services may have the force of law.[6] But executive orders even though issued by a Secretary to the government cannot have the effect of rules.[7] There is, however, nothing to prevent the government to issue administrative orders or instructions in matters in respect of which the rules are silent.[8] In the absence of any statutory rules regulating promotion to selection posts the government is competent to issue administrative instruction.[9] In the same way, appointment and seniority may be regulated by executive instructions in the absence of any rule.[10] But by administrative instruction, the

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[1] Ibid; *Ramesh v. Bihar*, AIR 1978 SC 327

[2] *Bangladesh v. Shafiuddin Ahmed*, 50 DLR (AD) 27

[3] *Secy. Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104; see Para 1.87A

[4] *Nagarajan v. Karnataka*, AIR 1979 SC 1676

[5] *West Pakistan v. Din Mohammad*, PLD 1964 SC 21

[6] *Bangladesh v. Shafiuddin Ahmed*, 50 DLR (AD) 27; *Pakistan v. Abdul Hamid*, 13 DLR (SC) 100; *Md. Naseem v. Azra Feroze Bakth*, PLD 1968 SC 37

[7] *West Pakistan v. Nasir Khan*, PLD 1965 SC 106

[8] *Nagarajan v. Mysore*, AIR 1966 SC 1942

[9] *Lalit Mohan v. India*, AIR 1972 SC 995; *Bangladesh v. Shafiuddin Ahmed*, 50 DLR (AD) 27 (The court observed, "We see no reason why in our country as well the void created by the absence of law and rules under Article 133 cannot be filled up by executive power under Article 55(2) expressed to be taken in the name of the President." (p.38) The court, however, found fault with a notification delegating to the Ministry of Establishment the functions of formulating policies and principles in respect of promotion/appointment to specified posts. The court observed, "The said Ministry may be the proper Ministry to assist the President in the formulation of principles under the Rules of Business, but cannot itself be the final authority in these fields." P.37)

[10] *Mathur v. India*, AIR 1999 SC 129

government cannot add to the qualifications prescribed by rules.[1] There were a number of rules existing at the time of commencement of the Constitution. By virtue of the provision of art.149 read with the definition of `law' in art.152 (1) those rules are applicable.[2] A rule made under art.133 cannot be given retrospective effect to affect a vested right. When at the time of making promotion the basis of promotion was seniority-cum-merit and the petitioner complained of denial of his right to be considered for promotion, his asserted right cannot be defeated by a subsequent change of rule making the promotion post a selection post.[3] All rules framed under art.133 are not enforceable. There may be certain rules which are directory in nature and those rules may not be enforceable in legal proceedings.[4] There are certain rules which confer a discretion on the administration as distinguished from a duty and those rules will not be enforceable.[5]

6.22 *Protection against arbitrary dismissal etc.:* Art.135 provides for certain protections to the holders of civil posts in the service of the Republic in respect of dismissal, removal or reduction in rank. Here the expression "civil post" has to be understood as post in contra-distinction to military post. The protection of art.135 is not available to the holders of military posts[6] or to any one who is not in the service of the Republic.[7] Thus the protection is not available to the employees of statutory corporations.[8] Merely because an institution decides to apply the rules applicable to the government servants, the provisions of this article will not be applicable to its employees who are not members of the service of the Republic.[9] The holders of civil post are not disentitled

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[1] *Haryana v. Shamser Jang*, AIR 1972 SC 1546

[2] see also s.24 of the General Clauses Act, 1897 which is applicable by virtue of art.152(2)

[3] *India v. Balakrisnan*, AIR 1975 SC 1498

[4] *UP v. Babu Ram*, AIR 1961 SC 751

[5] *M.P. v. Mandawar*, AIR 1954 SC 493

[6] *Major Hafizur Rahman v. Bangladesh*, 29 DLR 34; *Pakistan v. Md. Ayub Khan*, 17 DLR (SC) 504; *Ghaira Hayet v. Pakistan*, 12 DLR (SC) 271 (employee of Ordnance Depot is not a holder of civil post); *Serajul Islam Thakur v. Bangladesh*, 46 DLR 318 (civilian employees in the defence services, not being members of defence services, are holders of civil post); see also *Ishaquddin v. Commandant, Bogra Cantt.*, 51 DLR (AD) 144; *Abdul Latif v. Bangladesh*, 43 DLR 446

[7] *Faiz Ahmed v. Registrar Co-operative Societies*, 14 DLR (SC) 183 (employee of Co-operative Bank); *Bangladesh Bank v. Abdul Mannan*, 46 DLR (AD) 1

[8] *B.S.I.C. v. Mahbub Hossain*, 29 DLR (AD) 41

[9] *Bangladesh v. Md. Alauddin*, 38 DLR (AD) 81

to the protection simply because the functions of the post are connected with the defence.[1] Though the police service falls within the category of disciplined force, its members do not hold post in the service of the Republic in military capacity and they are entitled to the protection of this article.[2]

6.23 Under art.135(1), a holder of a civil post shall not be dismissed, removed or reduced in rank by an authority subordinate to that by which he was appointed. Art.135(2) provides that no such action shall be taken against him until he has been given a reasonable opportunity of showing cause against the proposed action unless -

(i) the action is being taken on the ground of conduct which has led to his conviction of a criminal offence;

(ii) the authority empowered to take action is satisfied that, for reasons to be recorded in writing, it is not reasonably practicable to give that opportunity; or

(iii) the President is satisfied that in the interest of the security of the State it is not expedient to give him such opportunity.

6.24 In order to understand the applicability of art.135 it is necessary to go back to the history. When reforms were introduced in 1919 the British Government took steps to incorporate rules for safeguarding the security of service to its servants in India. By s.45 of the Government of India Act, 1919 read with Part I of the Second Schedule to that Act, several sections, including s.96B were introduced in the Government of India Act, 1915. S.96B for the first time gave statutory recognition to the English common law doctrine of pleasure and at the same time imposed an important qualification in the exercise of the Crown's pleasure, namely, that a servant might not be dismissed by an authority subordinate to that by which he was appointed. Again under that section the power of the Crown to dismiss the government servants at pleasure was made "subject to the provisions of the Act, and the Rules made thereunder". Sub-sec.(4) of s.96B validated and continued the then existing rules and sub-sec.(2) gave power to the Secretary of State for India in Council to make rules for regulating the classification of the civil service in India, and the method of their recruitment, conditions of service, pay, allowances, discipline and conduct. In exercise of the power under s.96B(2) the first batch of rules were framed in 1920 which with subsequent modifications were known as the Civil Service

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[1] *Pakistan v. S.A.H. Bokhari*, 13 DLR (SC) 349

[2] *Bangladesh v. A.K.M. Zahangir Hossain*, 34 DLR (AD) 173

(Classification, Control and Appeal) Rules, 1930. These rules provided several punishments which could be inflicted for good and sufficient reasons on a civil servant. R.49 provided for seven types of punishment including dismissal, removal from service and reduction in rank and added an explanation stating, "The discharge - (a) of a person appointed on probation, during the period of probation, (b) of a person appointed otherwise than under contract to hold a temporary appointment, on the expiration of the period of the appointment, (c) of a person engaged under contract, in accordance with the terms of his contract, does not amount to dismissal or removal within the meaning of this rule." R.55 provided detailed provisions for initiating disciplinary actions against the servants of the Crown and thus s.96B and the rules made thereunder made careful provisions against arbitrary termination of service. However, great deal of controversy arose as regards justiciability and binding nature of the protection contained in s.96B and the rules made thereunder. The Privy Council in *Venkata Rao v. Secretary of State*[1] decided that the rules made under s.96B should no doubt be treated as a solemn assurance that the right of the Crown to terminate the services of the servants at pleasure could not be exercised arbitrarily, but this assurance could not give rise to a contract between the Crown and the civil servant with scope for relief in a court of law in the event of breach thereof. The rules had no statutory force as they could be changed from time to time and hence did not limit the powers of the Crown or the State to dismiss their servants at pleasure. In case of breach of the rules, the remedy of the civil servant "was not by a law suit but by an appeal of an official or of a political kind". However, the Privy Council took a different view regarding the restriction inserted in the Act itself, i.e., the protection against dismissal by an authority subordinate to one who appointed the civil servant. S.96(c) provided, "no person in that service (civil service of the Crown) may be dismissed by an authority subordinate to that by which he was appointed". The Privy Council held that this statutory safeguard had legal effect and could be legally enforced.[2]

6.25 In 1935 the British Parliament passed the Government of India Act, 1935. S.240(1) of the Act incorporated the doctrine of pleasure. S.240(2) provided that a civil servant could not be dismissed or reduced in rank by an authority subordinate to the authority which gave the

[1] AIR 1937 PC 31

[2] *Rangachari v. Secretary of State*, AIR 1937 PC 27

appointment and s.240(3) provided that no civil servant would be dismissed or reduced in rank without reasonable notice and proof of the charge of misconduct. S.240(4) made provision for contract employment. Having regard to the provisions of s.240 of the Act, the Federal Court decided that a servant of the Crown wrongfully dismissed could sue for arrears of salary.[1] One I.M. Lall brought a suit challenging the validity of an order of the Secretary of State removing him from service. The Privy Council held that the provisions of s.240(3), no longer resting on a rule alterable from time to time, are mandatory. The civil servant must be given sufficient opportunity to show cause at two stages of the inquiry, the first when the charges were enquired into and the second when after the inquiry the authority had come to its conclusion on the charges and the question arose as to the proper punishment to be awarded. If the statutory provision is not complied with, the dismissal of the civil servant would be wrongful for which he can get a declaration in court that the purported dismissal was inoperative.[2] But without noticing the Federal Court decision in *Tara Chand*[3] and relying on a Scottish case, *Mulvena v. The Admiralty*[4], the Privy Council held that a civil servant cannot maintain a suit against the Crown for the recovery of arrears of salary. On the basis of *I.M. Lall* the courts were treating the salary of a civil servant as a bounty of the State as a corollary of the doctrine of pleasure, but in a well-reasoned judgment in *Pakistan v. A.V. Isaacs*[5] the Pakistan Supreme Court held, "a civil servant has and always had the right to recover from the Crown salary already accrued due to him, in spite of the fact that he held service during the pleasure of the Crown. The theory of the bounty of the State never applied either in England or in pre-independence India as regards arrears of pay."

6.26 *Meaning of dismissal, removal:* Where the termination of service is stated to be by way of penalty for misconduct, negligence etc., there is no doubt that art.135 will be attracted and such a termination not complying with the terms of art.135 will be void irrespective of the question whether the appointment is permanent, temporary, officiating or probationary.[6] But where the termination of service does not indicate

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[1] *Province of Punjab v. Tara Chand*, AIR 1947 FC 23
[2] *High Commissioner for India v. I.M. Lall*, AIR 1948 PC 121
[3] AIR 1947 FC 23
[4] 1926 SC 842
[5] 22 DLR (SC) 371, Para 61; *Executive Engr. v. Mohammad Ali*, 41 DLR (AD) 64
[6] *Pakistan v. Mrs. A.V. Isaacs*, 9 DLR (SC) 16, Para 11; *Noorul Hassan v. Pakistan*, 9

that it is a disciplinary action or where the termination order has been passed in terms of a clause in the service agreement or in the service rules providing that the employee's services can be terminated after giving notice of a stipulated period and without assigning any reason, the question arises whether the termination amounts to dismissal or removal from service within the meaning of art.135.

6.27 In *Noorul Hassan v. Pakistan*[1] several police officers of subordinate rank were holding temporary employment of indefinite duration and one of the terms of their service was that their service could be terminated at any time by serving one month's notice. Their services were terminated by giving the stipulated notice. The question arose whether they were entitled to the protection of s.240(3) of the Government of India Act, 1935. It was contended on behalf of the government that termination of employment of a temporary employee in terms of his employment did not amount to dismissal or removal from service within the meaning of s.240(3). The Pakistan Supreme Court negativing the contention held that the Act did not make any distinction between temporary and permanent appointment and termination of service of a temporary employee of indefinite duration constituted removal from service and was void for not complying with the provisions of s.240(3) of the Act. A reading of the opinion of Munir CJ shows that his Lordship was treating all termination or discharge except in the situations mentioned in the explanation to rule 49 of the Civil Service (Classification, Control and Appeal) Rules, 1930 to be dismissal within the meaning of s.240(3) read with s.277.[2]

6.28 In 1950 the Indian Constitution came into operation. The provisions of ss.240(1), 240(2) and 240(3) were substantially incorporated as arts.310(1), 311(1) and 311(2) of the Indian Constitution. One P.L. Dhingra, a permanent railway employee in a lower grade, was appointed to officiate in a higher grade. His confidential report being adverse, he was reverted to his lower substantive grade. The question arose whether the action amounted to reduction in rank within the meaning of art.311(2). In going to answer the question, the Indian Supreme Court dealt with the meaning of `dismissal', `removal' and `reduction in rank' in art.311(2). The majority

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DLR (SC) 47, Para 25; *Dhirendra Nath Sarker v. Bangladesh*, 31 DLR 151; *Syed Abul Mansoor v. East Pakistan*, 28 DLR 337 (probationer)

[1] 9 DLR (SC) 47

[2] Ibid, Para 25 and 29

of the Judges held that these expressions had acquired technical meaning when the Government of India Act, 1935 was passed by the British Parliament which used these expressions in s.240 of the Act in the technical sense these were used in the then existing service rules. It was held that these expressions in art.311(2) represented three major penalties contemplated by the relevant service rules and so it was only when the challenged action partook the character of one or the other of these punishments that art.311(2) could be invoked; in order to attract the provision of art.311(2), the dismissal, removal or reduction in rank must be by way of punishment. The court held that it was only in those cases where the government intended to inflict any of the three forms of punishment, that the government servant must be given a reasonable opportunity of showing cause against the proposed action. Thus "any and every termination of service is not a dismissal, removal or reduction in rank. A termination of service brought about by the exercise of a contractual right is not *per se* dismissal, removal or reduction in rank ... In short, if the termination of service is founded on the right flowing from contract or the service rules then *prima facie* the termination is not a punishment and carries with it no evil consequence and so art.311 is not attracted."[1] It, therefore, follows that art.311(2) will not be attracted if a permanent employee is discharged by issuing notice in terms of a contract or the rules.[2] According to the court, the form of the order is not conclusive. The provisions of art.311(2) will be attracted even in a case of simple discharge, if any of the two tests is satisfied, namely, (1) whether the government servant had, but for the order of termination, the right to hold the post and (2) whether he has been visited with evil consequences. Bose J in his dissenting judgment observed -

> I do not think that the gist of the matter is either the form of the action or the procedure followed; nor do I think it is relevant to determine what operated in the mind of a particular officer. The real hurt does not lie in any of those things but in the consequences that follow and, in my judgment, the protection of Art.311 are not against harsh words but against hard blows. It is the effect of the order alone that matters; and in my judgment, Art.311 applies whenever any substantial evil follows over and above a purely "contractual one". I do not think that the Article can be evaded by saying in a set of rules that a particular consequence is

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[1] *P.L. Dhingra v. India*, AIR 1958 SC 36.

[2] In *Motiram Deka v. N.E.F. Railway*, AIR 1964 SC 600, a larger Bench of the Court held to the contrary, but did not overrule *Dhigra* on this point.

not a punishment or that a particular kind of action is not intended to operate as a penalty.

6.29 In *Ghulam Sarwar v. Pakistan*[1] the appellant, a permanent employee of the Pakistan Western Railway for long years, challenged the termination of his service by a notice purportedly given under a clause of his service agreement on the ground of violation of section 240(3) of the Government of India Act, 1935. The respondent placed strong reliance on *Dhingra* and contended that the termination was effected in terms of the service agreement and as such it did not amount to dismissal within the meaning of s.240(3). In view of the importance of the case, a larger Bench with seven Judges was constituted. The Pakistan Supreme Court failed to agree with the majority view in *Dhingra* and found the termination violative s.240(3) of the Government of India Act, 1935. The court noted that s.240(3) did not make a distinction between permanent or temporary employees, nor gave an indication that it would be attracted only if the challenged action is by way of punishment. The section intended to give security of tenure to the civil servants against arbitrary termination of service and any termination of service whether by way of punishment or in exercise of a right under a contract amounted to dismissal from service within the meaning of that section. The majority of the Judges held that the expression 'dismissal' which included 'removal' by virtue of s.277 had not been used in any special or technical sense, but in the general sense of meaning separation from office and was not confined to cover only the three types of punishment mentioned in r.49 of the Civil Service (Classification, control and Appeal) Rules, 1930. Kaikaus J observed that the three cases mentioned in the explanation to rule 49 did not include any case of removal even in the ordinary sense and the discharge as envisaged in the explanation to r.49 did not affect the security of tenure of an employee. The Government of India Act, 1935 being a constitutional Act, any provision of any rule or contract providing for discharge of an employee by giving notice of a stipulated period so as to avoid compliance with the provisions of s.240 was void. The court felt that to hold otherwise would mean that s.240(3) was applicable only to cases where the termination was in consequence of a charge of misconduct or inefficiency and thus while a misbehaving or inefficient employee could demand proof of misconduct or inefficiency, innocent employees would be liable to removal at will without any inquiry.

[1] PLD 1962 SC 142

Hamoodur Rahman J, though held that the expressions 'dismissal' and 'removal' had not been used in the Act in any general sense, arrived at the same conclusion that a provision in any rule or contract providing for termination of service of a permanent employee simply by serving 14 days' notice would be void being in conflict with s.240. He held a temporary employment for indefinite duration to be a non-temporary employment and found support for this proposition from r.9(30) of the Fundamental Rules which defined temporary post as "a post carrying a definite rate of pay sanctioned for a limited time". According to him, a provision in the rules or contract which purport to put an end to the service of a non-temporary employee without giving him the protection guaranteed to him under the provisions of s.240 must to that extent be held to be void and inoperative. He then concluded -

> Thus after excluding these void provisions the position, to my mind, would be that under the rules of service governing a non-temporary servant, his service cannot be put to an end except by way of dismissal or removal or discharge in cases where the post is abolished or he being a person appointed on probation is discharged during the period of probation, or being a temporary employee has either completed the term of his employment or has been given a notice of the period stipulated for in the contract, if any, entered into by him or prescribed under the rules, or the establishment is reduced, or he has failed to conform to the requisite standards of physical fitness or has failed to qualify in certain duties or subjects under the conditions of his service.[1]

Subsequently, in *Abdul Majid Sheikh v. Mushaffe Ahmed*[2] the Pakistan Supreme Court held the termination of a temporary employment of indefinite duration under a clause of service agreement providing for termination with notice of 14 days void for not complying with the requirement of notice and hearing. Cornelius CJ overruled the objection that the employee being a temporary employee was not entitled to the protection under art.177 in view of the provisions of art.179 of the Pakistan Constitution, 1962 on the ground that the employee continued in the service on the same terms he held the office at the commencement

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[1] Ibid, p.201-202

[2] 17 DLR (SC) 63 (This decision seems to run counter to the decision in *Pakistan v. Abdul Ghani*, PLD 1964 SC 68, but it should be noted that in *Ghani*, the employee did not plead protection of s.240(3) of the Government of India Act and was not allowed to press it before the Supreme Court); see also *Naseem Jahan Naim v. General Manager*, PLD 1968 SC 112

of the Constitution of 1962 and one such term was the protection of art.181 of the Constitution of 1956 which like, the Government of India Act, 1935, did not make any distinction between temporary and permanent employee.

6.30 It is submitted that the majority in *Ghulam Sarwar* was not right in giving the expressions 'dismissal' and 'removal' the ordinary and general meaning. It cannot be said that the meaning of these expressions is unequivocal so that there was no necessity to consider the context in which these expressions were used. These expressions were used in a restricted sense in the service rules which were in operation for quite some time and in the absence of any contra indication, it is reasonable to hold that the British Parliament used the expressions in the sense used in the service rules. It is true that the rules cannot control the meaning of the constitutional language. But they can provide the context. Hamoodur Rahman J rightly pointed out that if the expression 'dismissal' was used in the ordinary sense, there was no necessity to enlarge its meaning to include 'removal' by s.277. But the difference is not material as even if the context, that is, the then existing rules, is taken into consideration it will be found that the explanation to r.49 of the Civil Service (Classification, Control and Appeal) Rules, 1930 declared that discharge of an employee would not amount to removal in the three specified cases from which it logically followed that discharge of employees in other cases would amount to removal. Thus discharge of a temporary employee before the expiry of his fixed period of employment would amount to removal. The last case mentioned in the explanation meant special contract (reference to which was made in s.240(4) of the Government of India Act, 1935) between the government and the employee, otherwise there was no necessity of mentioning the second case as every employment involves a contract between the government and the employee.

6.31 S.240 of the Government of India Act, 1935 did not mention anything about temporary or permanent employment. S.241(2), which made provision for framing of rules of service, included a proviso to the effect that rules regulating the conditions of service of persons employed temporarily on condition that their employment may be terminated on one month's notice or less need not be made. From this it can be said that an employment with such a condition was permissible under that Act and was not inconsistent with s.240(3). The protections of s.240(2) and (3) of the Government of India Act, 1935 were incorporated in art.181 of the Pakistan Constitution of 1956 and art.182, making

provision for law and rules regarding recruitment and conditions of service, contained a proviso similar to the proviso to s.241(2) of the Act of 1935. The Pakistan Constitution of 1962 substantially incorporated the provisions of art.181 of the earlier constitution in art.177 and specifically by art.179 excluded the temporary employees from the protection of art.177. But the Constitution has not maintained any difference between permanent and temporary employment either in the matter of making rules under art.133 or in the matter of protection under art.135. Having regard to the history of this provision and the trend of the decisions in Pakistan and Bangladesh, it can be said that the protection will not be available only in the three cases mentioned in the explanation to rule 49 of the Civil Service (Classification, Control and Appeal) Rules, 1930.[1] As such the protection of art.135 is available to a permanent employment[2] or a temporary employment of indefinite duration irrespective of the question of punishment[3] or when the service of a temporary employee appointed on fixed term is terminated before the expiry of the term[4]. Termination of service of an employee, who was appointed subject to verification of character and antecedents, on failure of the condition does not amount to dismissal or removal within the meaning of art.135.[5] A probationer has no tenure at all and as such the question of the security of his tenure does not arise. Again art.135 is not attracted when a temporary employment is terminated at the end of the period for which employment was given as the tenure came to an end and the question of security of the tenure cannot arise. But if it appears that the employment of a probationer or of a temporary employee for fixed term is, in fact, sought to be terminated for misconduct or inefficiency, though not expressed in the order of termination, notice and hearing under art.135 will have to be given as he is being visited with a punishment or stigma.[6] Generally speaking, a case of termination

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[1] see Para 6.24

[2] *Ghulam Sarwar v. Pakistan*, PLD 1962 SC 142; *Md. Ismail Khan v. Pakistan*, 25 DLR 382

[3] *Noorul Hassan v. Pakistan*, 9 DLR (SC) 47; *Abdul Majid Shiekh v. Mushaffe Ahmed*, 17 DLR (SC) 63; *Naseem Jahan Naim v. General Manager*, PLD 1968 SC 112; *Pakistan v. G. Moinul Ahmed*, 17 DLR 377; *Md. Seraj v. Pakistan*, 19 DLR 771; contra *Pakistan v. Serajul Islam*, 9 DLR (SC) 114 (the decision does not disclose the reason for departing from the earlier decision in *Noorul Hassan* and this decision has not been followed in subsequent decisions)

[4] *Noorul Hassan v. Pakistan*, 9 DLR (SC) 47, per Munir CJ

[5] *Pakistan v. Afzal Khan*, 11 DLR (SC) 45

[6] *Syed Abul Mansoor v. E. Pakistan*, 28 DLR 337 (probationer); *Capt. Md. Azhar v.*

of service on abolition of posts will not attract the provisions of art.135[1] because the government has the executive power to create or abolish posts. But where the termination of service upon abolition of the post is *mala fide* or for collateral purposes, art.135 may be attracted.[2] Thus if it is seen that the strength of a cadre is reduced from ten to eight and the services of two senior most employees are terminated, a case of *mala fide* or collateral purposes may be upheld if the authority cannot adequately explain the action.

6.32 Art.135(4) provides that the provisions of this article will not be applicable in case of termination of contract between an employee and the government in terms of the contract. Per force this contract must be a special contract in special circumstances, otherwise the government may, if so minded, render the protection of art.135 nugatory by entering into contract with all of its employees.[3] But if the termination is not in terms of the contract or is ordered for misconduct or inefficiency, the protection of art.135 will be available as art.135(4) does not cover these cases.

6.33 *Compulsory retirement:* The service rules generally provide for the age of superannuation. These rules sometimes provide for compulsory retirement before the age of superannuation after an employee has completed a minimum period of service if the government is satisfied that public interest requires it. The provision for compulsory retirement was there in the service rules in British India which were continued in force in Bangladesh. The President's Order no.14 of 1972 was promulgated providing for compulsory retirement and this law was replaced by the Public Service Retirement Act, 1975 fixing the age of superannuation at 57 and providing for compulsory retirement after an employee has put in a minimum period of 25 years of service. The question arises whether compulsory retirement attracts the provisions of art.135. In India and Pakistan such a contention has been negatived.[4]

Commissioner, Karachi Division, 17 DLR (SC) 439 (temporary)

[1] *Noorul Hassan v. Pakistan*, 9 DLR (SC) 47; *Ghulam Sarwar v. Pakistan*, PLD 1962 SC 142; *S.M. Faruque v. E. Pakistan*, 10 DLR 562; *Ramanatha v. Kerala*, AIR 1973 SC 2264; *Haryana v. Sangar*, AIR 1976 SC 1199

[2] *Ramanatha v. Kerala*, AIR 1973 SC 2641; *Haryana v. Sangar*, AIR 1976 SC 1199

[3] *Ghulam Sarwar v. Pakistan*, PLD 1962 SC 142

[4] *Pakistan v. Liaquat Ali*, 11 DLR (SC) 73; *Sheikh Shamsul Haq v. East Pakistan*, 10 DLR 417; *India v. S.A. Razzak*, AIR 1981 SC 360; *Dinesh Chandra v. Assam*, AIR 1978 SC 17

The High Court Division held that compulsory retirement under the Public Servants Retirement Act, 1974 would not attract art.135.[1] In *Dr. Nurul Islam v. Bangladesh*[2] it was contended that an order of compulsory retirement is a punishment and, therefore, must comply with the requirements of notice and hearing under art.135. The leading judgment of Munim J did not answer this question. R. Islam J accepted the contention, but S. Ahmed J differed. The preponderant view in this sub-continent is that compulsory retirement does not involve punishment and does not require notice and hearing. However, a rule providing for compulsory retirement must fix the minimum period of completed service which should be reasonably long to be valid.[3] Where the minimum period of completed service is not reasonably long, the order of compulsory retirement will attract art.135.[4] When an order of compulsory retirement is passed as a punishment[5], or it contains words from which stigma may be inferred, or if the employee loses his benefit already earned[6] the order of compulsory retirement will attract art.135. Judicial scrutiny of any order imposing compulsory retirement is permissible if the order is either arbitrary or *mala fide* or if it is based on no evidence.[7] The order of compulsory retirement must be made *bona fide* in the public interest and would be bad if it is arbitrary or based on collateral grounds.[8] When it is alleged that the order was not made in the public interest the court will examine the service record to see if the order has been made in the public interest.[9] The government is

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[1] *Abdur Rashid v. Bangladesh*, 31 DLR 233 (in this case leave preparatory to retirement was refused which the Court found not legal, but refused to treat this refusal as punishment to attract art.135)

[2] 33 DLR (AD) 201

[3] *Takhetray Shivadattray v. Gujarat*, AIR 1970 SC 143; *Bombay v. Shaubhagchand Doshi*, AIR 1957 SC 892

[4] *Gurdev v. Punjab*, AIR 1964 SC 1585

[5] *Bangladesh v. Abdul Motaleb*, 45 DLR (AD) 108; *Fazlul Haq Chowdhury v. Bangladesh*, 30 DLR 144; *Abdul Quadir v. West Pakistan*, 19 DLR (SC) 398; *U.P. v. Shyamlal Sharma*, AIR 1971 SC 2151; *India v. Tulsiram*, AIR 1985 SC 1416

[6] *U.P. v. Shyam Lal*, AIR 1971 SC 2151

[7] *Bindra v. India*, AIR 1998 SC 3058

[8] *Mofizur Rahman v. Bangladesh*, 34 DLR (AD) 321; *Baldev Raj v. India*, AIR 1981 SC 70 (order of compulsory retirement found invalid when it was passed taking a very old adverse report into consideration without taking into account recent favourable confidential report); *Brij Mohan v. Punjab*, AIR 1987 SC 948; *Baikuntha v. Chief District Medical Officer*, AIR 1992 SC 1020

[9] *Mofizur Rahman v. Bangladesh*, 34 DLR (AD) 321

principally the judge of 'public interest'. There may be variety of reasons which may lead the government to be satisfied that the compulsory retirement is necessary in the public interest. The court may interfere if the materials disclosed show that the action was taken in collateral exercise of or in abuse of power.[1] Where charges were framed against an employee, but was dropped and he was promoted to a higher post and thereafter he was compulsorily retired, the court found the order invalid.[2] The court also held an order of compulsory retirement invalid when the authority did not produce the service record of the employee to show the public interest and it was passed to circumvent the order of the court or when the service record did not disclose any deterioration in the efficiency or integrity of the employee.[3] In *Gujrat v. Umed Bhai*[4], the Indian Supreme Court summarised the principles laid down by it in different decisions as follows:

(i) Whenever the service of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental inquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure.

6.34 *Reduction in rank:* Reduction in rank means reversion of an employee from a higher to lower rank. When a person is appointed to a

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[1] *Farzand Ali v. West Pakistan*, 22 DLR (SC) 203

[2] *D. Ramaswami v. T.N.*, AIR 1982 SC 793

[3] *Dr. Nurul Islam v. Bangladesh*, 33 DLR (AD) 201; *Baldev Raj v. Punjab*, AIR 1984 SC 986; see also *Swami Saran v. U.P.*, AIR 1980 SC 269

[4] AIR 2001 SC 1109, 1112

particular post, whether substantively or temporarily, his reversion to a lower post which he did not at any point of time hold is a reduction in rank attracting the provision of art.135(2). But when an employee is reverted from a promoted post, the question arises whether such a reversion amounts to reduction in rank within the meaning of art.135(2). If an employee has a right to a particular rank, his reversion from that rank without complying with the requirements of art.135(2) will be void. Where, however, the employee has been temporarily holding the higher rank on probation or on *ad hoc* or officiating basis and has thus no right to hold the higher rank, his reversion from the higher rank to his substantive rank does not entail reduction in rank within the meaning of art.135.[1] The same will be the case when a promotion is made temporarily for a limited period of time as in such case the promotee will have no right to hold the promoted post.[2] When a promotion is made subject to approval of the higher authority, reversion resulting from disapproval by the higher authority does not constitute reduction in rank.[3] Reversion of a person to his substantive post from a higher rank which he was holding on deputation was not held to be a reduction in rank.[4] Appointment to class II gazetted post (stating clearly in the appointment letter that the post was sanctioned for a limited period) and shortly thereafter making that post class II non-gazetted post does not amount to reduction in rank.[5] Placing of some persons above the petitioner does not entail reduction in rank of the petitioner.[6] In *Noorul Hassan*[7] and *Ghulam Sarwar*[8] the concept of non-temporary employment in case of persons having temporary appointment of indefinite duration has been brought in. Those were cases of termination

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[1] *Pakistan v. Syed Hikmat Khan*, 11 DLR (SC) 188; *West Pakistan v. Bashir Ahmed*, 11 DLR (SC) 232 (reversion is not reduction in rank even though an employee is reverted from the higher post without reverting his juniors having the same status); *East Pakistan v. Sajjad Ali Mazumder*, 14 DLR (SC) 13 *Dr. M. Amin Durrani v. West Pakistan*, PLD 1966 SC 99; *Md. Akram Khan v. Additional I.G.*, PLD 1958 SC 256; *P.L. Dhigra v. India*, AIR 1958 SC 36 *Hartwell Prescott Singh v. U.P.*, AIR 1957 SC 886

[2] *Pakistan v. Moazzem Hossain Khan*, 11 DLR (SC) 64 (tenure post); *Pakistan v. F.R. Khundkar*, 11 DLR (SC) 253 (tenure post)

[3] *East Pakistan v. Md. Abdu Mia*, 11 DLR (SC) 377

[4] *Pakistan v. F.R. Khundkar*, 11 DLR (SC) 253

[5] *Syed Md. Hasan v. Pakistan*, 12 DLR (SC) 6

[6] *Sukuruddin v. East Pakistan*, 18 DLR 406

[7] 9 DLR (SC) 47

[8] PLD 1962 SC 142

of service. Can this concept be applied in the case of reversion to a lower post?

6.35 In *Chairman, Railway Board v. Abdul Majid*[1] the Pakistan Supreme Court refused to apply art.181 of the Pakistan Constitution of 1956 in a case of reversion as the employee was holding the promoted post temporarily even though the temporary promotion was of indefinite duration. Here the employee served in the promoted post for about three years before reversion. The court noted that in the service book of the employee it was noted "promoted to T.C. (temporarily) subject to replacement by approved hand". In a later case the court made certain observations from which it follows that in case of temporary appointment of indefinite period within the dictum of *Abdul Majid Sheikh v. Mushaffe Ahmed*[2] a reversion from the superior post may amount to reduction in rank.[3] The High Court Division in *Anwarul Haq v. Bangladesh*[4] declared a reduction in rank void for non-compliance of the provisions of art.135(2) stating, "It is a settled law that the constitutional protection in Article 135 is also available to a person who holds a temporary appointment of indefinite duration for a considerably long period".

6.36 In *Bangladesh v. Md. Ismail Hossain*[5] the respondent was a District Kanungo and he was temporarily appointed as a Circle Officer (Revenue) in 1966. The cadre itself was temporary and was being sanctioned from year to year. In 1973 the respondent was reverted to his original post. The Appellate Division upheld the decision of the High Court Division that it amounted to reduction in rank upon a reasoning that the respondent was appointed for the life of the cadre which was temporary and the word 'temporary' "cannot be attributed for classifying the respondent as temporary appointee". In this decision the Appellate Division did not bring in the concept of non-temporary appointment. But in *Saleh Ahmed v. Bangladesh*[6] by a majority decision the Appellate Division non-suited Saleh Ahmed who stood in the same position as was

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[1] 18 DLR (SC) 532

[2] 17 DLR (SC) 63

[3] *Md. Ibrahim v. Pakistan*, PLD 1972 SC 332, 336

[4] 31 DLR 21 (The Court found that the employee was holding the superior post substantively, but even if his appointment to that post was not substantive it would not help the Government); see also *M.A. Rashid v. Bangladesh*, 33 DLR 366

[5] 31 DLR (AD) 127

[6] 36 DLR (AD) 26

Md. Ismail Hossain with the difference that he was reverted in 1967 and at the time when the Appellate Division heard the case, the cadre stood abolished. The majority judgment mentioned about temporary appointments continuing for years which in the Indian jurisdiction is called 'quasi-permanent' appointment. The difference between the two concepts is that while non-temporary appointment occurs when a temporary appointment of indefinite duration is made, a temporary appointment becomes quasi-permanent when continued for a number of years fixed by the rules. But the majority departed from *Ismail Hossain* because the cadre stood abolished at the time of hearing and Saleh Ahmed did not join the post he was reverted to. S. Ahmed J dissented on the ground that these two facts were irrelevant in determining the issue involved and there was no reason to depart from the earlier decision. It is submitted that the learned dissenting Judge was right in making no distinction between the two cases as the cadre was in existence when Saleh Ahmed was reverted and his failure to join the lower post cannot alter the nature of his appointment to the higher post. But it is to be noticed that when Saleh Ahmed was reverted in 1967 art.179 of the Pakistan Constitution of 1962 precluded application of art.177 in case of a temporary employee which prompted the Pakistan Supreme Court to refuse the remedy in *Kudrutualla.*[1] Art.135 does not make any distinction between temporary and permanent employee, but its operation is prospective only. In any view, *Saleh Ahmed* diluted the holding in *Ismail Hossain.*

6.37 Then came the case of *Bangladesh v. Md. Fazlul Haque*[2] where an employee after serving for five years in the higher post purely on temporary basis was reverted to his substantive post. The Appellate Division referred to the earlier decisions of *Ismail Hossain* and *Saleh Ahmed* and distinguished it saying that *Fazlul Haque* was not a case of abolition of post. The court observed -

> The uninterrupted service rendered by the respondent for about five years, if considered as "one non-temporary or quasi-permanent", as

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[1] An unreported decision referred to in both majority and minority judgments. *Abdul Majid Sheikh v. Mushaffe Ahmed,* 17 DLR (SC) 63, was distinguishable in that in this case the employee was appointed before coming into operation of the Pakistan Constitution, 1962 and in terms of art.225, the employee continued to hold the office on the same terms and conditions he had and as such art.179 would make no difference.)

[2] 43 DLR (AD) 144

> suggested by the learned counsel for the respondent, even then the impugned order of reversion cannot be termed as an instance of reduction in rank for attracting the protection under art.135 of the Constitution. The language of the impugned order indicates in unmistaken manner that it was never meant to be an order of promotion.

The first sentence of the quotation suggests that their lordships do not agree to apply the concepts of non-temporary and quasi-permanent employment in the matter of reduction in rank. But the second sentence creates a doubt as the case of the respondent was being rejected on the ground that the initial order on the basis of which he claimed his right was never meant to be an order of promotion. The court legitimately held the initial order to be not an order of promotion as it did not use the word 'appointed' or 'promoted' and merely showed a stop-gap arrangement which incidentally continued for five years. But it is something different from saying that those concepts will not be applicable. It is submitted, the position remains unsettled and requires an authoritative pronouncement of the court on the question whether and in what circumstances a temporary promotion will create a right to the promoted post.

6.38 Even though an employee is temporarily appointed in the promoted post, but the reversion is made for misconduct[1] or is accompanied with forfeiture of his pay or allowances or loss of seniority in his substantive rank, or stoppage or postponement of his future chance of promotion, or if a stigma is attached to him, or when a formal inquiry was held before his reversion, art.135 will be attracted.[2] It is not necessary that the impugned order contains words of stigma. The order may apparently be innocuous, but if the entirety of the circumstances preceding or attendant on the impugned order disclosed that misconduct is the motive or foundation of the order, art.135 will be attracted.[3] When as a result of reversion, the employee loses his seniority in his substantive rank, it amounts to reduction in rank.[4] When charges were framed against an employee holding a post on probation or on officiating basis in a higher rank, but was reverted without any inquiry, it is not a

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[1] *Md. Siraj Mia v. Director General*, 12 DLR 638

[2] *R.S. Sial v. U.P.*, AIR 1974 SC 1317; *G.S. Gill v. Punjab*, AIR 1974 SC 1898; *Debesh Chandra Das v. India*, AIR 1970 SC 77

[3] *Bihar v. S.B. Mishra*, AIR 1971 SC 1011

[4] *P.C. Wadhwa v. India*, AIR 1964 SC 423; *Madhav v. Mysore*, AIR 1962 SC 8

reduction in rank within the meaning of art.135.[1] But when a reversion appears to be *mala fide* and was, in fact, made for misconduct, art.135 will be attracted.[2]

6.39 *Dismissing authority:* Art.135(1) stipulates that the order of dismissal, removal from service or reduction in rank cannot be passed by an authority subordinate to the appointing authority.[3] It is not necessary that the order has to be made by the authority who made the appointment. He may be an authority other than the authority who made the order of appointment so long as he is not subordinate to the appointing authority, otherwise the action will be void.[4] A rule permitting a subordinate authority to take the action will be void.[5] The constitutional guarantee given under art.135 cannot be whittled down by designating as appointing authority an officer lower in rank than the one who was the appointing authority at the time of making the appointment. Thus compulsory retirement order passed by the Conservator of Forests was held invalid when the petitioner was appointed to the post by the Chief Conservator of Forests even though before the order was passed the Conservator of Forests was empowered to make appointment to that post.[6] If a civil servant is reverted to his substantive post he may be dismissed by the appointing authority of the substantive post, but the dismissal will be invalid if the reversion is found to be illegal.[7] On the other hand, it has been held that when an official is placed on charge for taking disciplinary action while he is officiating in a higher post, it is from the substantive post which he holds that he is so dismissed in proper form and his dismissal by the appointing authority of the substantive post is valid.[8] Where a person is confirmed in a higher post in which he was officiating, it is the officer who issues the order of confirmation who becomes his appointing authority and not the higher officer who may have selected him for such confirmation.[9] In *Abdul*

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[1] *Punjab v. Sukh Raj*, AIR 1968 SC 1089
[2] *Sukhbans Singh v. Punjab*, AIR 1962 SC 1711
[3] *Bihar v. S.B. Mishra*, AIR 1971 SC 1011
[4] *Mahesh Prasad v. U.P.*, AIR 1955 SC 70
[5] *N.W.F.P. v. Suruj Narain*, AIR 1949 PC 112
[6] *Bangladesh v. Abdul Motaleb*, 45 DLR (AD) 108
[7] *Bihar v. S.B. Mishra*, AIR 1971 SC 1011
[8] *Collector of Central Excise v. Waliullah Chowdhury*, PLD 1966 SC 788
[9] *Assam v. M.K. Das*, AIR 1970 SC 1255; *Assam v. Kripanath*, AIR 1967 SC 459; *Pakistan v. Nazir Ahmed*, 18 DLR (SC) 333

Quadir v. West Pakistan[1] the employee was appointed as Head Constable by the I.G. of Police, but he was compulsorily retired from his substantive promoted post of Assistant S.I. of Police by the D.I.G. of Police who was the appointing authority of the promoted post. It was contended that none below the rank of I.G. of Police could pass the order. The court rejected the contention holding that when he was appointed to the higher post in substantive capacity his condition of service became those which attached to the post when he was appointed. The expression "subordinate" refers to subordination in rank on the date of appointment of the civil servant proceeded against so that the subsequent delegation by the appointing authority does not cure the invalidity of dismissal by a person who was subordinate to the appointing authority at the time of appointment of the civil servant dealt with.[2] The appointing authority cannot delegate his power of dismissal or removal to a subordinate authority.[3] This does not mean that government cannot empower an officer other than the appointing authority to take action against a civil servant, but the officer so empowered must not be subordinate to the appointing authority.[4] The power to enquire into the charges and report may be delegated to an authority subordinate to the appointing authority provided the ultimate responsibility for the exercise of the power to take action remains with the person who is not subordinate to the appointing authority.[5] The notice to show cause and the order taking the action must be issued by a person not subordinate to the appointing authority.[6]

6.40 *Reasonable opportunity to show cause:* Art.135(2) mandates that an employee proceeded against must be given a reasonable opportunity of showing cause why he shall not be dismissed, removed or reduced in rank. Before coming to the decision about the punishment to be inflicted, the authority must come to the finding of guilt of the employee for which inquiry is necessary and principles of natural justice (which requirement is also mandated by the procedural due process of art.31) require that the employee be given a reasonable opportunity to

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[1] 19 DLR (SC) 398

[2] *Krisna v. Divisional Assistant Engineer*, AIR 1979 SC 1912

[3] *Pradyat Kumar v. Chief Justice*, AIR 1956 SC 285

[4] *M.P. v. Ram Naresh*, (1970) 3 SCC 173

[5] *Pradyat v. Chief Justice*, AIR 1956 SC 285

[6] *Capt. Md. Azhar v. Commissioner, Karachi Division*, 17 DLR (SC) 439; *Garewal v. Punjab*, AIR 1959 SC 512

defend himself.[1] Stating it broadly and without intending it to be exhaustive it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross examining the witnesses examined by that party, and that no material should be relied on against him without his being given an opportunity of explaining them.[2] Where the authority reaches the conclusion after inquiry about the misconduct or negligence of the employee, the second stage is reached when art.135 mandates that the employee be given an opportunity to show cause why the employee shall not be dismissed, removed or reduced in rank.[3] This notice under art.135(2) is different from and in addition to the notice and hearing required by the service rules or the principles of natural justice.[4] This opportunity under art.135(2) is not limited to explanation regarding the punishment to be awarded, it enables the employee to cover the whole ground relating to the inquiry proceeding and to plead that no case has been made out against him for taking the disciplinary action.[5] If the authority decides to

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[1] The relevant service rules contain elaborate procedure of inquiry embodying the principles of natural justice. For the content of natural justice and procedural due process, see Para 5.49-5.59. See also *Jamuna Oil Company v. S.K. Dey*, 44 DLR (AD) 104

[2] *India v. T.R. Varma*, AIR 1957 SC 882, 885; *M.P. v. Chintamon*, AIR 1961 SC 1623

[3] *High Commissioner of India v. I.M. Lall*, AIR 1948 PC 121 (A question arose as to whether s.240(3) required reasonable opportunity to be given at the stage of inquiry into the allegations of misconduct or at the stage when the authority reached the conclusion about the employee's guilt and wanted to penalise. The Privy Council observed, "... no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-s.(3) makes provision. Their Lordships would only add that they can see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry under r.55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as a result of the findings of the enquiry."); *D.G. Prison v. Md. Nasimuddin*, 53 DLR (AD) 30

[4] *Jamuna Oil Company v. S.K. Dey*, 44 DLR (AD) 104; *Fazlul Haq Chowdhury v. Bangladesh*, 30 DLR 144

[5] *Assam v. Bimal*, AIR 1963 SC 1612 (Para 6)

award a punishment which is lesser than the mentioned three, art.135 will not be attracted and the second notice contemplated by art.135(2) need not be given. The question when an opportunity will be deemed reasonable does not admit of any uniform answer, for what is reasonable will depend on the facts and circumstances of each case. But generally it can be said that the constitutional requirement will be satisfied if the particulars of the charge and the substance of the evidence in support of the charge, a summary of the findings in the inquiry and the punishment that will follow are communicated to the employee and he is given a reasonable time to explain.[1] But the requirement will not be satisfied if the employee is not furnished with a copy of the report of the inquiry officer.[2] The opportunity to show cause does not necessarily include a personal hearing at that stage.[3] In *Abdul Latif Niazi v. West Pakistan* charges were levelled and inquiry was held where the employee was heard in person. Thereafter a notice was issued to show cause why he should not be dismissed. No hearing was asked for and none given at that stage. The Pakistan Supreme Court held that the constitution required reasonable opportunity to be given and when reasonable opportunity was given at the inquiry stage "it seems to be an excessive requirement that personal hearing should also in every case be given in relation to the show cause notice. There are ... occasions when a personal hearing may properly be asked for, but in this case none was asked for, and nothing appears in the entire facts, which were fully exposed during the enquiry, which could provide any reason why the dismissing authority should have taken this course on its own initiative."[4] There cannot be any reasonable opportunity under art.135(2) if the employee has not been given a reasonable opportunity to defend at the inquiry stage[5] or if the inquiry has been held by an officer who by

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[1] Munir - Constitution of Pakistan, 1965, p.507

[2] *Mojibur Rahman v. Manjur Morshed*, 3 MLR (AD) 27; *Torab Ali v. BTMC*, 41 DLR 138 (this is a case of corporation employee, but the corporation service rules providing for second show cause notice the principle was applied; *Punjab v. Amar Singh*, AIR 1966 SC 1313; *Maharashtra v. Joshi*, AIR 1969 SC 1302

[3] *Kapur Singh v. India*, AIR 1960 SC 493

[4] PLD 1967 SC 52, 67

[5] *Ghulam Sarwar v. Pakistan*, PLD 1962 SC 142; *M.P. v. Chintamon*, AIR 1961 SC 1623; *Paul Anthony v. Bharat Gold Mines Ltd*, AIR 1999 SC 1416 (Where subsistence allowance admissible under the rules was withheld which prevented the accused employee from attending the inquiry, it was held that the employee had no reasonable opportunity)

reason of any bias was disqualified to hold the inquiry.[1] The dismissing authority is not bound to accept the finding of the inquiry officer and may differ, but when the dismissing authority differs from the inquiry officer and decides to issue a second show cause notice, the principles of natural justice requires that the notice should disclose the reasons for taking a different view from the inquiry officer.[2] The dismissing authority need not, however, discuss the materials in details and establish that the findings of the inquiry officer are improbable.[3]

6.41 *Exceptions:* Proviso to art.135(2) enumerates three situations in which the delinquent employee need not be given opportunity to show cause. It does not mean that the authority need not make any enquiry at all and need not apply its mind as to whether the fact situation calls for the disciplinary action mentioned in art.135(2) and as to what punishment should be awarded in the facts of the case. The proviso does not open the door for arbitrary action. Though in situations covered by the proviso the power is to be exercised *exparte*, it must be exercised fairly, justly and reasonably.

6.42 Clause (i) of the proviso provides that a civil servant need not be given notice and hearing when the action is sought to be taken for misconduct which has led to his conviction of a criminal offence. Here it will be superfluous to give the civil servant the opportunity when he had one before the court. The conviction is a sufficient proof of misconduct. In order to attract this clause, it must not be only be a conviction of an offence, it must be a conviction of a criminal offence. All crimes are offence, but all offences are not crimes. Thus where there was conviction for petty offence against breach of discipline or for lending and borrowing money in violation of the regulations by the members of E.P. Riffles, the court held that the clause was not attracted.[4]

6.43 Though no opportunity has to be given to a delinquent employee in case of conviction of criminal offence, the authority has to come to a decision as to whether action is to be taken and what penalty is to be imposed. For this it has to take into consideration the judgment of the

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[1] *Mohsin Siddiky v. West Pakistan*, 16 DLR (SC) 151; *U.P. v. Mohd. Nooh*, AIR 1958 SC 86

[2] *M.A. Hai v. T.C.B.*, 32 DLR (AD) 46; *Torab Ali v. BTMC*, 41 DLR 138; *State Bank of India v. Arvind Shukla*, AIR 2001 SC 2398

[3] *High Court, Bombay v. Shashikant*, AIR 2000 SC 22

[4] *Haji Ahmed v. E. Pakistan*, 15 DLR 423; *Shafi Chowdhury v. East Pakistan*, 17 DLR 25

criminal court, the entire conduct of the employee, the gravity of the offence and its impact on the administration, whether the offence was of a technical or trivial nature and the extenuating circumstances.[1] The order imposing penalty may be struck down if it is found that the penalty imposed is arbitrary, grossly excessive or out of all proportions to the offence committed. Thus where the penalty of dismissal was imposed on conviction under s.409 of Penal Code in spite of the magistrate's observation that the employee could not deposit the money in time under compelling circumstances and expressed the opinion that he should be dealt with under the Probation of Offenders Act, the court set aside the order of dismissal. The court observed -

> Surely, the Constitution does not contemplate that a Government servant who is convicted of parking his scooter in a non-parking area should be dismissed from service. He may perhaps not be entitled to be heard on the question of penalty ... But the right to impose a penalty carries with it the duty to act justly.[2]

Once a civil servant is convicted, it is not necessary for the authority to wait till the disposal of appeal or revision challenging the conviction. But if the conviction is set aside the penalty imposed on the basis of the conviction will cease to have effect and the civil servant will be entitled to be reinstated forthwith until he is punished complying with the provision of art.135(2).[3]

6.44 Clause (ii) of the proviso provides that the opportunity need not be given where the authority empowered to impose the penalty of dismissal, removal or reduction in rank is satisfied that it is not reasonably practicable to give that opportunity. To attract this clause total or absolute impracticability is not required. "What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation."[4] For denying the opportunity of being heard, the authority must not only

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[1] *D.P.O. v. Challappan*, AIR 1975 SC 2216

[2] *Shanker Das v. India*, AIR 1985 SC 772

[3] *India v. Akbar*, AIR 1961 Mad 486; *R.S. Das v. Divisional Superintendent*, AIR 1960 All 538

[4] *India v. Tulsiram*, AIR 1985 SC 1416, 1479 (There was wilful and deliberate disobedience of orders of superiors, hunger strike, shouting of rebellious slogans and threats of violence and bodily harm to supervisory officers and army had to be called. The Court observed, "No person with any reason or sense of responsibility can say that in such a situation the holding of an inquiry was reasonably possible.")

be fairly and reasonably satisfied, but must also record the reasons for being so satisfied. If no reason is recorded, or the reason is vague or just repetition of the language of the proviso, the deprivation of the opportunity will be unconstitutional.[1] Art.135(3) states that the decision of the authority in this regard shall be final. But the finality cannot foreclose judicial review if the condition of the proviso is not fulfilled. The finality restricts the scope of judicial review and the adequacy or sufficiency of the reason will not be gone into. Once the reasons are assigned, it will be subject to judicial review limited to the question whether the reasons are germane to the issue or a mere cloak. The authority is not to dispense with the opportunity of being heard lightly or arbitrarily or out of ulterior motives or merely to avoid the notice and hearing because the department's case against the employee is weak.[2] The Indian Supreme Court observed -

> ... when the decision of the employer to dispense with the enquiry is questioned, the employer must be in a position to satisfy the Court that holding of the enquiry will be counter-productive or may cause such irreparable and irreversible damage which in the facts and circumstances of the case need not be suffered. This minimum requirement cannot and should not be dispensed with to control the wide discretionary power and to guard against the drastic power to inflict such a heavy punishment as denial of livelihood and casting a stigma without giving the slightest opportunity to the employee to controvert the allegation and even without letting him know what is his misconduct.[3]

6.45 Clause (iii) of the proviso provides that no opportunity of showing cause need be given to an employee proceeded against if the President is satisfied that in the interest of the security of the State it is not expedient to give the opportunity. This satisfaction is not the personal satisfaction of the President. It is a satisfaction in the constitutional sense in exercise of the executive power and as such can be of a person authorised by the Rules of Business.[4] The President need not be satisfied that by giving the notice the interest of the security of the State will be affected, he must be satisfied that it is expedient in the interest of the security of the State not to give such notice.[5] "Expediency

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[1] Ibid, p.1480

[2] Ibid, p.1479.

[3] *Workmen, Hindusthan Steel v. Hindusthan Steel Ltd*, AIR 1985 SC 251, 255

[4] *Shamser v. Punjab*, AIR 1974 SC 2192

[5] *India v. Tulsiram*, AIR 1985 SC 1416

involves matters of policy. Satisfaction may be arrived at as a result of secret information received by the Government about the brewing danger to the security of the State and like matters ... The reasons for the satisfaction reached by the President ... cannot, therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public."[1]. 'Security of the State' has to be distinguished from 'public order' and 'law and order'. While situations which affect 'public order' are graver than those which affect 'law and order', situations which affect 'security of the State' are the gravest.[2]

6.46 Now that the Administrative Tribunal Act, 1981 has been passed and the administrative tribunal has been set up no court shall entertain any complaint as regards violation of the provisions of art.135 and under art.117 the administrative tribunal has the exclusive jurisdiction. But the dispute may go to the Appellate Division by leave of the Appellate Division because of the provision of the Administrative Tribunal Act in this regard read with the provision of art.103(4). When an action is taken by the authority concerned, it can be challenged in the administrative tribunal, but its role will be limited to the adjudication of only four things - (a) whether the employee is entitled to the protection of art.135; (b) whether the principles of natural justice and/or the rules, if any, framed regarding the inquiry have been complied with, (c) whether the inquiry officer conducted the inquiry in accordance with the principles of administrative law and (d) whether the employee had the opportunity to show cause as contemplated under art.135.

PUBLIC SERVICE COMMISSION

6.47 In a democratic system appointments in the service of the State cannot be a matter of patronage and the members of the civil service should be appointed on the basis of merit. It is essential to have an independent service commission free from the control and influence of party government. The Constitution, therefore, makes provisions for establishment of Public Service Commission by law with a Chairman and such number of members as may be prescribed by law.[3] More than one such Commission may be established. The Chairman and the members of the Commission are to be appointed by the President, but at

[1] Ibid, p.1483
[2] Ibid, p.1482
[3] Art.137

least half of the members must be persons who have held office for at least twenty years under any government which functioned within the territory of Bangladesh.[1] Subject to any law made by Parliament[2], the conditions of service of the Chairman and the members of the Commission are to be determined by the President.[3] The Chairman and the members of the Commission before entering their office are required to take oath to preserve, protect and defend the Constitution.[4] The office of the Chairman and the members of the Commission shall be for a term of five years. The Chairman is eligible for re-appointment for a further term of five years and the members are eligible for re-appointment for one more term or for appointment as the Chairman. The limitation on re-appointment is placed as a safeguard against corruption, partiality and patronage resulting from assurance of continuation in office for an indefinite period of time.[5] In order to maintain the independence of the Chairman and members of the Commission it has been provided that they cannot be removed from office except in the like manner and on the like grounds as a Judge of the Supreme Court may be removed[6] and their remuneration, privileges and other terms and conditions of service cannot be varied to their disadvantage during the term of their office[7]. In order to keep them free from allurement, it has also been provided that on ceasing to hold office, the Chairman and the members of the Commission shall not be eligible for any other employment in the service of the Republic. But this bar is not applicable to an appointment to any constitutional office for such an appointment is not an employment in the service of the Republic.[8]

6.48 *Functions of the Commission:* The primary function of the Commission is to select the best men who are capable of faithfully and efficiently carrying out the policy of the government. The Commission is to conduct tests and examinations for selection of suitable persons for appointment to the service of the Republic.[9] It is not specified whether it would be a competitive or selective examination or whether the

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[1] Art.138(1)
[2] see art.147; see Para 6.59B
[3] Art.138(2)
[4] Art.148 read with the Third Schedule
[5] *Mysore v. Bidap*, AIR 1973 SC 2555
[6] Art.139(2)
[7] Art.147(2)
[8] *India v. Seth*, AIR 1977 SC 2378; *Hargovind v. Raghukul*, AIR 1979 SC 1109
[9] Art.140(1)(a)

examination will be written or oral or both written and oral. While written examination is necessary to adjudge academic excellence, *viva voce* is necessary to evaluate the initiative, alertness, ability to make decisions and personal qualities. In case of recruitment to some services, personality is more important than academic excellence and, therefore, what weightage is to be given to written examination and *viva voce* should be left to the determination by the government and the rules. The court may only interfere where exaggerated weightage is given to *viva voce* with oblique motive to favour particular candidates.[1] Where the rules require, the Commission has to send the names of successful candidates in order of merit and it cannot withhold the names of some of the successful candidates on the ground that there are not so many vacancies to fill up.[2] But assignment of merit by the Commission does not confer any right upon the candidate who secured the highest position in the examination.[3] Once the Commission determines the norms for an examination and recommends the list of successful candidates to the government, it cannot re-open the selection and lower down the norms at the instance of the government.[4] The Commission is to advise the President on any matter specified in art.140(2) or on any matter connected with its function which is referred to it by the President. It shall also perform such other functions as may be prescribed by law.

6.49 Art.140(2) provides that subject to the provisions of any law made by Parliament or any regulation consistent with the law made by the President in consultation with the Commission, the President shall consult with the Commission with respect to (a) matters relating to qualifications for, and methods of recruitment to, the service of the Republic, (b) the principles to be followed in making appointments to the service of the Republic and promotions and transfers from one branch of the service to another, and the suitability of candidates for such appointments, promotions and transfers, and (c) the discipline of the service. In *Bangladesh v. Shafiuddin Ahmed*, the validity of Bangladesh Public Service Commission (Consultation) Regulations, 1979 was challenged on the ground that there should first be a law made by Parliament and then the President can make regulations consistent with such law, but the regulations have been made by the President

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[1] *Haryana v. Subash*, AIR 1973 SC 2216
[2] *Neelima v. Haryana*, AIR 1987 SC 169
[3] *Haryana v. Subash*, AIR 1973 SC 2216
[4] *U.P. v. Rafiquddin*, AIR 1988 SC 162

before any law has been enacted by Parliament. The court rejected the challenge observing, "If the Parliament makes any law earlier then it will be a case of occupied field. The regulations made by the President will only supplement the law and will not be inconsistent with it. But if the President makes the regulations earlier then that will occupy the field until a law is made by Parliament. If the law made by Parliament and the regulations already made by the President can co-exist without being in conflict with one another, well and good, but if there is a conflict between the law made by the Parliament and the regulations made by the President, the law will prevail".[1]

6.50 The Commission shall have to make report to the President on or before first March on the performance of its functions during the period ending on thirty first December of the previous year together with a memorandum setting out the cases in which its advice was not accepted and the reason for it and the cases where the Commission ought to have been consulted but was not consulted and the reason therefor. The President shall cause the report and the memorandum to be laid before Parliament at its first meeting after submission of the report.[2] This has been prescribed as a safeguard against arbitrary action of the executive in disregard of the advice of the Commission.

6.51 Though normally the government is expected to accept the advice of the Commission except in exceptional cases warranting special consideration, the advice given by the Commission is not binding on the government.[3] On the other hand, the government cannot act mechanically on the advice of the Commission and must apply its mind.[4] A question often arises whether the provision of consultation is mandatory. The Indian Supreme Court holds the opinion that though the word 'shall' is used, the consultation is not mandatory in the sense that in default of consultation the action of the government will be void particularly when the advice of the Commission is not binding on the government.[5] This court held that a punishment given cannot be challenged on the ground of non-consultation. But in *Capt. Azhar*

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[1] 50 DLR (AD) 27, 34

[2] Art.141

[3] *Bangladesh v. Md. Matiur Rahman*, 1982 BLD (AD) 109; *Bangladesh v. Salekuzzaman*, 52 DLR (AD) 166; *East Pakistan v. Dr. K.A. Mansur*, 14 DLR 1; *D'Silva v. India*, AIR 1962 SC 1130

[4] *Ram Choudhury v. Secretary, W.B.*, AIR 1964 Cal 265

[5] *U.P. v. Srivastava*, AIR 1957 SC 912; *Ram Gopal v. M.P.*, AIR 1970 SC 158

Hussain v. Pakistan[1] the Pakistan Supreme Court declared the punishment awarded to a temporary employee void for non-consultation with the Commission. Art.141(2)(b) provides for preparation of a memorandum stating the cases where the Commission ought to have been consulted but was not consulted and the reasons for non-consultation. Thus the framers of the Constitution contemplated that for some reasons the government may not consult the Commission in some cases and this indicates that they did not intend the requirement of consultation to be mandatory. Had they intended otherwise, they would not have made this provision or, having made it, would have made further provision to make it mandatory. On a reading of art.140 together with art.141, the Appellate Division held that consultation with the Public Service Commission is not mandatory, but consultation provided for on sound principles of public administration and good governance may be avoided only as an exception and not as a rule.[2]

TERRITORY AND PROPERTY OF THE REPUBLIC

6.52 All lands and water bodies being part of the territory of the Republic belong to the Republic. This ownership is concomitant of the sovereignty of the Republic. Because of leasing out, the Republic is not the absolute owner of most of the lands and in those leasehold lands the Republic has the incorporeal right of a lessor. The lands which are in absolute ownership of the Republic can be leased out, but cannot be sold outright as an outright sale would have the effect of divesting the Republic of the ownership of the land sold affecting the sovereignty of the Republic. All water bodies which are not man-made now vests absolutely in the Republic.

6.53 In addition to the lands and water bodies vested in the Republic, all minerals and other things of value underlying any land of Bangladesh vests in the Republic even though the Republic has only the incorporeal right of a lessor in that land.[3] The Republic is also the owner of all lands, minerals and other things of value underlying the ocean within the territorial waters or the ocean over the continental shelf of Bangladesh.[4]

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[1] 17 DLR (SC) 439

[2] *Bangladesh v. Shafiuddin Ahmed*, 50 DLR (AD) 27, 34-35; *M.A. Rashid v. Bangladesh*, 33 DLR 366, 373

[3] Art.143(1)(a)

[4] Art.143(1)(b)

Art.143(1)(c) provides that any property in Bangladesh without a rightful owner shall vest in the Republic. This is an incident of sovereignty and rests on the ultimate ownership of the sovereign of all properties within its jurisdiction. When an accused disclaiming possession of the gold recovered was acquitted on the finding that it was not recovered from his possession, the gold escheated to the Republic as ownerless property.[1] If a person dies intestate without leaving any legal heir, his property escheats to the Republic.[2] When a pre-emptor, whose application has been allowed, dies during the pendency of appeal without leaving any heir, the pre-emption does not fail on that account as the interest of the pre-emptor vests in the government.[3] But before the government can succeed on a claim on escheat, it has to discharge the onus of proving that there is no legal heir of the deceased property holder any where in the world.[4]

6.54 Under art.143(2) Parliament may by law provide for determination of the boundaries of the territory, territorial waters and continental shelf of Bangladesh.[5] Without the backing of such a law the executive authority of the Republic does not extend to such determination of boundary. But the making of law for determination of boundary does not include a power to provide for cession of any part of the territory for which a constitutional amendment is necessary.[6]

CONTRACTS, DEEDS AND TREATIES

6.55 *Contracts and deeds:* Art.145(1) mandates that all contracts and deeds made in exercise of the executive authority of the Republic shall be expressed to be made by the President and shall be executed on behalf of the President by such person and in such manner as he may direct or authorise. This article corresponds to art.299(1) of the Indian Constitution and s.173(3) of the Government of India Act, 1935. This provision is attracted only when a contract or deed is executed in exercise of the executive authority of the Republic and not in exercise of power conferred by a statute.[7]

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[1] *Gopinath Ghose v. State*, 32 DLR (AD) 177
[2] *Bihar v. Radha Krisna*, AIR 1983 SC 684
[3] *Hossain Ali v. Rezia Khatun*, 2 BLC (AD) 94
[4] Ibid.
[5] Bangladesh Territorial Waters and Maritime Zones Act, 1974
[6] *Kazi Mukhlesur Rahman v. Bangladesh*, 26 DLR (AD) 44
[7] *Haryana v. Lal Chand*, AIR 1984 SC 1326

6.56 The Indian Supreme Court viewed that art.299(1) has been incorporated on the ground of public policy to protect the state from the liability of unauthorised contracts and, therefore, its provisions are mandatory and non-compliance with the requirement of art.299(1) renders a contract invalid and unenforceable.[1]

6.57 The question is whether the expressions 'execute' and 'expressed to be made' require a formal document executed in the manner stipulated. One opinion in interpreting s.175(3) of the Government of India Act, 1935 was that a formal document was necessary.[2] The other opinion was that if correspondence was made on behalf of the Secretary of State and the final correspondence was signed by a person authorised in that behalf, a binding contract would emerge.[3] In *India v. Rallia Ram*[4] the Indian Supreme Court upheld the latter view holding that a contract by tender or correspondence would be valid if the tender is accepted or correspondence is signed on behalf of the President by a person duly authorised by the President. *Rallia Ram* did not expressly require the authorised person to accept the tender in the name of the President. But in *Punjab v. M/S Om Prakash*[5] the court refused to hold a contract valid because the executive engineer (who was authorised) did not state in the letter of intent that he was accepting the tender on behalf of the Governor.

6.58 Art.145(1) being in the same terms as art.299(1) of the Indian Constitution, the decisions of the Indian Supreme Court have relevance in the interpretation of art.145(1). But it has to be seen that numerous contracts are being made by authorised public servants through correspondence and in many of them a formal document is not signed and hardly in any of the letters of intent or acceptance of tender the authorised officer expresses acceptance on behalf of the President. The other party has no hand in the language used by the public official and no inconvenience or detriment would be suffered by the government if such acceptance of tender is accepted to be valid. On the other hand great inconvenience or injury may be caused to the party who has no control in the matter of language of acceptance of the tender. On the

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[1] *W.B. v. B.K. Mandol*, AIR 1962 SC 779; *Bhikraj v. India*, AIR 1962 SC 113; *K.P. Chowdhury v. M.P.*, AIR 1967 SC 203; *U.P. v. Murari*, AIR 1971 SC 2210

[2] *Province of Bengal v. Puri*, 51 CWN 753; *Nalini Kanta v. East Pakistan*, 13 DLR 11

[3] *S.C. Mitra & Co. v. Governor-General*, (1950) 2 Cal 431

[4] AIR 1963 SC 1685

[5] AIR 1988 SC 2149

principle laid down by the Privy Council in *Montreal Street Railway v. Normandin*[1] strict compliance with the provision of art.145(1) should not be held mandatory and the court should insist on substantial compliance of the provisions of art.145(1). If the person accepting the tender has, in fact, the authority to accept the tender, it is a mere formality to express the acceptance to be on behalf of the President. The public interest which impelled the Indian Supreme Court to take a very strict view will not be thwarted if the expression of acceptance on behalf of the President is not insisted in a case where it is proved beyond doubt that the tender has been accepted on the authority, and on behalf, of the President.

6.59 The Privy Council held that on the principle applicable between principal and agent, an agreement made by a public servant in excess of his authority may be binding upon the government if the government ratified it.[2] But the Indian Supreme Court held that non-compliance of the requirements of art.299(1) renders an agreement invalid and the question of ratifying such a contract by the government does not arise.[3] The view taken by the Indian Supreme Court is too rigid and goes beyond the necessity of protecting the public interest. However, the court held that even though a contract may be invalid for non-compliance with the provisions of art.299, any of the parties to the contract may get relief under s.70 of the Contract Act wherever the requisite conditions of s.70 are fulfilled.[4]

6.59A *Treaties:* Art.145A requires that all treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament.[5] The Vienna Convention on the Law of Treaties defines a treaty as an international agreement concluded between States in written form and governed by international law. All agreements entered into by Bangladesh with foreign countries are not treaties. Only those agreements, whether called treaty, convention, covenant, protocol, charter or exchange of notes, concluded with foreign countries in written

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[1] AIR 1917 PC 142

[2] *Collector of Masulipatam v. Venkata*, 8 MIA 529

[3] *Mulumchand v. M.P.*, AIR 1968 SC 1218; *Bihar EGF Co-op. Society v. Sipahi*, AIR 1977 SC 2149; *Punjab v. M/S Om Prakash*, AIR 1988 SC 2149

[4] *W.B. v. B.K. Mondol*, AIR 11962 SC 779; *New Marine Coal Co. v. India*, AIR 1964 SC 152

[5] This article was inserted by Second Proclamation Order no.IV of 1978 and its validity is open to question. See Para 6.70

form and governed by international law are treaties within the meaning of art.145A. All other agreements with foreign countries may be treated as executive agreements.[1] In a treaty, there has to be an intention to create a legal obligation[2] and the obligation must be governed by international law and not municipal law. Thus a military and technical co-operation agreement between Bangladesh and Russia to be governed by Bangladesh and Russian law and not by international law, was held to be an executive agreement.[3] In the U.S.A. the power of making treaty is vested in the President, but the treaty does not become effective until the Senate by two-third votes ratifies it. Once ratified by the Senate, the treaty becomes part of the law of the land. But in Bangladesh, like in the U.K., making of a treaty is an executive act and for its validity approval of Parliament is not necessary. Though there is an obligation to lay a treaty before Parliament, the High Court Division held that failure to lay a treaty before Parliament will not affect its validity.[4] If the performance of the obligations of a treaty requires alteration of any existing law, an Act has to be passed by Parliament. Except to the extent that a treaty becomes incorporated into the laws of Bangladesh by an Act of Parliament, the courts have no power to enforce the treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.[5]

SPECIAL PROVISIONS RELATING TO SOME CONSTITUTIONAL OFFICES

6.59B Art.147 makes some provisions in respect of the offices of the President, Prime Minister, Speaker, Deputy Speaker, Minister, Minister of State, Deputy Minister, Judge of the Supreme Court, Comptroller and Auditor General, Election Commissioner and Member of Public Service Commission. The remuneration, privileges and other terms and conditions of service of the persons holding these offices are to be determined by Acts of Parliament and the remuneration, privileges and terms and conditions of the holders of these offices cannot be varied to

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[1] Redlich, Schwartz and Attanasio - Understanding Constitutional Law, 1995, p.140

[2] *Major (Retd) Akhtaruzzaman v. Bangladesh*, W.P. No.3774 of 1999 (Unreported)

[3] Ibid

[4] Ibid

[5] *Rayner (Mincing Lane) Ltd. v. Department of Trade*, [1990] 2 AC 326, 347; *Littrell v. USA (No.2)* [1994] 2 All E.R. 203

the disadvantage of the holders of these offices during their respective term of office. So that the holders of these offices may perform their duties free of any consideration except that of the public interest, art.147(3) provides that no person appointed to or acting in any such office shall hold any office, post or position of profit or emolument[1] or take part in the management or conduct of any company, association or body having profit or gain as its object. This may prevent the holder of any such office from receiving the salary or remuneration of the office as payment of salary or remuneration renders such an office an office of profit. To remove any such contention, a proviso has been included which states that for the purpose of clause (3) holders of these offices shall not be deemed to hold any office of profit even though they will receive the salary and other benefits of the office prescribed by Acts of Parliament in terms of art.147(1).

SUITS BY AND AGAINST BANGLADESH

6.60 Art.146 provides that the Government of Bangladesh may sue and be sued by the name of Bangladesh. In view of the provisions of art.145 neither the President, nor any person executing any contract or deed in exercise of the executive authority of the Republic shall be personally liable in respect thereof. Further provision of the article that this immunity shall not prejudice the right of any person to take proceedings against the government makes it clear that an individual can sue the government on such contract or deed. But the question is whether the government can be sued on vicarious liability for the tort of its employees.

6.60A Though art.146 provides that the Government of Bangladesh may sue or be sued by the name of Bangladesh, the applicant has to mention a competent official in the facts of a particular case who can represent Bangladesh. If the government is not made a party or is not properly described in the application, the opposite party must raise objection, if they want to, at the earliest opportunity so that the applicant may get an opportunity to take steps. If the proper party is not before a tribunal then whether any objection is taken or not the applicant will run the risk of having an ineffective order to his peril and his application may be adjudged as incompetent.[2] A petition will not, however, fail

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[1] See Para 4.7 for the meaning of 'office of profit'.

[2] *Ali Emdad v. Labour Directorate*, 1998 BLD (AD) 137; see also *Abdul Naim v.*

where there is a mere misdescription of a necessary party.[1]

6.61 *Tort claims:* In British India a distinction was made between sovereign and non-sovereign acts and it was held that the government could not be sued for tort of its servant engaged in sovereign acts.[2] In some cases this distinction was not made.[3] After independence the same distinction was in most cases maintained in India.[4] In *Rajasthan v. Vidyawati*[5] the Indian Supreme Court made certain observation from which it appeared that the court was ready to give up the distinction, but in *Kasturi Lal Ralia Ram v. U.P.*[6] the Supreme Court maintained the distinction to deny a claim in tort. The courts, however, tried to alleviate the position by treating the functions as non-sovereign which were earlier treated as sovereign functions.[7] The Indian Supreme Court has allowed compensation for tort involving life and personal liberty in proceedings under art.32 and 226[8], but so far in respect of private law

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Chairman, Bd. of Directors, Sonali Bank, 3 BLC (AD) 1 and 1 BLC (AD) 80

[2] *Rashiduzzaman v. Bangladesh*, 49 DLR 43

[2] *Gurucharan v. Madras*, AIR 1942 Mad 539 (no suit could lie against the government for wrongful confinement as it was performing a sovereign function; *Etti v. Secretary of State*, AIR 1939 Mad 663 (tort of employees employed in government hospital); *Secretary of State v. Ram*, 37 CWN 967 (negligence of officer in discharge of statutory duty); *Mata Prasad v. Secretary of State*, AIR 1931 Oudh 29; *P. & O. Steam Navigation Co. Secretary of State*, 5 Bom. H.C.R. App.1; *Secretary of State v. Moment*, 40 IA 48

[3] *Secretary of State v. Hari Bhanji*, ILR 5 Mad 273

[4] *India v. Harbans Singh*, AIR 1959 Punj 39 (no cause of action against government for rash driving of military driver engaged in military duty which is a sovereign function); *Purnendu Deb v. India*, AIR 1956 Cal 66; *Kishanmurthy v. A.P.*, AIR 1961 AP 283 (injury by road roller engaged in maintaining roads);

[5] AIR 1962 SC 933

[6] AIR 1965 SC 1039 (Police seized some gold from the plaintiff suspecting it to be stolen and the gold was stolen from the malkhana by an employee. The plaintiff was acquitted of the charge, but the court denied his claim in tort as the damage had been caused by the state's employees during the course of employment and in exercise of statutory function delegated to them which fell within the concept of sovereign powers.)

[7] *Shyam Sunder v. Rajasthan*, AIR 1974 SC 890 (famine relief work); *Pushpa Thakur v. India*, AIR 1986 SC 1199 (negligent driving of a military truck by a military jawan); *State v. Hindusthan Lever*, AIR 1972 All 486 (banking business by State); *Mysore v. Ramchandra*, AIR 1972 Bom 93 (construction of reservoir for drinking water); *India v. Sadasiv*, AIR 1985 Bom 345 (injury caused while towing a crane of government department);

[8] *Nilabati Behra v. Orissa*, AIR 1993 SC 1960; *Rudul Shah v. Bihar*, AIR 1983 SC 1086

remedy of suit the distinction between sovereign and non-sovereign acts has been maintained. The Pakistan Supreme Court, however, took a different view and held in *Pakistan v. A. Hayat*[1] that the constitutional status of the Crown was wholly different from that of the Government of Pakistan and in a subsequent case found the government liable in tort observing that the expression 'sovereign act' was applicable only to acts committed in relation to other States or aliens and was inapplicable in a case where the government was acting in relation to its own citizens.[2]

6.62 The doctrine of sovereign immunity was developed from the English maxim, "King can do no wrong" and the doctrine was carried to the United States where it was applied to deny tort claims. When it was pointed out that there was no kingship in the U.S.A., the doctrine was rationalised by Justice Holmes, saying "A sovereign is exempt from suit not because of any formal conception or absolute theory, but on the logical and practical ground that there can be no legal right against the authority which makes the law on which the right depends."[3] But the position changed in that country with the passing of the Federal Tort Claims Act, 1946 and the amendment of the Administrative Procedure Act in 1976 eroding the doctrine of sovereign immunity. In England also the hardship has been removed by the Crown Proceedings Act, 1947 and the Crown is vicariously liable for the wrongful acts of its servants. The Crown sometimes claims exemption from liability on ground of public policy. But such claim has been rejected. In *Dorset Yacht Co. v. Home Office*[4] the House of Lords held that the Crown would be liable for damage of a yacht caused by boys escaping from an open borstal if negligent custody be found. Making a distinction between sovereign and non-sovereign acts to preclude tort action in respect of sovereign acts virtually amounts to application of the doctrine of act of State[5], but there can be no act of State by a sovereign against its own citizens[6].

6.63 In Bangladesh where the people are the ultimate sovereign and

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[1] 14 DLR (SC) 7

[2] *Pakistan v. Mohammad Yaqoob*, 15 DLR (SC) 369

[3] *Kawananakoa v. Polybank*, 205 US 349, 353

[4] [1970] AC 1044

[5] An act of State is an act of a sovereign against another sovereign or an alien outside its territory which derives its authority not from municipal law but from ultra-legal means and is not subject to scrutiny of municipal courts. See *East India Co. v. Syed Ally*, 7 MIA 555; *Secretary of State v. Kamachee Boyee Sahaba*, 7 MIA 476; *Eshugbayi Eleko v. Nigeria*, 1931 AC 662

[6] *Mir Ahmed Nawaz Khan v. Superintendent, Lyallpur Jail*, PLD 1966 SC 357, 360

its Constitution proclaims the rule of law, there is no justification for clinging to a doctrine developed centuries before in a country ruled by the monarchs. The doctrine really does not serve any legitimate purpose. On the contrary, it does incalculable harm in that if the government is not liable in tort for malfeasance of its employees, the government may not bother much about what its employees do to the citizens and in the ultimate analysis there remains no accountability on which success of democracy depends.

SAVING OF EXISTING LAWS AND REPEALS

6.64 Validity of laws depends on the continuance of the legal order under which those were made. Once that legal order is destroyed, the laws cease to have validity unless the new legal order recognises those pre-existing laws. Subject to the Proclamation of Independence, all Pakistani laws were continued by the Laws Continuance Enforcement Order, 1971. Art.152 defines 'existing law' as meaning any law in force in, or in any part of, the territory of Bangladesh immediately before the commencement of the Constitution, whether or not it has been brought into operation. Art.149 provides that subject to the provisions of this Constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution. Thus all laws which were in force at the commencement of the Constitution were continued and have the force of law under the Constitution. The important question is what are the laws which were continued by the Laws Continuance Enforcement Order, 1971. In order to apply the Order of 1971 two conditions must be fulfilled - (1) the law must be a valid law and (2) it must not be inconsistent with the Proclamation of Independence.[1] If a piece of legislation cannot qualify as a valid law it is not necessary to consider whether it is inconsistent with the Proclamation of Independence. In *M/S Dulichand Omraolal v. Bangladesh*[2] the Enemy Property (Continuance of Emergency Provisions) Ordinance (Ordinance no.1 of 1969) was held to be a valid law. It was observed that the validity of the law was impliedly upheld in *Bangladesh Enemy Property Management Board v. Abdul Mazid*[3]. In

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[1] *Chittagong Textile Mills v. Bangladesh*, 1979 BSCR 440 (War Risk Insurance Ordinance, 1969 was held to be inconsistent with the Proclamation of Independence and hence not continued by the Law Continuance Enforcement Order, 1971)

[2] 33 DLR (AD) 30

[3] 27 DLR (AD) 52

Abdul Mazid the validity of the Ordinance was not questioned and as such it cannot be a precedent for the validity of the Ordinance. The Ordinance was promulgated on 17 February 1969 under art.29 of the Constitution of Pakistan of 1962 and in terms of art.29(3) the Ordinance ought to be deemed to have been repealed on the expiry of 180 days. The Ordinance was, however, continued in operation by the Provisional Constitution Order, 1969 passed on 4 April 1969 by Yahya Khan. Hence the validity of the Ordinance depended on the validity of the Provisional Constitution Order, 1969. Unquestionably Yahya Khan was an usurper and his acts had not been validated by any constitutional manipulation either in Pakistan or in Bangladesh and, in fact, he had been declared to be a usurper by the Pakistan Supreme Court in *Asma Jilani v. Punjab*[1]. In this situation the laws purported to have been made by Yahya Khan cannot be treated as valid law and the Ordinance could not be continued by the Laws Continuance Enforcement Order, 1971. It can be treated as a valid law only if the doctrine of implied mandate enunciated by Lord Pearce in *Madzimbamuto v. Lardner-Burke*[2] or the doctrine of condonation applied by Hamoodur Rahman CJ in *Asma Jilani*[3] is applied in this case. It is an open question whether a law made by a Pakistani usurper can be treated as a valid law by the application of the doctrine of necessity and whether the doctrine can at all be applied for finding continuity of the law in the completely new State of Bangladesh. The Appellate Division held the Ordinance valid without consideration of the issues involved. The court did not go into the question because of the repeal of the Ordinance by Parliament in 1974 from which it may be contended that Parliament considered that in case of this law the doctrine of necessity was applicable. In *Mullick Brothers v. Bangladesh*[4] the Appellate Division held that M.L.R. 32 of 1969 was not a valid piece of legislation and was not continued by the Order of 1971. But this judgment was reviewed and set aside by the court without coming to a finding that the holding in the original judgment was wrong.[5] Whatever be the position of the laws made by Yahya

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[1] PLD 1972 SC 139

[2] [1968] 3 All E.R. 561

[3] Yakub Ali J was of the view, "Laws saved by this rule do not achieve validity. They remain illegal, but acts done and proceedings undertaken under invalid law may be condoned on the conditions that the recognition given by the court is proportionate to the evil averted ..." (p.239)

[4] 31 DLR (AD) 165

[5] *Commr. of Income Tax v. Mullick Brothers*, 33 DLR (AD) 274 (for analysis of the

administration prior to 25 March 1971, all laws made in Pakistan after 25 March 1971 must be held to be inconsistent with the Proclamation of Independence and were not continued by the Order of 1971.[1]

6.65 A law to be continued under art.149 must not be inconsistent with any provision of the Constitution.[2] The expression 'existing laws' includes not only statutory laws, but also personal laws and the common law of the land which were being administered in the territory of Bangladesh.[3] The Indian Supreme Court held that the doctrine that the Crown was not bound by statute was also continued.[4] But the court later overruled this holding stating that the doctrine was inconsistent with the principle of equality and incongruous in the present set up and cannot be treated to be continued.[5] It is submitted that the same position must obtain in our constitutional dispensation.

TRANSITIONAL AND TEMPORARY PROVISIONS

6.66 Whenever a new constitution is adopted there occurs the necessity of making certain provisions for transition from the old legal order to the new legal order to ensure continuity. Thus art.150 provides for such transitional provisions in the Fourth Schedule and states that those provisions of the Fourth Schedule shall have effect notwithstanding any inconsistency with the provisions of the Constitution.

6.67 The provisions of the Fourth Schedule provide for dissolution of the Constituent Assembly constituted under the Provisional Constitution of Bangladesh Order, 1972, holding of the first general election of the members of Parliament, ratification of all things done from 26 March 1971 up to the commencement of the Constitution, continuance of the legislative and executive powers of the Republic till the commencement of the Constitution, continuance in the office of the President, Speaker, Deputy Speaker, Prime Minister and other Ministers and the persons who were holding those offices, continuation of persons holding the

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case, see Para 5.208)

[1] see *Md. Yahya v. Bangladesh*, 35 DLR 182

[2] *India v. City Municipal Council*, AIR 1978 SC 1803

[3] *Director of Rationing v. Corp. of Calcutta*, AIR 1960 SC 1355; *Builders Supply Corp. v. India*, AIR 1965 SC 1061

[4] *Director of Rationing v. Corp. of Calcutta*, AIR 1960 SC 1355

[5] *W.B. v. Corp. of Calcutta*, AIR 1967 SC 997

office of Judges of the High Court constituted under the Provisional Constitution of Bangladesh Order, 1972 and continuation of the proceedings pending in the High Court of Bangladesh and the interim rights of appeal, continuation of the Election Commission and the Public Service Commission and the holders of office in such Commissions and continuation of the members of the service of the Republic.[1] Paragraph 16 provided for vesting of the properties, assets and rights and liabilities and obligation of the Government of Bangladesh existing prior to the commencement of the Constitution in the Republic. Clause (3) of the paragraph provides that no liability or obligation of any other government which functioned in the territory of Bangladesh is or shall be a liability or obligation of the Republic unless it is expressly accepted by the Government of Bangladesh. Thus when not accepted by the Government of Bangladesh, it cannot be saddled with the liability of paying equivalent value of the demonetised notes deposited in pursuance of Martial Law Regulation of Pakistan regime.[2]

6.68 Under art.83 of the Constitution no tax can be levied or collected except by or under the authority of an Act of Parliament. Hence on the commencement of the Constitution no tax could be levied or collected under the pre-constitution laws as an Act of Parliament means an Act of Bangladesh Parliament constituted under art.65. To avoid this situation, paragraph 13 provides that all taxes and fees imposed under any law in force in Bangladesh immediately before the commencement of this Constitution shall continue to be imposed but may be varied or abolished by law.

6.69 Paragraph 17 conferred on the President power of adaptation of laws and removal of difficulties including the power to direct up to the time of first meeting of Parliament that the Constitution would have effect subject to adaptations (whether by way of modification, addition or omission) made by him for such period as he would specify.

6.70 After the Constitution came into force the Fourth Schedule was amended by incorporating paragraphs 3A, 6A and 6B by the Martial Law Proclamation Orders of 1976 and 1977. These amendments would have been void but for the Constitution (Fifth Amendment) Act, 1979 whereby paragraph 18 was inserted in the Fourth Schedule to impart

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[1] *Dr. Nurul Islam v. Bangladesh*, 1981 BLD 12 (terms and conditions of service of a pre-Constitution employee can be varied or revoked only by law)

[2] *Md. Yahya v. Bangladesh*, 35 DLR 182

validity to the acts and things including constitutional amendments done during the Martial Law period and ousting the jurisdiction of the courts in respect of those acts and things. The Constitution (Seventh Amendment) Act, 1986 followed the same pattern to achieve the same purpose by inserting paragraph 19 in the Fourth Schedule.[1] It is open to question whether these amendments are invalid on the ground of fraud on the Constitution and alteration of the basic features of the Constitution, namely, supremacy of the Constitution, judicial review and the rule of law.[2]

6.71 In some cases the actions of the Chief Martial Law Administrator were challenged, but the court rejected the challenge holding that those actions were protected by the Seventh Amendment of the Constitution.[3] It does not appear that invalidity of the amendment for alteration of the basic features of the Constitution was raised.

6.72 By paragraphs 3A, 18 and 19 laws made during Martial Law period have been imparted validity and protected from challenge of unconstitutionality. From this an argument was advanced in *Shahriar Rashid Khan v. Bangladesh*[4] that such laws became part of the Constitution and could not be repealed or amended by Parliament by simple majority. The argument was repelled and the court held that those paragraphs did not make those laws part of the Constitution, but merely protected the validity of the laws passed during the Martial Law period and have not the effect of precluding repeal of these laws in the way other laws can be repealed by Parliament.

6.73 Paragraphs 3A(6) and 19(8) provide that the revocation of Martial Law Proclamations and withdrawal of Martial Law shall not revive or restore any right or privilege not in existence at the time of such revocation or withdrawal. Read in proper context, these provisions refer to the rights and privileges destroyed or affected by the Martial Law Proclamations and not to the rights and privileges affected by ordinary laws.[5]

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[1] *Helaluddin v. Bangladesh*, 45 DLR (AD) 1

[2] see Para 4.68 and 4.69

[3] *Abdur Rashid Sarker v. Bangladesh*, 48 DLR (AD) 99; *Mujibur Rahman v. Bangladesh*, 1993 BLD (AD) 54; *Shah Mohd. v. Secy. to the President*, 1 BLC 8

[4] 1998 BLD (AD) 155

[5] See Para 1.103